Title of Program and Description:

Lessons Learned from the Bench and Beyond Presented by Hon. Elizabeth Laporte (Ret.)

Join JAMS neutral, Hon. Elizabeth D. Laporte (Ret.), for a program on *Lessons Learned from the Bench and Beyond*. Judge Laporte will discuss success for women in and out of the courtroom and the growth of trade secret litigation, in both volume and impact.

Judge Laporte will discuss:

- Challenges, and opportunities, both old and new, that women face in and out of courtroom today
- The Women Attorneys Advocacy Project
- Trends in the civil trade secrets case field
- Issues and key considerations surrounding the use of special masters in e-discovery matters
- Benefits of early mediation and the value of ADR in an era of increased uncertainty

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Program Outline: Lessons Learned from the Bench and Beyond

Introduction – 3 mins

- Hon. Elizabeth D. Laporte (Ret.) is a full-time mediator, arbitrator and special master at JAMS. She joined JAMS after more than two decades as a United States magistrate judge for the Northern District of California. Judge Laporte was the chief United States magistrate judge for the Northern District of California from 2013 to 2015. As a magistrate judge, she presided over numerous civil cases with the parties' consent, with a robust docket that included patent, trademark, copyright, business, class actions, employment, insurance, environmental, antitrust and civil rights litigation. And after last sentence. She also successfully presided over numerous settlement conferences and chaired the development of the court's eDiscovery guidelines.

Challenges and Opportunities women face in and out of the Courtroom – Estimated 20 mins (Elimination of Bias)

- *Personal Reflection Opening:*
    - As a female litigator, a judge for over two decades and now a mediator, arbitrator, special master and neutral evaluator at JAMS, I look back with pride on the advances we have made, while being aware of the need for more progress. When I began law school, there were only two women on the Yale Law faculty; this number dipped to zero before I graduated in 1982. I had the great honor of clerking for the first woman judge on the U.S. District Court for the Northern District of California, Marilyn Hall Patel, who would later become the first female chief judge of the district, but it would be years before another woman joined her on what is now a court with many female and diverse judges. Meanwhile, the first woman joined JAMS the same year I graduated, a few years after it was founded. About a century before that, Clara Foltz became the first woman to join the bar in California. (Women's History Month: Women in Law and ADR, Hon. Elizabeth Laporte (Ret.), JAMS Insights)

- *The "Glass Ceiling" (Women on the Frontlines by Michele Goodwin)*

- The "Glass Ceiling" term has been attributed to Marilyn Loden – 1977 Women's Action Alliance
- In March 1986, the Wall Street Journal issued a special report on the "glass ceiling." **The authors identified imperceptible impediments that hindered female mangers from advancing that stymied their progress because of what they described as a "corporate tradition and prejudice."** (Ben Zimmer, The Phrase: 'Glass Ceiling' Stretches Back Decades, Wall St. J. (April 3, 2015))
  - Invisible barriers to women's advancement to leadership positions, despite important civil rights gains
- Women who reach senior leadership, continue to encounter obstacles and challenges, including tending to be "evaluated less favorably, receive less support from their peers, excluded from important networks, and receive greater scrutiny and criticism even when performing exactly the same leadership roles as men (Sabharwal, supra note 384, at 400)

- *Glass Walls, Escalators, Sticky Floors and Glass Cliffs (Women on the Frontlines by Michele Goodwin)*

  - Today, women's progress is not only measured by glass ceiling but also by a lexicon of terminologies and metaphors to describe and capture impediments to full inclusion and advancements. (Meghna Sabharwal, From Glass Ceiling to Glass Cliff: Women in Senior Executive Services, 25 J. Pub. Admin. Res & Theory 399-400 (2013)). These include the following:
    - **Glass Walls:** Barriers that hold women in the pink collar (pink collar work is care-oriented career field or in fields historically considered to be women's work)
    - **Glass Escalators:** occupational segregation where men in female dominated occupations are promoted to leadership positions at a much faster rate
    - **Sticky Floors:** Where women are held "down to low level jobs" that prevent them from seeking management positions
    - **Glass Cliffs:** Where women in leadership are precariously positioned to fall

- *Glass Ceiling at Law Firms – Women on the Frontlines – Statistics (Women on the Frontlines by Michele Goodwin)*

  - Women comprise nearly 50% of associates at law firms, yet they account for less than 20% of equity partners (Women in Law: Quick Take, Catalyst (Oct 2. 2018))
  - Despites, women's advancements as law students and stature as junior associates, the decline in employment at the nation's law firms "is primarily among women." (Vault & MCCA. 2017 Vault/MCCA Law Firm Diversity Survey 12). In 2016, Vaults most recently available research:
    - **Black women attorneys resigned their firms** at the highest rates among all women **at 18.4%**
    - **Asian American** women departed elite law firms at high rate of **14.4%**
    - **Latinas** departed at **12.4%**
    - **White women resigned** higher than that of white men **at 9.1%**

- Women who place at elite firms might find the environments unwelcoming, unsupportive, and quite frankly toxic. This might contribute to the sex flight from top firms (Michele Goodwin & Mariah Lindsay, American Courts and the Sex Blind Spot: Legitimacy and Representation, 87 FORDHAM L. Rev. 2347-48)

- *Glass Cliffs on the U.S. Courts (Women on the Frontlines by Michele Goodwin)*

  - In 2018 women held barely 20% of elected federal offices and roughly 12% of federal judgeships (Women in Effective Office, 2018, CTR. For AM. Women & POL'Y)
    - As of 2018, 754 judges had served on the U.S. courts of appeals and only 91 of those judges were women (Women on the Frontlines by Michele Goodwin)

  - *Gavel Gap Research – Women on the U.S. Courts*
    - The Gavel Gap research studies diversity on state courts and their data provides an important lens for examining and measuring the glass ceiling and cliff.
      - For Instance, "people of color are 40% of the population, but less than 20% of state judges" (Introduction Webpage to Who Sits in Judgement on State Courts,? The Gavel Gap)
      - Stat courts: only 30% of judges are women, and overall, eighty percent of judges are white (Tracey E. George & Albert H. Yoon, AM. Constitution SOC'Y, The Gavel Gap: Who Sits in Judgement on State Courts? (2016))
    - Of the 114 justices who have served on the Supreme Court since 1790, only 6 have been women
      - In more than 225 years, only three justices have been persons of color (two of whom are presently serving on the court)
    - In 2018, no women of color had ever served as circuit judges in the Third, Fifth, Eight, Tenth and Eleventh Circuits (Hufstedler, Shirley Ann Mount, FED. Judicial CTR. (Sept 13, 2020)

  - *Trump Administration and the U.S. Courts (2016-2020)*
    - This sex gap on America's courts was further magnified under the Trump Administration. More than 90% of President Donald Trump's nominees were white and more than 80% male (Catherine Lucey & Meghan Hoyer, Trump Choosing White Men as Judges. Highest Rate in Decades. AP News (Nov. 13, 2017)
    - Given the federal judicial seats come with life appointments, women will be shut out for decades to come
    - Similar patterns are detected within ranks of U.S. attorneys: "There are 93 offices around the country" and as of 2020 "just seven [U.S. attorneys] who are women. There are only two who are black" (Andrew Cohen, Trump and McConnell's Overwhelming White Male Judicial Appointments. Brennan CTR. Justice (July 1, 2020)

- *Four Kinds of Gender Bias Women Face at Work – Joan C. Williams Research (Possible Video)*
  1. Women have to prove themselves over and over again

2. The "tightrope"
3. The Maternal Wall
4. Tug of War – When Gender Bias reflects all three of the other patterns plays out and creates conflict among women

- *"The Tightrope" – Professor Williams (See Joan C. Williams and Rachel Demsey, What Works for Women at Work: Four Patterns Working Women Need to Know (2014))*
  - Example of the Tightrope:
    - When women attorneys are perceived as likeable, they are also often mistakenly perceived as less competent; but when they are perceived as competent, they too often get demerits for being unlikable or worst
    - Bias Runs deep…for example the two meanings of "stature" as "natural height" (women being shorter on average) and "importance or reputation gained by ability or achievement," illustrating the traditional association of greater physical height, where men on average loom over women with higher status and skill (Oxford English Dictionary (2020) (www.oed.com))

- *Women Attorneys Advocacy Project*

  - Women still face barriers, too often from unconscious bias, which can require them to try to walk the fine line between being perceived as likeable but then somehow less competent or as capable but unlikeable. While on the bench, Judge Laporte launched the Women Attorneys Advocacy Project with the support of the court and a group of outstanding female attorneys who volunteered their time, putting on programs focused on overcoming obstacles to and maximizing opportunities for women attorneys' success

- *Old Issues that Persist and Fundamental Takeaways*

  - Old issues can stubbornly persist, even as new issues arise that require our attention and support, especially during the era of working remotely
    - Era of working remotely: the responsibility of taking care of children at home and supporting their remote learning can sometimes fall unevenly on women attorneys, although fortunately newer generations are sharing the work more equally. Support for flexible schedules, child care and time off without penalizing career progress, and mentorship and sponsorship, are even more important to retaining and benefiting from women attorneys' contributions.
  - Fundamental Takeaway: Diverse teams that embrace inclusivity deliver better results
    - As a mediator, Judge Laporte can help ensure a level playing field set a respectful tone and, if necessary, separate the parties and their counsel
    - In some situation clients are demanding such teams, with women and minority attorneys playing important roles not just window dressing, and juries and judges are paying attention (David Rock and Heidi Grant, Why Diverse Teams Are Smarter, Harvard Business Rev. (Nov. 4, 2016))

- *Challenges and Opportunities Conclusion*

    - Progress, of course, does not happen automatically; it takes the collective efforts of persons of all demographics. Old issues can stubbornly persist, even as new issues arise that require our attention and support. For example, in this era of working remotely, the responsibility of taking care of children at home and supporting their remote learning can sometimes fall unevenly on women attorneys, although fortunately newer generations are sharing the work more equally. Support for flexible schedules, child care and time off without penalizing career progress, and mentorship and sponsorship, are even more important to retaining and benefiting from women attorneys' contributions. Mediators and arbitrators need to be sensitive to participants' schedules and should allow for breaks to accommodate participants' needs during telephonic and videoconference hearings. At the same time, one unexpected benefit I've been pleased to see and hear is the recognition of our shared humanity; for example, when we watch a participant cradling a child on her lap, or we hear youthful, excited shouts and laughter, or we see a beloved pet (Women's History Month: Women in Law and ADR, Hon. Elizabeth Laporte (Ret.), JAMS Insights)

Trade Secrets and e-Discovery – Estimated 10-15 mins

- *Rise of Trade Secret Litigation on the rise in California*
    - Trade secret litigation in California is growing, in both volume and impact. The second-largest plaintiffs' verdict in 2019 was $845 million, which was awarded to ASML, a Dutch semiconductor chip processing software company, in its case against XTAL, a company founded by two ex-employees of the plaintiff's subsidiary in Santa Clara who allegedly worked in secret for XTAL using stolen trade secrets to get a head start in development and siphon off a major customer contract.
    - In these types of cases, plaintiffs have the advantage of being able to craft a compelling narrative of theft…most commonly, former employees surreptitiously appropriating the plaintiff company's trade secrets for their own benefit in a rival venture – and to over come employees' general freedom to switch employers under California law, which voids almost all non-compete agreements (Bus. & Prof. Code Sec. 1600) and does not recognize the doctrine of inevitable disclosure (Schlage Lock Company v. Whyte, 101 Cal. App. 4th 1443 (2002))
    - Trade secrets do not expire automatically; they allow broad protection without disclosure, unlike copy right and patents
        - The trend of higher awards for plaintiffs who succeed in proving infringement and willfulness likely reflects the added power of the story of wrong doing

- *E-Discovery*
    - Need to add section notes – Laporte to advise Erica Ploetz

Benefits of Early Mediation: Value in ADR during an era of increased Uncertainty – Estimated 15 mins

- From experience, Judge Laporte understands how daunting managing a caseload can be even in normal times
    - Parties and their attorneys should consider pre-lawsuit dispute resolution and look for opportunities to begin or resume efforts to resolve cases outside the courtroom.

- *Virtual Mediations*
    - Virtual Mediations conducted via videoconference and/or telephone offer many advantages even in normal times, such as savings in time and travel costs. Currently, the advantages are magnified, as many attorneys, clients and claims adjusters are unable to travel due to government, employer and/or medical restrictions, and clients may not have the funds to pursue litigation
    - Other forms of alternative dispute resolution should also be considered if settlement is not possible. For example, parties can stipulate to streamlined proceedings in front of a special master. Now is the time to try to expeditiously and economically resolve cases.

- *Benefits of ADR Conclusion*
    - As we know, justice delayed can be justice denied. Mediation can help achieve speedier results, as the courts suffer backlogs due to the restrictions on live proceedings posed by the pandemic, especially trials, as well as the priority given to criminal trials. Mediation can help more promptly resolve civil rights, employment discrimination and disability access disputes and vindicate the rights of those who too often struggle to obtain justice (Access to Justice and Lessons Learned During a Pandemic, Hon. Elizabeth Laporte (Ret.), October 2020)

JAMS ADR Insights

Why Now Is a Good Time to Engage in Mediation or Other Streamlined Dispute Resolution

Parties should consider pre-lawsuit dispute resolution and look for opportunities to resolve cases outside the courtroom

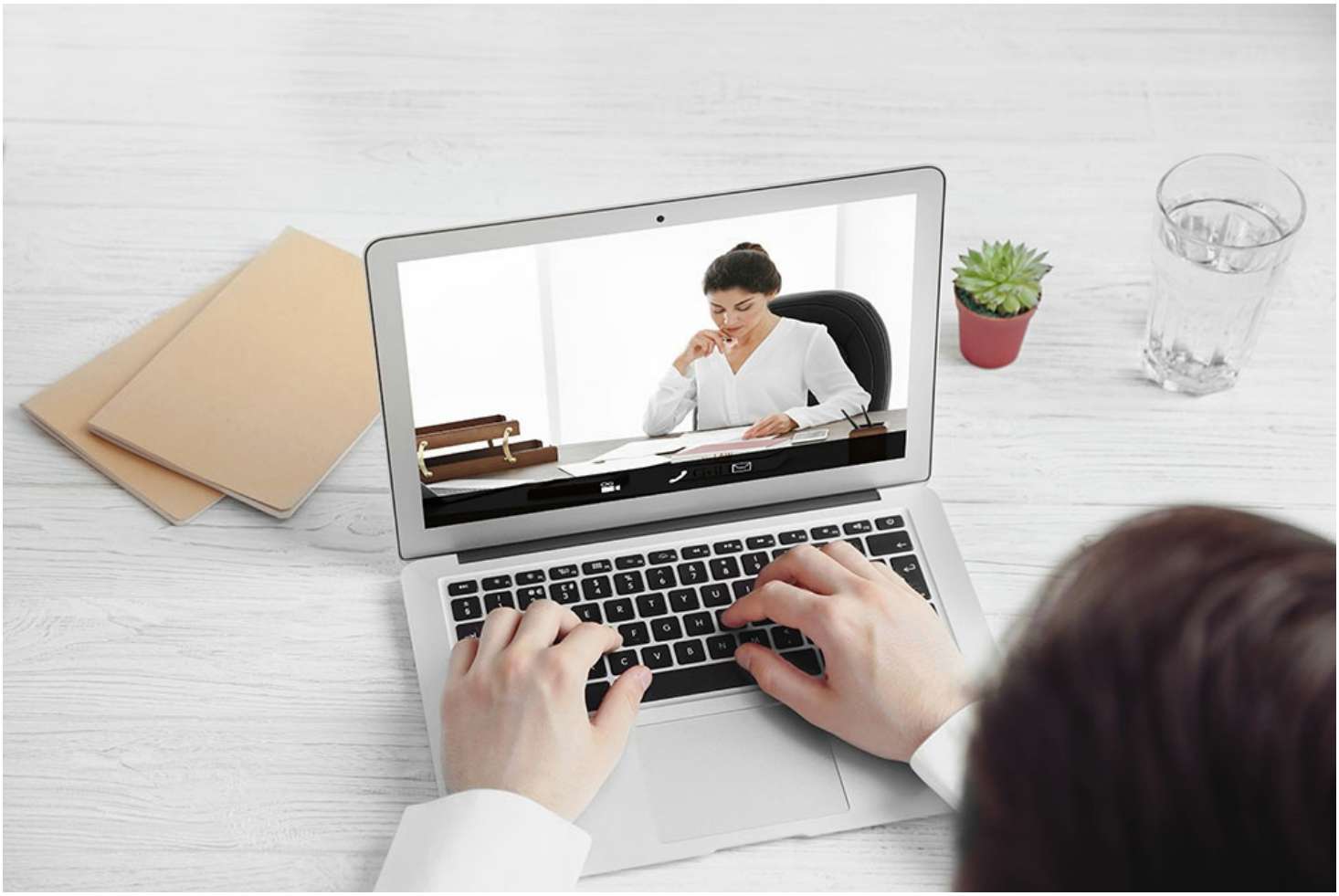
HON. ELIZABETH D. LAPORTE (RET.)

JAMS Mediator, Arbitrator, Referee/Special Master, Neutral Evaluator

Published June 4, 2020

As a recently retired federal judge who served for more than two decades on the U.S. District Court for the Northern District of California, I know firsthand how daunting managing a caseload can be even in normal times. Now, with civil jury trials suspended, courts' caseloads are rising. The Northern District of California has issued General Order No. 72-3 on May 21, 2020, postponing all civil jury trials through September 30, 2020, although individual judges may offer bench trials by videoconference and all civil matters will be decided on the papers, unless the presiding judge chooses to conduct a hearing by telephone or videoconference. Because criminal trials generally take precedence, civil matters will likely be delayed even further. Meanwhile, litigation costs of existing cases have not stopped, as discovery and motions continue, albeit with less opportunity for oral argument. However, many businesses and individuals are spending their cash on remaining viable and adapting

to the new circumstances rather than pursuing litigation. Therefore, parties and their attorneys should consider pre-lawsuit dispute resolution and look for opportunities to begin or resume efforts to resolve cases outside the courtroom.



Indeed, parties may find themselves required to do just that by the judges presiding over their cases. For example, Judge Richard Seeborg of my former court issued a general order for all his pending civil cases on May 18 requiring the parties to meet and confer and jointly report to the court on the prospect of settlement, and then report back within 30 days as to whether the case settled or the parties were able to make any progress. Judge Seeborg explained, “As a result of the current pandemic, the scheduling of civil matters in this court going forward remains highly uncertain. At this juncture, no assurances can be given as to when civil trials can be resumed and, if so, whether a further suspension due to public health developments will be necessary. Accordingly, it would seem to be an optimal time for the parties to initiate or renew an exploration of possible settlement or some other form of alternative dispute resolution.”

Virtual mediations conducted via videoconference and/or telephone offer many advantages even in normal times, such as savings in time and travel costs. Currently, the advantages are magnified, as many attorneys, clients and claims adjusters are unable to travel due to government, employer and/or medical restrictions, and clients may not have the funds to pursue litigation. Therefore, the benefits of virtual mediations likely outweigh the costs associated with waiting until in-person mediations can resume. JAMS can demonstrate the videoconferencing tools it offers and explain the stringent security steps it is taking. I have already had success mediating complex matters on Zoom.

Other forms of alternative dispute resolution should also be considered if settlement is not possible. For example, parties can stipulate to streamlined proceedings in front of a special master. Now is the time to try to expeditiously and economically resolve cases.

Hon. Elizabeth D. Laporte (Ret.) is an arbitrator, mediator, special master/referee and neutral evaluator at JAMS in San Francisco. She handles matters involving antitrust, business/ commercial, civil rights, employment,

environmental law, insurance and intellectual property. She can be reached at elaporte@jamsadr.com.

EXPLORE MORE ON THESE TOPICS

Mediation	COVID-19 Business Disruption	Virtual & Remote ADR

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Success for Women In and Out of the Courtroom

Hon. Elizabeth D. Laporte (Ret.)

Five years ago, I attended the United States District Court for the Northern District of California's annual conference along with other judges from the federal court, lawyer representatives to the court and other attorneys. There, professors Joan Williams of the University of California, Hastings College of the Law and Deborah Rhode of Stanford Law School—leading scholars regarding how women fare in the legal profession—spoke of the obstacles that, despite much progress, many still faced, including implicit bias. I was already familiar with studies in which

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Also in This Issue

Pointers on Discovery Motions in Federal Court

Hon. Sallie Kim

Hon. Thomas Hixson

In the Northern District of California, district judges and magistrate judges often require parties to submit their discovery disputes in the form of letter briefs with specific limitations on the number of pages. Letter briefs have become popular with the Court because they are seen as a more efficient way to resolve discovery disputes than the default five-week briefing and hearing schedule with 25-page briefs that normally applies to motions. However, letter briefs place a premium on making the right arguments in limited space. In the midst of discovery in a busy case, and given all the demands of modern legal practice, it can sometimes be hard for attorneys to find the time needed to write a well-crafted letter brief. Still, it's obviously essential to do it because what you do or don't get in discovery, or what you are forced to produce, can have a significant impact on the strength of your claims and defenses, as well as on the expense of litigation. The authors of this article

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VINCE PARRETT

On SHANE READ'S WINNING AT CROSS-EXAMINATION

Vince Parrett

All business trial lawyers can benefit from Shane Read's new book, *Winning at Cross-Examination*. By focusing on the importance of creating compelling bottom-line messages, Read shows how cross examination is done right by some of the best trial lawyers alive using examples like David Boies in the Proposition 8 trial challenging California's ban on same-sex marriages.

The golden thread that runs throughout Read's book is that to effectively cross-examine a witness you must first develop a bottom-line message that will show why you should win. Developing a bottom-line message before crafting your cross-examinations will focus you on what is most important and thereby help you ask the right questions. And it will stop you from going down rabbit holes that waste the valuable time of counsel, witnesses, and the court—and even worse, bore the jury.

Likewise, the topics that you choose for your cross-examinations should advance your bottom-line message to win your case. To help you select the right topics for a successful cross, Read shows you how to use the acronym ***CROSS***:

- **C**redibility: challenge by showing a witness's (1) favoritism for one side, (2) past criminal convictions or evidence of untruthfulness, (3) murky perceptions of what happened, or (4) memory of past events that is too good;

- **R**estrict damaging testimony: show the jury a witness's lack of knowledge about important matters;

- **O**utrageous: exploit witness statements that exceed the limits of what jurors will believe as true, *e.g.*, "It depends on what the meaning of 'is' is" or "I smoked, but I never inhaled";

- **S**tatements that are inconsistent: impeach with statements made by the witness prior to trial that are inconsistent with trial testimony; and

- **S**upport your case: Read considers this one of the most neglected tools in an attorney's arsenal on cross. For even if a witness has hurt you on direct, you can still ask many questions that will support and highlight your bottom-line message to the jury.

Interestingly, Read's advice to focus your cross on crystal-clear themes conflicts with some of Irving Younger's famous Ten Commandments of Cross-Examination, which many of us learned in law school or in CLE courses on trial advocacy. Irving Younger, a distinguished professor of trial techniques at Cornell Law School, attorney at a major New York law firm, and Judge on the Supreme Court of New York City, was a strong believer in his commandments. He wrote, "I cannot tell you how powerfully I want to preach these Ten Commandments. You should never violate them; if you do, you will want the ground to open up beneath your feet, so that you will sink in and be devoured forever. Every time you violate these commandments, your case will blow up in your face. . . . They come from on high; they must be obeyed."

But Read begs to differ, arguing that some should never have been included in the list and are "flat-out wrong." Among the Ten Commandments, Read highlights in **bold** those that are wrong:

1. *Be brief.*
2. *Use plain words.*
3. **Use only leading questions.**
4. *Be prepared.*
5. *Listen.*
6. **Do not quarrel.**
7. *Avoid repetition.*
8. **Disallow witness explanation.**
9. **Limit questioning.**
10. **Save for summation.**

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MARIE BAFUS

On SECURITIES LITIGATION

Federal courts may adjudicate more claims under the Securities Act of 1933 ("Securities Act") following a recent Delaware Supreme Court decision. Earlier this year, the Delaware Supreme Court ruled that corporations may require stockholders to litigate claims under the Securities Act in federal court, holding that such forum provisions in corporate charter documents and bylaws are facially valid. The Court's decision in *Salzberg v. Sciabacucchi*, --- A.3d ---, 2020 WL 1280785 (Del. Mar. 18, 2020), reversed an earlier ruling of the Delaware Court of Chancery and opened the door for Delaware corporations to require plaintiffs to bring Securities Act claims in federal court. From the perspective of the defense bar, the decision allows Delaware corporations to mitigate the costs, inefficiencies, and burdens imposed when such claims are filed and litigated in state court.

Marie Bafus

Background

Over the past several years, the plaintiffs' bar has increasingly filed Securities Act claims in state rather than federal court. Plaintiffs' lawyers view state court as a more favorable forum for such cases because many of the key provisions of the Private Securities Litigation Reform Act ("PSLRA") – including more stringent pleading standards, an automatic stay of discovery pending motions to dismiss, and a statutory process for appointing lead plaintiffs – often have been held inapplicable in state court proceedings. To address that trend and minimize the prospect of multiple Securities Act cases proceeding simultaneously in different courts, many corporations included provisions in their charter documents or bylaws requiring Securities Act claims to be brought exclusively in federal court. The enforceability of those clauses assumed greater importance after the U.S. Supreme Court's March 2018 decision in *Cyan, Inc. v. Beaver County Employees' Retirement Fund*, which confirmed that plaintiffs may file Securities Act claims in either state or federal court.

Delaware law expressly permits corporations to use their charter documents and bylaws to require internal corporate claims – *e.g.*, derivative suits and claims involving alleged breaches of fiduciary duty, the rights of stockholders, or application of the Delaware General Corporation Law – to be brought exclusively in the Court of Chancery. But in December 2018, Vice Chancellor J. Travis Laster of the Court of Chancery found that federal forum provisions (FFPs) – those requiring Securities Act claims to be brought in federal court – are unenforceable under Delaware law. In *Sciabacucchi v. Salzberg*, V.C. Laster held that while charter documents and bylaws may properly specify that claims involving the "internal affairs" of Delaware corporations be litigated in Delaware, they may not regulate matters involving federal law or other "external issues."

The Delaware Supreme Court Decision

Reversing V.C. Laster's decision, the Delaware Supreme Court held that FFPs: (1) are, on their face, within the permissible scope of bylaws and charter provisions because (in the words of the relevant statute) they address "the management of the business" and "conduct of the affairs of the corporation"; (2) provide corporations with "efficiencies in managing the procedural aspects of securities litigation" post-Cyan; and (3) do not violate Delaware law or policy. The Delaware Supreme Court rejected the lower court's finding that, as a matter of Delaware law, mandatory forum provisions are applicable only to matters involving a corporation's "internal

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ROGER N. HELLER

On CLASS ACTIONS

Picking up where the last decade left off, the 2020s are off to a fast developing and interesting start for class action practitioners in the Ninth Circuit, with the court already handing down several notable opinions addressing such important issues as personal jurisdiction, privacy law, class damages, punitive damages, and Article III standing.

Roger N. Heller

At the intersection of several of these issues, is perhaps one of the most closely-watched cases of the year, *Ramirez* v. *TransUnion LLC*, --- F.3d ---, 2020 WL 946973 (9th Cir. Feb. 27, 2020), where the Ninth Circuit recently provided clarification regarding the application of Article III standing principles in the class action context.

The *Ramirez* case involved allegations that the defendant credit reporting bureau knowingly violated the Fair Credit Reporting Act ("FCRA") by placing inaccurate "terrorist alerts" on consumers' credit reports, failing to take reasonable steps to ensure the accuracy of the information, and incorrectly indicating to the consumers that the alerts had been removed from their credit reports when that was not the case. The plaintiff, on behalf of himself and a proposed class of others who had these false alerts on their reports, sought statutory and punitive damages under the FCRA. After the district court certified a litigation class pursuant to Federal Rule of Civil Procedure 23(b)(3), the case proceeded to a jury trial. After the trial, the jury found in favor of plaintiff and the class and awarded statutory damages and punitive damages. On appeal, the Ninth Circuit affirmed the jury's award of statutory damages as "clearly proportionate to the offense and consistent with the evidence." The court determined, however, that the jury's punitive damages award—approximately 6.45 times the amount of the statutory damages—were excessive under the facts of the case and the standards articulated by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and ordered that the punitive damages be reduced by approximately 38% (*i.e.*, to a ratio of 4:1). *Ramirez*, 2020 WL 946973, at *18-19.

Prior to addressing the damages issues, the majority tackled two important issues regarding Article III standing in the class context. *First*, the majority held that, at the motion to dismiss stage, class certification stage, and, for purposes of injunctive relief, at the judgment stage, only the representative plaintiffs must have Article III standing. *Ramirez*, 2020 WL 946973, at * 7. *Second*, the majority held that, at the final judgment stage of a class action, only those class members who can satisfy Article III standing requirements may recover monetary damages. *Ramirez*, 2020 WL 946973, at * 8.

It is probably fair to say that neither of these holdings significantly defied general expectations among class practitioners. As the *Ramirez* majority noted, the first holding followed prior Ninth Circuit authority on the issue. *Id.* at * 7 (citing *In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018); *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015), *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *Casey v. Lewis*, 4 F.3d 1516, 1519–20 (9th Cir. 1993)). As for the second holding, the issue was essentially presented but not resolved by the Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016). The requirement that class members must satisfy Article III to recover damages at the final judgment stage does not stray significantly from the practice, employed in certain types of class cases that go to trial, of utilizing a second phase or process (*i.e.*, bifurcation) regarding the calculation and/or allocation of class members' damages.

After addressing these doctrinal issues, the *Ramirez* majority conducted a detailed analysis of whether the recovering class members in the case at hand had Article III standing under the Supreme Court's and Ninth Circuit's respective decisions in *Spokeo*, concluding that each class member did, in fact, allege a concrete injury and had Article III standing. The majority emphasized the severe nature of the inaccurate information at issue and the corresponding risk of harm. *Ramirez*, 2020 WL 946973, at *8-14. The third member of the panel, who concurred in part and dissented in part, would have held that only those class members

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AMY BRIGGS

On INSURANCE LITIGATION

On March 16, 2020, six Bay Area counties issued "shelter in place" orders, which effectively brought many businesses to a grinding halt. Lawsuits against insurers who sold business interruption coverage are now rolling in, thus far led largely by restaurants. In California, for example, Thomas Keller's Michelin-starred restaurant—The French Laundry—recently filed suit in Napa County seeking coverage for the shutdown of his restaurant. Similar suits have been filed in New Orleans and Chicago. As one CEO recently put it, "Shut the doors = shut down the revenue. If that's not a property-based interruption, I'll go light the [expletive] thing on fire myself."

Amy Briggs

Many policyholders, however, are not ready for litigation, and instead are asking what they need to do simply to preserve their rights under their business interruption policies. Of course, it is critical for clients to read their insurance policies and know their terms and conditions. Generally speaking, however, there are three different steps to keep in mind.

First, many policies require a notice of loss within a limited time frame following awareness of either the event causing the loss or the loss itself. A notice of loss is a straightforward document that simply alerts the insurer to the fact of a loss. Even if the insured does not timely submit notice, failure to do so is not necessarily fatal. California generally follows a notice-prejudice rule, requiring the insurer to demonstrate that it was actually and substantially prejudiced by the late notice. *Northwestern Title Security Co. v. Flack*, 6 Cal.App.3d 134, 140 (1970). This can be a difficult burden for insurers to meet except in rare circumstances. Strict adherence may be required, however, in other jurisdictions.

Second, commercial property and business interruption coverage requires that the insured then submit a proof of loss. A proof of loss is a more detailed document that provides the insurer with information substantiating the claim that is being made. Generally speaking, it entails a sworn and notarized itemized statement that includes information such as (1) the date and cause of the loss; (2) documents that support the value of the property and the amount of loss claimed (*i.e.*, estimates, inventories, receipts, etc.); (3) the identity of parties claiming the loss under the policy; (4) parties having an interest in the property, like the bank holding the mortgage; and (5) the policy under which coverage is sought.

Often—but not always—the time to submit a proof of loss runs from the date the insurer requests it. Be advised that it may be due within 60 days of the request, which, given the current situation, could be a challenging deadline for insureds to meet.

Submission of a proper and timely notice and proof of loss may be subject to a "substantial compliance" standard. *McCormick v. Sentinel Life Ins. Co.*, 153 Cal.App.3d 1030, 1046 (1984). Accordingly, a defect in a notice or proof of loss, by itself, is rarely a sufficient ground to deny a claim. Moreover, the insurer is under a duty to specify any defects in the notice or proof of loss so that the insured can address them. If the insurer fails to identify the deficiency, the notice is waived. Cal. Ins. Code §§ 553, 554. However, the total failure to comply with the notice and proof of loss conditions could excuse insurer liability altogether. *1231 Euclid Homeowners Assn. v. State Farm Fire & Cas. Co.*, 135 Cal.App.4th 1008, 1018 (2006); *Hall v. Travelers Ins. Cos.*, 15 Cal.App.3d 304, 308 (1971).

If your client is unable to meet the proof of loss deadline for logistical reasons, make sure it is in touch with its insurer to obtain an extension *in writing*.

Third, if the client receives a denial from its insurers, it may want to initiate litigation or arbitration. Many clients may have California's four-year statute of limitations in mind and feel little pressure to move forward at this time. But that would be a mistake. Most property and business interruption insurance contains a different—and much shorter—contractual limitations period. For instance, the California Standard Form Fire

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Frank Cialone

On TRUSTS & ESTATE LITIGATION

No-contest clauses and the anti-SLAPP law, again . . . . A few years ago, I wrote a column in this publication in which I discussed the tension between then-recent changes to the Probate Code governing the application of no-contest clauses in testamentary instruments and the anti-SLAPP law. Since then, several cases have reached the Court of Appeal and confirmed the need for the Legislature to resolve that tension.

Frank Cialone

A no-contest clause provides, in essence, that a beneficiary of a will or trust instrument will be disinherited if he or she contests that instrument. Such clauses have long been held valid in California. They promote the policies of honoring donative intent and discouraging litigation. On the other hand, they limit access to the courts and create potential forfeitures, deterring what might well be meritorious claims of undue influence or similar problems in the procurement of testamentary instruments. In practice, moreover, they often resulted in drawn-out "safe harbor" proceedings in which parties sought preliminary findings that would avoid a no-contest provision.

The Legislature balanced these interests by enacting Probate Code Section 21311, in 2010. That statute provides that no-contest clauses will be enforced only against "[a] direct contest brought without probable cause" (and against certain other types of claims if the no-contest clause itself expressly so provides). To invoke a no-contest clause, a trustee, named executor, or other interested party will bring a petition to disinherit in order to obtain a court determination that Section 21311 applies. But, because the predicate for such a petition is the filing of litigation (*i.e.*, the contest), it can trigger a motion to strike, and a request for attorney's fees, under the anti-SLAPP statute, C.C.P. Section 425.16. To defeat such a motion, the petitioner must offer admissible evidence to show that the contestant lacked probable cause for his or her claim. An anti-SLAPP motion stays discovery, and an order granting or denying such a motion is subject to an immediate direct appeal.

Reported cases confirm that the anti-SLAPP statute applies to a petition to enforce a no-contest clause. *See, e.g., Kay v. Tyler*, 34 Cal. App. 4th 505, 510 (2019). In one case, the Court of Appeal stated that "the policies underlying the no contest provisions have been carefully balanced by the Legislature" through its enactment of Probate Code section 21311, and that "the anti-SLAPP procedures may impede some of those goals, including increasing litigation costs and potential delay." *Urick v. Urick*, 15 Cal. App. 5th 1182, 1195 (2017). But the *Urick* court also found that the anti-SLAPP statute—which the Legislature expressly directed the courts to construe broadly—applies by its terms to a petition to disinherit. (In both cases, the Court of Appeal reversed an order granting the anti-SLAPP motion, finding that the petitioner had adequately demonstrated a likelihood of success on the merits.)

To put this in practical terms: The trustee of a trust (or the named executor of a will, or a beneficiary of such instruments) that contains a no-contest provision will likely want to invoke that provision in the event of a contest. But a lawyer representing that person will have to advise that doing so risks an anti-SLAPP motion and an award of fees to the contestant—and also risks months or years of delay, not only to the litigation but to the overall administration and distribution of the trust or estate, while such a motion is litigated and appealed. In both *Kay* and *Urick*, the Court of Appeal acknowledged that good reasons exist to limit the application of the anti-SLAPP statute to actions to enforce no contest clauses. But in both cases, the Court also acknowledged that those reasons are for the Legislature to consider.

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Success for Women In and Out of the Courtroom

reviewers of two otherwise identical resumes, except for one having a female-sounding first name and the other a male-sounding one, rated the male resume superior (as well as similar studies involving a name usually associated with African-Americans and a typically Caucasian one). Yet I was particularly struck by what Professor Williams termed "the tightrope" that women must navigate due to stubborn gender stereotypes between being seen as likeable versus being respected. *See* Joan C. Williams and Rachel Demsey, *What Works for Women at Work: Four Patterns Working Women Need to Know* (2014). When women attorneys are perceived as likeable, they are also often mistakenly perceived as less competent; but when they are perceived as competent, they too often get demerits for being unlikeable or worse. By contrast, men enjoy more latitude to be perceived as both, without being penalized for an authoritative stance. This bias runs deep in the unconscious of both men and women. Think, for example, of the two meanings of "stature" as "natural height" (women being shorter on average) and "importance or reputation gained by ability or achievement," illustrating the traditional association of greater physical height, where men on average loom over women, with higher status and skill. *Oxford English Dictionary* (2020) (www.oed.com).

Wanting to do something to help, I gathered a handful of the excellent women attorneys at the conference to meet and brainstorm, thus launching the Women Attorneys Advocacy Project. Many attorneys (too numerous to list all) have generously volunteered their time to the Project, including Randy Sue Pollack who has worked tirelessly from the start and current members Jamie Dupree, Miriam Kim, Michelle Roberts, Charlene (Chuck) Shimada and Juliana Yee. With the full support of the court, including Chief Judge Phyllis Hamilton, we have put on a series of programs open to all at the federal courthouse, as well as at UC Hastings and Stanford Law School. Our programs have included panels of judges or judge moderators, including Judge Yvonne Gonzalez Rogers and Justice Teri Jackson, and outstanding attorneys giving tips on how to overcome obstacles and—at least as important—create and get the most out of opportunities. Other programs have featured outstanding coaches in effective styles of speech and presentation in the courtroom and other litigation settings. They focused on how to project confidence and competence without being perceived (too often unfairly) as tentative and uncertain on the one hand, or cold and overly aggressive on the other (*i.e.*, walking the tightrope). Then, in March of 2020, we co-sponsored an Association of Business Trial Lawyers dinner program, which I moderated, featuring outstanding and diverse panelists: the Honorable Teri Jackson of the First District Court of Appeal; Ruth Bond of the Renne Public Law Group; Kate Dyer of Clarence Dyer & Cohen; Jan Little of Keker, Van Nest & Peters; and Quyen Ta of Boies Schiller Flexner. We had an excellent turnout, including both men and women.

Based on these programs, talking to many judges and lawyers (female and male; of diverse ages, ethnicities and backgrounds; straight and from the LGBTQ community), reading the research, and my own experience (first as an attorney and then over two decades as a judge), certain common themes and lessons emerged. One fundamental takeaway is that diverse teams that embrace inclusivity deliver better results, as numerous recent studies have shown, so attorneys and judges benefit when law firms enable women and ethnically diverse attorneys to contribute fully. Further, some clients are demanding such teams, with women and minority attorneys playing important roles, not just window dressing, and juries and judges are paying attention. *See, e.g.*, David Rock and Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016). Seizing these opportunities requires leadership, by both men and women. As more women and minorities graduate from law school, they need mentorship, feedback and opportunities to learn and shine. Fortunately, many judges are actively encouraging oral argument and examination of witnesses by newer lawyers, which means more opportunities for women attorneys, as well as minorities, as the pipeline improves with a higher percentage graduating from law school.

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Success for Women In and Out of the Courtroom

Women can take steps to help themselves and each other, building their confidence and in some cases overcoming cultural pressures that have traditionally led some of them to voice opinions in a tentative tone or not to take up space. For example, if at a meeting a woman first makes a good point that is ignored, others can echo it; and if a man gets credit for later raising the same point, others can thank him for agreeing with the original comment. Many attorneys can benefit from training in effective vocal skills, posture, body language and eye contact to better project confidence and competence while successfully navigating the tightrope. *See, e.g.*, Cara Hale Alter, *The Credibility Code: How to Project Confidence and Competence When it Matters Most* (2012).

Women also have to be prepared for the obstacles they may encounter. Courtroom behavior is generally more respectful under the eyes and ears of the judge, but on occasion we still observe an attorney (more often male) talking over and interrupting opposing counsel (more often female or younger). Attorneys must be prepared not to get knocked off their stride and to calmly but persistently have their say, enlisting the help of the judge if necessary.

More often, uncivil behavior occurs outside the courtroom (*e.g.*, in the hallway, in meet and confer sessions and in depositions). And sometimes even lead counsel is still mistaken for a secretary or associate when female, young, minority or some combination thereof. (As Quyen Ta noted at the ABTL dinner program, she recently came to take a deposition and wondered why it was slow to begin, only to learn that opposing counsel was waiting for lead counsel—assuming that role could not be hers. And Justice Jackson in her courtroom, albeit without a robe, has been mistaken for a clerk.) Attorneys must be ready to calmly but firmly correct such mistakes and call out bad behavior, make a record, enlist help as needed and not back down. Many judges, including those in the Northern District, take calls during depositions and can rule when opposing counsel misbehaves, *e.g.*, on obstreperous speaking objections, as well as in subsequent motions. In the alternative dispute resolution setting, the mediator can help ensure a level playing field, set a respectful tone and, if necessary, separate the parties and their counsel.

Traditionally, women have shouldered more responsibility for raising children and doing housework ("the second shift," as sociologist Arlie Hochschild termed it in her book of the same name), although younger generations are sharing responsibilities more equally. Accommodating the need for flexibility (*e.g.*, for school and doctor appointments)—and not just permitting but encouraging the use of parental leave by men and women alike, rather than stigmatizing it—helps retain valuable attorneys in whom law firms have invested. Openness to hiring attorneys who have left the workforce for a period of time to raise children and to non-traditional arrangements like job sharing also keeps talented attorneys in the work force.

Importantly, each of us needs to develop our own effective style that is authentically ours. As Oscar Wilde said, "Be yourself. Everyone else is already taken." From my experience on the bench, calm, persistent (but not repetitive) advocacy based on solid preparation on the law and the evidence is far more persuasive than overheated rhetoric or interrupting opposing counsel or—worst of all—the judge. Therefore, do not give up your voice, do not bluster and be prepared to address the substantive issues and answer any questions from the judge.

Finally, working together to overcome bias, implicit or otherwise, is beneficial for all because law firms, clients and judges cannot afford to go without the full contributions that the skills and expertise of women attorneys bring to the table.

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Pointers on Discovery Motions in Federal Court

are magistrate judges on the Court, and we offer some pointers for briefing discovery disputes.

1. Tell us what you want

It seems incredible, but sometimes lawyers don't say what they want from the court. They are so mired in their dispute and complaints about the opposing party and counsel that they forget to ask for specific relief. Some briefs are rants instead of well-reasoned explanations why the other side should produce specified documents or information. A better strategy is to remember that there is a decisionmaker on the receiving end of the letter brief who must decide what to do. Instead of just handing the Court a problem – the other side's misconduct – propose a solution. Ideally, the first line of the letter brief would state the relief requested and the reason for that request. Think about it this way: if you can't figure out what you want, how are we supposed to know? In particular, with discovery disputes, the lawyers normally have much more information about the case than we ever will – what documents have and have not been produced, who the custodians are, who's been deposed, and so on. We're looking to you to identify what you want because we usually don't know what you have. Given the space limitations on letter briefs, if you cannot summarize your request in one or two sentences, your request is probably doomed.

2. Include the essential information

Give us what we need to know to rule on your dispute. You should include, as an attachment or as a quote in the brief, the specific request or requests and the response by the opposing party, and cite the specific number of the request(s) at issue. When we review disputes over discovery, we always read the request(s) and response(s). Sometimes the information or discovery that the moving party seeks is not even contained in any specific request, and in other situations, the opposing party has failed to object in the written objections on the basis asserted in the brief. Sometimes the opposing party explains in the written response that the requested documents or information do not exist, and the requesting party completely ignores that written response. The written requests and responses matter.

Also, make sure that the letter brief provides an adequate discussion of the specific requests you want us to address. When your opponent stiffs you on 100 requests for production all at once, it may be tempting to file an angry letter brief denouncing their obstructionist tactics and demanding immediate compliance, but there is no way that the space limitations will allow you to explain why we should compel production of documents responsive to 100 requests. It's much more effective to break down a major dispute into more digestible pieces.

3. Provide a summary of the case

Federal courts have busy dockets, and each of us touches a large number of cases in any given week. As a result, when you file a discovery letter brief, you should not assume we remember the case or can learn about it quickly. Often we feel as if we are entering a movie halfway through and struggle to catch the plot. If a discovery referral to us takes place a year or two into the case, we may in fact be entering it halfway through. So, tell us what your case is about, or at least the part that's relevant to your discovery dispute. If there is another order or pleading on the docket that explains the case well, refer to it by docket number. For example, an order on a motion to dismiss or a case management statement usually provides a good summary of facts. We know that lawyers have problems squeezing information into a short letter brief, so referring to other sources is helpful for us.

4. Tell us why you need the evidence

Tell us why the information you want is relevant, and then tell us why it matters. Too many letter briefs skip past this part. If you do that, you force us to guess at a theory of relevance, which may not be what you were thinking. Also, be concrete and lay out what you plan to do with the information

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Pointers on Discovery Motions in Federal Court

you're seeking. For example, if you're seeking the defendant's revenue information, don't just say it relates to multiple issues in the case, including damages, because that tells us nothing new. Identify the claim that allows you to recover the defendant's profits related to certain conduct, and then detail how you would use this revenue information to get there. A motion to compel is much more compelling if we have a practical sense of why you need this evidence and what you're going to do with it. It's true that lawyers are sometimes reluctant to be that specific for fear of educating their opponent or divulging their trial strategy. Realistically, however, your opponent is far more likely to have already figured this out, and the issue is educating us, the decisionmakers.

5. Don't wait until the last minute

Judges have common sense, and we think you do too. If there is something you really need to prove your case, we assume you will ask for it right away, and if the other side doesn't agree to give it to you, you will promptly meet and confer with them and then raise this issue with the court. Even if you technically have the ability to ask the court to order the opposing party to produce information or documents at the last minute, don't do that. For example, under our district's local rules, parties may file motions regarding discovery (normally in the form of a discovery letter brief) up to seven days after the discovery cutoff, but filing a request that late might hurt your chances of getting a favorable ruling. First, raising a discovery dispute on the very last day to do so sends a message that this is the stuff you didn't care about enough to seek earlier. If you actually wanted to use these documents in depositions, you obviously wouldn't have waited until the last possible day to seek help from the court. Second, a late-breaking motion to compel that raises more than minimal issues can present scheduling concerns. If we grant the request and order production or additional responses, that could affect the schedule for dispositive motions or trial. If we as magistrate judges are handling discovery for a district judge, we must learn whether compelling further discovery will create a problem for the district judge. If you worry that you are filing too soon, let us know that you are filing earlier rather than later to give us notice that there are disputes about discovery that might affect the timing of other motions or trial. We can always send you back to meet and confer further, but we will be aware at least of the issue and can plan accordingly.

6. Tell us when you need the evidence

If you need the documents or information by a certain time frame, explain why and show that you were diligent in raising this dispute. Setting production deadlines often isn't necessary and can sometimes be undesirable, so you need to tell us when you need a deadline. For example, if it's early in the case and you have a dispute about whether a certain subject is relevant, but the parties are still in the process of negotiating who the document custodians will be, setting a production deadline at the same time the Court rules on the relevance objection would likely not make sense. But if you have a schedule for upcoming depositions, then you might need a production deadline. You will know these background facts much better than we will. Conversely, if we rule against you and order you to provide additional responses, documents, or a witness for deposition, you should be prepared at the hearing to say how long you need to comply.

7. Discuss proportionality

If you are asking for something, try your best to explain why it's not that hard for the other side to produce it. We know you're at a disadvantage because you have limited information about how your opponent stores documents and information, but through the Rule 26(f) conference, meet-and-confers, and early depositions, you may learn enough that you can say something credible on this score.

Conversely, if you're opposing the request, explain what is easy and what is hard for you to do and give specific information. How many people-hours will it take to produce the requested

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On TRUSTS & ESTATE LITIGATION

The purposes of the anti-SLAPP statute do not appear to include making it easier to bring a contest without probable cause, or imposing obstacles to enforcing no-contest clauses when against such a contest is brought. In this context, moreover, even a successful anti-SLAPP motion will not end the litigation: the parties will still litigate the merits of the contest, even if the claim that it was brought without probable cause is stricken. It seems appropriate, then, to provide that a petition to enforce a no contest provision pursuant to Probate Code Section 21311 should not be subject to the anti-SLAPP statute. In the meantime, practitioners in this area must be mindful of the interplay between the two statutes.

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Pointers on Discovery Motions in Federal Court

information or documents? Have you talked to your IT experts or conducted a sampling to bolster your claim of burden? Is some of the requested information in a database and you could run a query and find it easily, but the rest requires time-intensive manual review? Often we will ask during a hearing if parties can produce some information even if they cannot produce all of the requested information, and often the parties agree to the limited scope of production.

8. Follow the rules

Read the standing order of the judge assigned to this dispute. For example, in our district, all magistrate judges require discovery disputes to be raised in letter briefs, and none of us allows motions. Some of our standing orders require lawyers to meet and confer in person or by telephone; communicating in writing is not sufficient to satisfy the requirement of meeting and conferring. If you hand us a poorly formed discovery dispute that doesn't satisfy our rules, we may hand it right back to you and tell you to sharpen your pencil.

Each judge has an order outlining the number of pages for the letter brief and how to handle attachments. All of the orders are different, but most give fewer than 10 pages for a joint letter brief.

Some judges also allow informal discovery conferences without letter briefs, and the order will also address that issue.

9. Ask for hearing

If the matter is complicated, don't be afraid to ask for or volunteer for a telephone hearing or actual hearing. We often call them when we want to ask questions. And if you participate in a hearing by telephone, make sure we can hear you loudly and clearly. Even though you are not physically present, you should be mentally present. We have held hearings where lawyers have called in while driving or getting in an elevator or multi-tasking, and it is clear that there are distractions that make the argument ineffective.

10. Don't whine about things that don't matter

Often the letter briefs we receive catalogue a long list of supposedly evil acts opposing counsel committed, and those actions have nothing to do with the dispute at issue. (And sometimes the acts weren't evil.) If you think that you can sway us with your recitation of wrongdoing, you are sadly mistaken.

In conclusion, we hope that these pointers help you to file successful, succinct letter briefs.

Hon. Sallie Kim and Hon. Thomas Hixson are U.S. Magistrate Judges for the Northern District of California, both with chambers in San Francisco.

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On Shane Read's Winning at Cross-Examination

While five of them are good, Read explains how the other five "are so incorrect that they undercut his whole list." For instance, in his Tenth Commandment, Younger proclaimed that "you should save the ultimate point for summation" and argued that during your cross you should ask "the one question" that the jury will not understand why you asked—but you ask it anyway, because you know you can explain it in closing argument. Younger preached that your question will be so intriguing that the jury will think about it for the rest of the trial and wonder why you asked it; then you can give them the prize in your closing argument.

But Read shows that the reality of how jurors make decisions—they make snap judgments about you and your cross—makes Younger's Tenth Commandment bad advice. You need to grab your jurors' attention with your bottom-line message and never let go. Jurors are not going to spend any time thinking about your "clever" question after you asked it. They are not going to be "intrigued" by it and as a result wait breathlessly throughout the trial for a prize you will give them during your close.

Instead, by focusing your questions on your bottom-line message, Read argues that you should never wait until closing argument to tie up the reasons for asking your questions on cross-examination. So Read would replace Younger's Tenth Commandment with, "Never save it for summation. Make your points on cross now." The jury is contemporaneously deciding who won the battle of cross-examination, and it's up to you to show them clearly that you won.

Regarding Younger's Ninth Commandment to "limit questioning," Younger uses the following cross-examination from a criminal trial for assault to make his point that you must avoid asking "the one question too many":

Q. Where were the defendant and the victim when the fight broke out?
A. In the middle of the field.

Q. Where were you?
A. On the edge of the field.

Q. What were you doing?
A. Bird watching.

Q. Where were the trees?
A. On the edge of the field.

Q. Were you looking at the birds?
A. Yes.

Q. So your back was to the people fighting?
A. Yes.

Younger declares that after getting that helpful answer, "You stop and sit down. And what will you argue in summation? That he could not have seen it. His back was to them. You have challenged perception. Instead, you ask the one question too many:

Q. Well, if your back was to them , how can you say that the defendant bit off the victim's nose?
A. Well, I saw him spit it out."

Younger says that "this is the kind of answer you will get every time you ask the one question too many."

But Read says this is a bad commandment and terrible example. Why? Because if you don't ask the last question, the prosecutor surely will ask it on redirect examination. Your momentary "victory" on cross-examination would be immediately snatched away when the prosecution asks the "one question too many" that you cleverly avoided asking. When the prosecutor does this, you not only look foolish, you also look like you were trying to hide the truth.

Younger's example is also a bad one because it assumes that the prosecutor somehow did not discover before trial the key fact that this witness saw the defendant spit the victim's nose out of his mouth. But how realistic is that? If the prosecutor even briefly interviewed the witness before trial, wouldn't the witness tell the prosecutor about that unforgettable sight? That's why Read would change this commandant to: "Be the truth-teller in the courtroom."

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On Shane Read's Winning at Cross-Examination

Likewise, Read shows that the example that Younger used to support his Eighth Commandment—"disallow witness explanation"—actually undermines it completely. Younger used a cross examination by Abraham Lincoln, representing a defendant charged with murder, of the star witness who claimed to have seen the defendant hit the victim on the head:

Q. Did you actually see the fight?
A. Yes.

Q. And you stood near them?
A. No, it was about 150 feet or more.

Q. In the open field?
A. No, in the timber.

Q. What kind of timber?
A. Beech.

Q. Leaves on it rather thick in August?
A. Yes.

Q. What time did all this occur?
A. Eleven o'clock at night.

Q. Did you have a candle?
A. No, what would I want a candle for?

At this point, Younger insists that anyone but a "genius like Lincoln" must "stop and sit down. The witness has been impeached. He could not have perceived the murder."

But Read argues that it would be a mistake to stop and sit down for three reasons: First, by abruptly stopping and sitting down when the witness just asked a legitimate question that the jury may be interested in, you're giving the jury the bad impression that you're hiding the truth, that you're not a truth-teller in the courtroom. The second problem with sitting down is that on redirect examination the prosecutor will be sure to protect the witness by phrasing the question this way:

Q. Let me start where Lincoln so abruptly stopped. Do you remember asking him why you would need a candle before he abruptly sat down?
A. Yes.

Q. Let me ask you the question that he deliberately ignored. Is there a reason that you did not need a candle?
A. Yes. I could see because there was a full moon.

The third problem is that Younger's example does not make his point because the last two questions about the time of night and whether the witness had a candle to see by *do* work if there had been no moonlight that night. So to win this cross you don't need to be a "genius," you only need to ask a few more questions to show that there was no moonlight—just like Lincoln did:

Q. How could you see from a distance of 150 feet or more without a candle at eleven o'clock at night?
A. The moon was shining real bright.

Q. A full moon?
A. Yes, a full moon.

Lincoln then pulled out an almanac and asked the witness:

Q. Does the almanac not say that on August 29 [the night of the murder], the moon had disappeared; the moon was barely past the first quarter instead of being full?
A. [Witness does not answer.]

Q. Does not the almanac also say that the moon had disappeared by eleven o'clock?
A. [Witness does not answer.]

Q. Is it not a fact that it was too dark to see anything from 50 feet, let alone 150 feet?
A. [Again, witness does not answer.]

Regarding Younger's Sixth Commandment, "Do not quarrel," Read explains that this would

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On Shane Read's Winning at Cross-Examination

be correct if Younger meant "do not argue with the witness"—but Younger meant something different. Younger wrote that if during your cross-examination you get an answer that is "contradictory, absurd, patently false, irrational, crazy, or lunatic," you should stop and sit down.

Reads argues that "instead of sitting down, highlight the irrational answer for the jury." This ties back to Read's central theme that "you should use cross-examination to argue your case to the jury"—even where you know that the witness will give negative answers. Read encourages you to drive home the themes of your case through cross-examination, especially in the face of hostile answers, for two reasons: First, you want to remind the jury in your questions of facts that support your case. Second, you want the jury to contrast the truth of your questions with the lies of the defendant's answers. For, once you "have credibility with the jury, each of the witness's denials will be a further nail in his coffin."

Finally, Younger's Third Commandment proclaims, "use only leading questions." But Read shows how that makes for a boring cross-examination and can even undermine it if pushed too far. Read argues that it would be much better if this commandment read, "Only ask leading questions *unless* the answer to a non-leading question cannot hurt you." For it is perfectly fine to ask the witness to explain something if you know that whatever the explanation will be, that answer will not hurt your bottom-line message to the jury.

David Boies in the Proposition 8 trial is one of many powerful real-life examples that Read shows of brilliant trial lawyers on cross getting right to their bottom-line message. The key opposing expert, David Blankenhorn, opined during his direct examination that California's ban on same-sex marriages should be upheld because children raised with one biological parent are worse off than children that grow up with two married biological parents. On cross, Boies wasted no time in challenging that assertion. After an exchange with the witness about different types of studies, Boies goes straight for the kill:

Q. Let me jump right to the bottom line, OK, sir?
A. Good.

Q. Are you aware of any studies showing that children raised from birth by a gay or lesbian couple have worse outcomes than children raised from birth by two biological parents?
A. No, sir. Would it be OK for me to say additional—

Q. It would not be OK for you to volunteer anything. I heard your—the speech that ended, and I'm really trying to move along; OK, sir? You will have a chance to make speeches when your counsel is asking you questions.
A. OK.

Boies did *not* follow Younger's Tenth Commandment to ask subtle questions and tie everything up in closing. Instead, what did Boies do? He tells the witness and shows the trier of fact exactly what he wants to prove on cross, by confidently proclaiming: "Let me jump right to the bottom line, OK?" By making his bottom-line message through cross and never losing control of the examination, Boies won the cross, and won the trial.

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On SECURITIES LITIGATION

affairs"; instead, the scope of the relevant statute is broad enough to extend to certain other matters, including Securities Act claims. The decision stressed that provisions designed to regulate where stockholders may bring claims based on their purchase of shares in a company (such as Securities Act claims) fall within an area of "intra-corporate" matters, and thus are not purely "external" matters (such as tort or commercial contract claims). Finally, the decision concluded that FFPs do not violate federal policy or principles of "horizontal sovereignty" vis-à-vis other states.

What this Means for Federal Courts and the Plaintiffs' Bar

As more Delaware corporations adopt FFPs, federal courts can expect to adjudicate more Securities Act claims than they have in the recent past. And, as more Securities Act claims end up in federal court, plaintiffs will face the additional hurdles imposed on such litigation by the PSLRA.

To the extent plaintiffs determine to bring a Securities Act claim in state court despite an FFP, the Delaware Supreme Court left open the possibility that – although such provisions are facially valid – they may be invalid "as applied" – in other words, plaintiffs can argue that a particular FFP is not enforceable in a particular set of circumstances.

What Companies Can Do

- Delaware corporations without FFPs should consider adopting such a provision promptly. The easiest way to do so is by means of a bylaw amendment, which may be accomplished via board action and does not require a stockholder vote. And, although the Delaware Supreme Court's decision is based on – and limited to – Delaware law, it may provide persuasive authority for companies incorporated in other states that may want to adopt FFPs.

- Delaware corporations that adopted FFPs before the Court of Chancery's decision in Sciabacucchi but determined not to enforce them pending appellate review in that case, should view the Delaware Supreme Court's decision as a "green light" to seek enforcement of FFPs going forward. To the extent such companies included risk factors or other disclosures (including on Form 8-K) regarding the non-enforcement of FFPs, such risk factors and disclosures may need to be updated.

- For companies currently defending Securities Act claims in state court, if they had pre-existing FFPs but deferred enforcing them in the wake of Sciabacucchi, they may want to consider whether to seek enforcement now. The success of that strategy will depend on various factors, including the law of the state where the action is pending, the stage of litigation, and whether there are parallel actions in federal court. The ability of a corporation to enact a provision now that would apply retroactively to a pending suit is not yet clear.

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On INSURANCE LITIGATION

Insurance Policy (codified in California Insurance Code § 2071) provides:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

There are three important aspects to understand about this provision.

The first is that the limitations period is significantly shorter than the four years allowed by statute. Cal. Civ. Code § 337.

The second is that this shorter, contractual limitations period is routinely upheld by California courts. *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1093 (9th Cir. 2003) ("Under this provision, any claim that is 'on the policy' must be brought within 12 months of the 'inception of the loss' or it is time-barred.").

And third, the 12 months begins to run from "inception of the loss," not the insurer's denial of the claim. The California Supreme Court has clarified that "inception of the loss" is that point in time when appreciable damage occurs and is or should be known to the insured. *Prudential-LMI Comm'l Ins. v. Superior Ct.*, 51 Cal.3d 674, 686-87 (1990). And, given the national emergency arising out of COVID-19 and the impact on businesses, many policyholders are well aware of the loss their businesses have sustained. This means that the 12-month contractual limitations period is likely well underway for many policyholders already.

The limitations period is tolled while the insurer investigates the claim. *Prudential-LMI,* 51 Cal.3d at 692-93 (equitable tolling applies from time insured gives notice to time insurer denies claim in writing). But clients are reporting that the denials they have received have been almost immediate. *See, e.g.*, Complaint, *Big Onion Tavern Group, LLC et al. v. Society Insurance, Inc.*, No. 20-02005 (D. Ill. Mar. 27, 2020), ECF No. 1 (alleging insurer prospectively circulated memorandum concluding no coverage due to COVID-19 shutdown). This means that your client's claim may not have been tolled for very long.

Clients also may not be sure whether their policies afford coverage and need time to consult with their brokers or attorneys. In California, however, courts have generally rejected these reasons as a basis to extend the contractual limitations period. *Abari v. State Farm Fire & Casualty Co.*, 205 Cal.App.3d 530, 535 (1988) ("It is the occurrence of some ... cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations.").

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On CLASS ACTIONS

who had the false information disseminated to a third party had Article III standing. *Id.* at *23.

Looking ahead, while the generally fact-specific and claim-specific nature of the Article III standing and punitive damages inquiries may very well limit the direct applicability of *Ramirez* to other cases, class practitioners in the Ninth Circuit should expect to see *Ramirez* cited and quoted in their cases for the foreseeable future, particularly regarding the doctrinal issues. On the plaintiffs' side, the confirmation in *Ramirez* regarding Article III standing standards at the pleading and class certification stages, and the majority's analysis and application of *Spokeo* to claims involving risk of harm, may prove helpful. On the defense side, it is probably reasonable to expect an uptick in the filing of decertification motions at or around the time of trial, which was already becoming an increasingly standard procedural event for those class cases that go to or threaten to go to trial. Class practitioners on both sides should pay careful attention to the development of the law in this area.

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NORTHERN CALIFORNIA

WOMEN ON THE FRONTLINES

Michele Goodwin†

This Article takes aim at the troubling and persistent disempowerment and invisibility of women generally, and particularly marginalized women of color even one hundred years after the ratification of the Nineteenth Amendment. It observes how the persistence of sexism, toxically combined with racism, impedes full political, economic, and social personhood of women and girls in society, sometimes to deadly effect. On the centennial anniversary of the Nineteenth Amendment, it speculates reasons for women's labor being undervalued, even while on the frontlines of service to their families, employers, and our nation. It examines how women's invisibility and sacrifice are particularly striking during the 2020 pandemic—a public health crisis so severe that nations besieged by the novel coronavirus or COVID-19 closed their borders, issued shelter-in-place orders, or imposed quarantines.

In the United States, COVID-19 exposes preexisting institutional and infrastructural social problems, laid bare by a suffocating, debilitating virus. Racism, sexism, and xenophobia are the preexisting social conditions that further exacerbate harms manifested by the disease. Written during the heat of a pandemic, this Article closely examines the unique ways in which centuries of stereotypes and stigma further undermine women and girls as laborers during the 2020 pandemic and as patients. Meanwhile, their suffering is obscured in news media and not sufficiently accounted for in political spheres.

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INTRODUCTION

The spring and summer of 2020 sweltered under the thick heat of shots ringing out in the middle of a southern night, loudly ricocheting as if a combat sport against a hostile, weapon-bearing, foreign enemy. Under the cloak of darkness, they arrived, seemingly on a mission of search and destroy. Arguably the goal was not to serve or save a life but perhaps inflict death or injury itself.[1] As the men assembled with their weapons loaded and bulletproof vests secured, they instructed the ambulance—on standby—to leave, in violation of departmental protocols.[2]

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1 *See* Richard A. Oppel Jr. & Derrick Bryson Taylor, *Here's What You Need to Know About Breonna Taylor's Death*, N.Y. TIMES (Sept. 15, 2020), https://www.nytimes.com/article/breonna-taylor-police.html. [https://perma.cc/LF67-C7H2] ("An ambulance on standby outside the apartment had been told to leave about an hour before the raid, counter to standard practice.").

2 *See id.*

Like hunters for enemy combatants, they operated by surprise.[3] According to police, they knocked. Their account is disputed. Whether they knocked or not—no introductions or explanations were given on that evening.[4] This practice is known as the controversial "no-knock warrant."[5] It is a type of law enforcement strategy reserved for only the most exigent circumstances where officers fear armed suspects or the destruction of evidence,[6] because by default, "law enforcement officers must comply with the knock and announce rule."[7] To knock and announce is no modern rule. Rather, this "'ancient' common-law doctrine . . . generally requires officers to knock and announce their presence before entering a home to execute a search warrant."[8] On this night, constitutional protections found in the Fourth Amendment stood at bay, disarmed by local law enforcement.[9]

In reading the mounting reports and commentaries that copiously detail that tragic night,[10] I am reminded of President

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3 *See id.* (stating that Ms. Taylor's boyfriend called 911 and said, "I don't know what's happening. Someone kicked in the door and shot my girlfriend.").

4 *Id.*; David Alan Sklansky, *Stanford's David Sklansky on the Breonna Taylor Case, No-Knock Warrants, and Reform*, SLS BLOGS: LEGAL AGGREGATE (Sept. 28, 2020), https://law.stanford.edu/2020/09/28/stanfords-david-sklansky-on-the-breonna-taylor-case-no-knock-warrants-and-reform/ [https://perma.cc/64WM-XKZV].

5 *See Legal Sidebar: "No-Knock Warrants" and Other Law Enforcement Identification Considerations*, CONG. RES. SERV., at 1 (June 23, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10499 [https://perma.cc/23NE-MG3W].

6 *See id.* at 3.

7 *Id.* ("The Supreme Court has interpreted the Fourth Amendment's reasonableness requirement as generally mandating compliance with the knock and announce rule. knock and announce rule is also codified in a federal statute, but the Supreme Court has interpreted that statute as 'prohibiting nothing' and 'merely [authorizing] officers to damage property [upon entry] in certain instances.' When officers violate the knock and announce rule, they may be subject to civil lawsuits and 'internal police discipline.'") (alteration in original).

8 *Id.*

9 U.S. CONST. amend. IV.

10 *See, e.g.*, Oppel Jr. & Taylor, *supra* note 1; *What Breonna Taylor's Killing Says About Police Treatment of Black Women*, PBS NEWS HOUR (June 16, 2020), https://www.pbs.org/newshour/show/what-breonna-taylors-killing-says-about-police-treatment-of-black-women [https://perma.cc/MF5P-PDAW] ("I believe that her case was hidden, hidden from Louisville, hidden from Kentucky, hidden from America, primarily because she's black, and, secondarily, because she's a woman.") (quoting Hannah Drake); Errin Haines, *'It Helps Me Know That I Am Not in It Alone Anymore': Breonna Taylor's Mother On Her Daughter and Protests*, WASH. POST (June 5, 2020), https://www.washingtonpost.com/nation/2020/06/05/it-helps-me-know-that-i-am-not-it-alone-anymore-breonna-taylors-mother-her-daughter-protests/ [https://perma.cc/VC9H-M3FU] ("Taylor was killed March 13, fatally shot in her apartment by Louisville police officers serving a no-knock warrant on the wrong address. Her case is among the killings

Obama disclosing the tactical finesse of Osama bin Laden's killing, nine years prior by Navy Seals.[11] Bin Laden, the mastermind behind the September 11, 2001 terrorist attacks in the United States, deftly escaped surveillance and capture for a decade, fleeing from safehouse to guarded compound, masterfully eluding capture and death from highly skilled special forces.[12] The president referred to it as a "targeted operation" to murder one of America's foremost enemy—a person described by President Obama as "not a Muslim leader[,] [but] a mass murderer of Muslims."[13] Surely, the Navy Seals did not knock.

However, this was not Pakistan, Iraq, or Afghanistan. There were no hostile, enemy forces lurking there. No, it was the dim of night in Louisville, Kentucky. Breonna Taylor was not a terrorist or war criminal. She had not declared war on her neighborhood in Louisville or the state of Kentucky. Or on the United States. She was an essential worker, delivering medical aid amid a global pandemic.[14]

Nevertheless, on this evening, their forceful blasts, discharge after discharge, rapidly launch in search of prey. On this night, she will die. An officer shoots with sharp, exacting precision and another, seemingly firing without discernment or attention, launches ten bullets.[15] Shot after shot penetrate the flesh of a woman marked by the dubious distinction of being both essential and expendable. This is a lingering mark and contradiction of Black womanhood—the necessary, maligned social scapegoat against which a society steeped in a history of racism defines her. She is important in the fight against COVID-19 and yet fungible. As she writhes in pain, a woman who dedicated herself to saving the lives of others cannot count on the same from fellow civil servants.

In any case, Breonna Taylor will not survive this evening. Before the morning, she will be pronounced dead. She will not live to vocalize her fear or profess her pain. Her death will be recorded between (and somewhat eclipsed by) the murders of

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of unarmed black Americans by police and vigilantes that has led to national outrage and protests in recent weeks.").

11 *See* Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden Is Dead, Obama Says*, N.Y. TIMES (May 1, 2011), https://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html [https://perma.cc/EME4-W74T].

12 *See id.*

13 *Id.*

14 *See* Oppel Jr. & Taylor, *supra* note 1 (stating that Breonna Taylor worked as an "emergency room technician").

15 *See, e.g.*, *id.* ("The police . . . [struck] Ms. Taylor five times. One of the three officers on the scene . . . shot 10 rounds blindly into the apartment.").

Ahmaud Arbery (chased by white men in Georgia who hunted him down in a pickup truck and murdered him)[16] and George Floyd, whose killing, caught on video, occurred under the pressed knee on his neck by Derek Chauvin, a Minneapolis police officer.[17] As Washington Post reporters noted, "[a]fter Louisville police fatally shot 26-year-old Breonna Taylor during a nighttime raid at her home in March, her killing could have been just another in a long line of deadly police shootings of women that have drawn little publicity"; however, her "death . . . fell between two high-profile killings of Black men."[18]

Louisville police officers will later write a skeletal "incident report" that on some level reflects how little Breonna Taylor's life mattered to them or the systems and institutions that historically devalue women like her.[19] After all, on the night in question, as Breonna Taylor's boyfriend pleaded on her behalf for officers to secure medical help for her, the officers provided none.[20] Despite the numerous times in which she was shot, they will list her injuries as "none" in this report.[21] The officers lie about their forced entry into her apartment, checking "no"

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16 *See, e.g.*, Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html [https://perma.cc/SV5G-8YEC] ("On Sunday, Feb. 23, shortly after 1 p.m., [Mr. Arbery] was killed in a neighborhood a short jog from his home after being confronted by a white man and his son.").

17 *See, e.g.*, Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/JH5J-UM6Z] ("On May 25, Minneapolis police officers arrested George Floyd . . . . Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.").

18 Marisa Iati, Jennifer Jenkins & Sommer Brugal, *Nearly 250 Women Have Been Fatally Shot By Police Since 2015*, WASH. POST (Sept. 4, 2020), https://www.washingtonpost.com/graphics/2020/investigations/police-shootings-women/ [https://perma.cc/7C8G-KHWM].

19 *See* Oppel Jr. & Taylor, *supra* note 1 ("The police's incident report contained multiple errors. It listed Ms. Taylor's injuries as 'none,' even though she had been shot several times, and indicated that officers had not forced their way into the apartment—though they used a battering ram to break the door open.").

20 *See, e.g.*, *id.* (stating that Ms. Taylor's boyfriend called 911 "just after the shots were fired" to seek help).

21 *See* Third District Incident/Investigation Report, Case No. 80-20-017049, at 1 (on file with author), https://htv-prod-media.s3.amazonaws.com/files/bt-incident-report-redacted-1591815417.pdf [https://perma.cc/K3VP-LPYX]; *see also* Audrey McNamara, *Louisville Police Release Breonna Taylor Incident Report—It Lists Her Injuries as 'None'*, CBS NEWS (June 11, 2020), https://www.cbsnews.com/news/louisville-police-breonna-taylor-death-incident-report/ [https://perma.cc/6XPU-Z9TH] ("Despite the fact that [Ms. Taylor] was shot at least eight times during the no-knock search, the report listed Taylor's injuries as 'none.'").

next to the box that says "forced entry" on the form.[22] It is well known now, by witness accounts and crime scene photos, that "officers used a battering ram to force entry into the apartment."[23] Notwithstanding the false police report, Breonna Taylor tragically died in a hail of bullets.

Arguably, Breonna Taylor's death became visible primarily through the tragic murder of George Floyd two months later.[24] Until then, her death was mostly ignored by national news media.[25] And, unlike the police killing of unarmed Black men, Breonna Taylor's death did not draw national protests or persistent news coverage.[26] As such, three painful truths have resurfaced and come to light. First, Black women are historically devalued. Second, Black women's identities are subsumed under race and not distinguished by race and sex. Third, Breonna Taylor's death indicates that despite her value or contribution to society, including service on the frontlines during a pandemic, Black women like her may be rendered invisible due to their race and sex and are therefore considered unimportant. And, as in Breonna Taylor's case, their deaths may be perceived as inconsequential even as they sacrifice their health and lives during a pandemic in service to others.

This Article does not follow the course of the civil litigation or seemingly unavailing criminal prosecution of the men who murdered Breonna Taylor in the deep of night on March 13, 2020. Despite calls for firings and prosecutions, most of the officers involved in her killing remain employed by the Louisville Police Department.[27] Nor does the Article regard Ms. Taylor's death as episodic. To the contrary, since 2015, nearly 250 women have been fatally shot by police.[28] In fact, "Black women are fatally shot at rates higher than women of other

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22 *See* McNamara, *supra* note 21 ("Police also checked 'no' next to the box that says 'forced entry' on the form, but witnesses and crime scene photos show officers used a battering ram to force entry into the apartment . . . .").

23 *Id.*

24 *See* Iati, Jenkins & Brugal, *supra* note 18 ("Taylor's death 'could have been easily forgotten, and it was almost forgotten . . . . But I think the fact that other cases were happening in the same season made it harder to simply overlook her case.'" (quoting Kimberlé Crenshaw)).

25 *See id.* ("Black women often are left out of the public narrative about the use of force by police against Black people.").

26 *See generally* KIMBERLÉ W. CRENSHAW, ANDREA J. RITCHIE, RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, AFRICAN AM. POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 1 (2015).

27 *See* Iati, Jenkins & Brugal, *supra* note 18 (noting that one officer involved in the killing has been fired while others are under investigation).

28 *Id.*

races."[29] Rarely are these women's names fastened to memory. Even while hashtags such as #SayHerName urge remembrance,[30] too often Americans simply forget.

Yet Breonna Taylor's life represents more than its premature demise and proximity to the deaths of Ahmaud Arbery and George Floyd. She was more than the victim of police violence. Her life should be defined by more than her death. Breonna Taylor provided essential service to her community. Thus, this Article's touch point on Ms. Taylor considers her from a position as provider of essential care and service, during a period marked by pandemic. In this way, her life tells another provocative story about institutional and infrastructural inequalities laid bare by COVID-19 generally, and women's invisibility and erasure specifically.

Importantly, the erasure to which this Article speaks is not accidental, nor incidental or episodic. Rather, the function of women's erasure serves to preserve social norms, positions of power, and sex-based hierarchies. Clearly, these are not the destinies most women choose for themselves but rather that foisted upon them—sometimes with the force of law, and frequently enough within private spheres. Thus, by turning a lens toward persistent sex blind spots, a reordering of society emerges, particularly with the inclusion of an examination of race and racism. Importantly, this work is not a lofty academic foray detached from real life and real people. Instead, it centers on women, particularly the most vulnerable among them who through natural disaster and pandemic become expendable, fungible, and exploitable.

This invisibility which this Article describes is fourfold. First, women are rendered invisible as contributors to the advancement of society through law, medicine, science, and other fields to stunning effect. We could term this *professional invisibility*. Second, women's contributions to caregiving, broadly defined in essential care service is also muted, rendered invisible and devalued. COVID-19 brings this observation and deadly reality into stark relief. This Article describes this type of undervalued labor as *essential service invisibility.* Third and problematically, women as primary care providers in the domestic context are expected to assume such uncompensated roles. Thus, while in plain sight, *domestic invisibility* nonetheless harms women by foisting domestic service and the expectation of home-bound service upon them (even if they

29 *Id.*

30 *See id.* ("Taylor's name has become a rallying cry—#SayHerName . . . .").

simultaneously engage in professional invisibility or essential service invisibility).

Finally, women of color may suffer a unique invisibility, because they fall through the cracks of race and sex identities and social movements.[31] In other words, feminists historically imagined white women as the beneficiaries of their advocacy, and in racial justice movements, men take center stage. A 2020 study published by the American Psychological Association describes this phenomenon in the following way—"demographic group prototypes underdifferentiate Black women from Black men and exclude them from women. This may explain why Black women face disproportionate negative contact with the legal system and why the feminism and antiracism movements often fail to address their concerns."[32] We could refer to this as the *intersectional blind spot* and *intersectional invisibility.*

This Article concerns itself with an important, counterintuitive tension—women serving on the frontlines while also being undermined, undervalued, and invisible in the wake of pandemic. It analyzes asymmetries in how society situates women according to race, class, disability, immigration status and other social statuses. In other words, even while experiencing and working through COVID-19, women's experiences with misogyny and sex discrimination differ according to other identity statuses. The American tragedy of slavery bears this out to a chilling degree with Black women's bodies exploited and conscripted in service of that horrid enterprise. Or to enduring degree, with the harms inflicted on Indigenous communities.[33] More recently, the devastating impacts of COVID-19 within Latinx communities further illuminate the unique and intersecting ways vulnerable women can be harmed.[34] Or the violence directed at Asian women, during pandemic, including the murder of six women of Asian descent in a mass shooting at their workplaces prior to this Article's publication.[35] Simply

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31 *See* Stewart M. Coles & Josh Pasek, *Intersectional Invisibility Revisited: How Group Prototypes Lead to the Erasure and Exclusion of Black Women*, 6 TRANSLATIONAL ISSUES PSYCHOL. SCI. 314, 314 (2020).

32 *Id.*

33 *See infra* notes 90–100 and accompanying text.

34 *See infra* notes 90–100 and accompanying text.

35 Giulia McDonnell Nieto del Rio & Edgar Sandoval, *Women of Asian Descent Were 6 of the 8 Victims in Atlanta Shootings*, NY TIMES (March 24, 2021), https://www.nytimes.com/2021/03/17/us/asian-women-victims-atlanta-shootings.html [https://perma.cc/8E9R-A8YK].

put, not all women or their labor are equally situated in the United States, even as they experience sexism.

As such, this Article posits much can be learned by taking account of the confluence of health outbreak, racial unrest, and demands for sex equality. This Article takes up the challenge posed by Professor Victoria Nourse when she argues, "[W]e must take the ethnographer's view of experience about our most basic cultural and social concepts, whether they find their way into law cases or newspapers, diaries or Supreme Court opinions."[36] By doing so, this Article contributes to scholarship seeking to "dislodge even the firmest of our contemporary concepts,"[37] which includes the concept of women's dignity and social value. Otherwise, we fail to take them into account in our framing of legal issues, including women's constitutional rights, and thus our responsiveness to their plights.

This Article involved extensive research and compiling a data set of COVID19 cases, building from many primary sources, and detailed review of states' laws and policies. In various roles, my research benefitted from centering on policies and interventions related to women. My aim is to humanize the women subjects of this research to illuminate what is at stake when state and private power undermine their advancement. In other words, how can we take seriously the travails of women, including the most vulnerable among them, if we do not take into account their stories and life journeys?

Part I turns to COVID-19. It demonstrates how the pandemic exposes preexisting sex- and race-based institutional and infrastructural social problems. It argues that racism, sexism, and xenophobia are the preexisting social conditions that further exacerbate harms manifested by the pandemic. Part II turns to women's labor and invisibility. It queries women's positionality in society, scrutinizing how invisibility manifests and is magnified during the pandemic. Part III turns to women on the frontlines, providing empirical evidence of glass ceilings, glass cliffs, and pink ghettoes. Part IV reimagines ways in which value could be ascribed to women's labor.

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36 *See* Victoria Nourse, *History, Pragmatism, and the New Legal Realism*, Nov. 2005 (on file with the author).

37 *Id.*; *see also* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61, 64 (2009) (discussing the varieties of methods and the need to focus on "real life problems").

I
RACE, SEX, AND COVID

COVID-19 reveals underlying social inequalities in unique and devastating ways. In the United States, the pandemic exposes the fragility of constitutionally promised equality and uncovers a grim medical reality. Neither the contractions of COVID nor the deaths resulting are proportionate or equal.[38] And even while racial disparities in rates of disease in the United States are not a new phenomenon in the United States,[39] COVID-19 exacts a deadly toll bearing down in communities of color, harming women medically and economically.[40] Subpart A addresses healthcare's preexisting racial problem. Subpart B addresses how those harms manifest and are exacerbated during health crisis and the COVID pandemic.

A. Racial Disparities and Social Determinants of Health

COVID-19 pulls at the scab of preexisting health disparities and social realities. These health disparities may emerge from the stresses associated with poor living conditions, environmental injustice, poverty, residing in food deserts, and implicit bias in the medical setting, and may be compounded by existing medical conditions.[41] Often health status is informed by a person's social status and the environmental conditions in which they live, especially for women.[42]

For example, researchers have long known that environmental factors may negatively affect physical health.[43] These

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38 *See infra* notes 90–100 and accompanying text.

39 *See, e.g.*, Chandra L. Ford, *Commentary: Addressing Inequities in the Era of COVID-19*, 43 FAM. & COMMUNITY HEALTH 184, 184 (2020) (asserting that the health care field must address the fundamental role of racism and other social inequalities in shaping the unequal spread and effect of viruses, including COVID-19).

40 *See id.* at 184 (noting that the gross "disparities in rates of hospitalization and mortality due to COVID-19" highlight the necessity of not "overlooking marginalized, underserved populations").

41 *See* Austin Frakt, *Bad Medicine: The Harm That Comes from Racism*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html [https://perma.cc/RW9A-DSUG] (addressing reasons for poor, racially disparate health outcomes for people of color and explaining that "[r]easons include[ ] lower rates of health coverage; communication barriers; and racial stereotyping based on false beliefs").

42 *See, e.g.*, Nazli Hossain & Elizabeth Westerlund Triche, *Environmental Factors Implicated in the Causation of Adverse Pregnancy Outcome*, 31 SEMIN PERINATOL 240, 241 (2007) ("Lead has also been found to be associated with still births in humans.") (citation omitted).

43 *See, e.g.*, *id.* at 240 ("Adverse pregnancy outcome from environmental factors may include congenital anomalies, increased risk for miscarriage, preterm delivery, intrauterine growth restriction and still birth.").

factors include "video display terminals, anesthetic gases, antineoplastic drugs and exposure to lead, selenium and inorganic mercury."[44] Exposure to these factors may negatively affect women's pregnancies and harm children's cognitive development.[45] Findings by Professors Nazli Hossain and Elizabeth Westerlund Triche reveal that "[l]ead, mercury, nickel and manganese have been associated with poor reproductive outcome. An increased risk for spontaneous abortion has been associated with low levels of lead exposure."[46] Their research confirms prior studies that reach similar conclusions.[47]

For poor women of color and their children, who are more likely to live near toxic waste sites,[48] even the air they breathe and the water they drink might harm their health, as pollution is "associated with congenital birth defects, as well as with low birth weight and intrauterine growth restriction."[49] A detailed 2019 study conducted by Professors Daniel Grossman and David Slusky found that the fertility rates in Flint, Michigan—a municipality that "switched its public water source . . . , increasing exposure to lead and other contaminants"—decreased by 12% and "that overall health at birth decreased."[50]

However, it is not simply women's pregnancies that risk compromise by living in or near toxic environments. As Grossman and Slusky point out, high blood lead content is associated with later cognitive function, educational outcomes, mental health, as well as "cardiovascular problems, high blood pressure, and developmental impairment affecting sexual maturity and the nervous system."[51] In Flint, Michigan, children

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44 *Id.*

45 *See id.* at 240–41.

46 *Id.* at 241.

47 *See, e.g.*, Victor H. Borja-Aburto et al., *Blood Lead Levels Measured Prospectively and Risk of Spontaneous Abortion*, 150 AM. J. EPIDEMIOLOGY 590, 590 (1999) ("In the early part of this century, reports of pregnant women occupationally exposed to high levels of lead in England, Hungary, and elsewhere described increases in spontaneous abortions, stillbirths, premature births, and neonatal deaths, compared with mothers in nonexposed occupations.").

48 *See, e.g.*, Michael Gochfeld & Joanna Burger, *Disproportionate Exposures In Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH S53, S53 (2011) ("Age, poverty, and minority status place some groups at a disproportionately high risk for environmental disease. Such groups are exposed to hazardous chemicals or conditions at levels well above those for the general populations.").

49 Hossain & Triche, *supra* note 42, at 241.

50 Daniel S. Grossman & David J.G. Slusky, *The Impact of the Flint Water Crisis on Fertility*, 56 DEMOGRAPHY 2005, 2005 (2019).

51 *Id.* at 2006, 2010.

experienced significant health harms too.[52] Perhaps, not surprisingly, people more likely to be exposed to negative environmental conditions are poor people of color, especially women.[53]

Nor is poor health derived simply by matter of where poor people of color live. Poor people of color are more likely to work in low wage industries that expose them to environmental harm, from meatpacking to agriculture.[54] For example, poor women of color, working in agriculture, are more likely to be at risk of pesticide exposure.[55]

Moreover, strained economic conditions and compromised living environments may also negatively impact psychological health and mental well-being.[56] Stress and trauma may also further compound underlying physical health concerns.[57] An inability to access healthcare or navigate medical systems may exacerbate and compound distress.[58] Justice Blackmun spoke to the psychological and mental health side of this concern for pregnant women in *Roe v. Wade*.[59] Writing for the majority in that 7-2 decision, he noted, "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare."[60]

Understanding the social determinants of health provides a foundation for a critical evaluation of historic and contempo-

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52 *See, e.g.*, Mark A.S. Laidlaw, et al., *Children's Blood Lead Seasonality in Flint, Michigan (USA), and Soil-Sourced Lead Hazard Risks*, 13 INT'L. J. ENVTL. RES. & PUB. HEALTH 358, 367–69 (2016) ("Ultimately, the very fact that we are identifying these problems *after* the children have already been exposed and potentially *permanent harm has already come* to the health and future reveals a significant failing in the environmental health system, where environmental protection and management is disconnected from public health surveillance systems, often with corporate and/or municipal interests lying between the two. Indeed, public policy and systems need to change in order to more adequately integrate and inform issues of urban environmental exposure.").

53 *See* Gochfeld & Burger, *supra* note 48, at S59 (explaining that a sample of pregnant women, who were predominantly Black or Dominican, reported high use of pesticides in the home).

54 *See id.* at S53–54.

55 Hossain & Triche, *supra* note 42, at 240.

56 *See* K. Zivin, M. Paczkowski & S. Galea, *Economic Downturns and Population Mental Health: Research Findings, Gaps, Challenges and Priorities*, 41 PSYCHOL. MED. 1343, 1344 (2011).

57 *See id.*

58 *See Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. DISEASE CONTROL & PREVENTION, (JULY 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html [https://perma.cc/YX63-ZF2C].

59 410 U.S. 113, 153 (1973).

60 *Id.*

rary disparities and biases in health care.[61] That is, despite a well-documented history of racism in healthcare,[62] some researchers and policymakers may tend to ascribe poor health outcomes among people of color to their genes, habits, and biological factors.[63] By doing so, they problematically ignore the social conditions that emerge from poverty, the environment, a history of bias, or discrimination that persists in the medical profession.[64]

For example, racial disparities in the treatment of disease, quality of care, and mortality rates are a persistent phenomenon in American healthcare, which is sadly marked by a history of segregation, exclusion, and hostile care.[65] Even when adjusted for insurance, income, and education, expressed preference for treatments, and severity of disease, race-based health disparities persist.[66] Disquieting research results indicate that even when African Americans gain access to healthcare services, disparities persist in nearly every aspect of their medical experiences, including diagnostic screening and general medical care, mental health diagnosis and treatment, pain management, HIV-related care, and treatments in kidney disease, cancer, and heart disease.[67]

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61 *See, e.g.*, Robert B. Baker, *The American Medical Association and Race*, 16 AMA J. ETHICS 479, 483 (2014) (explaining how the AMA's origins resulted in black and female doctors having unequal opportunities compared to their white male peers for decades).

62 *See, e.g.*, Jonathan Sidhu, *Exploring the AMA's History of Discrimination*, PROPUBLICA (July 16, 2008), https://www.propublica.org/article/exploring-the-amas-history-of-discrimination-716 [https://perma.cc/L489-D3UF] ("Black doctors who attended an AMA meeting in Atlanta were arrested by the police because the AMA luncheon was being held in a segregated cafeteria. When the AMA was asked for comment, they did not defend them. The AMA simply stressed the importance of adhering to the laws of the land. And of course segregation was the law of the land.") (interviewing and quoting Harriet Washington).

63 *See* HARRIET WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 205, 258, 292 (2008).

64 *See* K. M. Hoffman, Sophie Trawalter, Jordan R. Axt & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites*, 113 PROC. NAT'L ACAD. SCI. U.S. 4296, 4296–97, 4300 (2016).

65 *See* WASHINGTON, *supra* note 63, at 45, 301.

66 *See* Carmen R. Green et al., *The Unequal Burden of Pain: Confronting Racial and Ethnic Disparities in Pain*, 4 PAIN MED. 277, 281 (2003).

67 *See* Michelle van Ryn & Steven S. Fu, *Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Racial/Ethnic Disparities in Health?*, 93 AM. J. PUB. HEALTH 248, 249, 251 (2003); Council on Ethical & Judicial Affairs, *Black-White Disparities in Health Care*, 263 (J)AMA 2344, 2344–45 (1990); *see also* COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 2–3, 58, 61 (Brian D. Smedley, Adrienne Y. Stith & Alan R.

Despite the implementation of standardized pain assessment in health care settings, discrepancies in pain management persist by race and ethnicity.[68] African Americans and Latinx populations are far more likely to experience the undertreatment of their pain in comparison to white counterparts.[69] Even when researchers adjust for multiple confounders (age, wealth, insurance status, etc.), research data reveal the harsh, constant barriers experienced by African Americans, including undertreatment or conditions ranging from cancer pain to post-operative pain, chest pain, chronic low back pain, and other acute pain.[70] These experiences occur whether African Americans present as patients in primary care settings, emergency hospital facilities, inpatient hospital or nursing home settings.[71]

Consider the research on heart disease. Studies that track the management of heart disease show similar racial disparities.[72] When compared to white patients, African Americans are less likely to be informed of their options and receive the standard of care afforded to white patients.[73] In the treatment of heart disease, they are unlikely to undergo cardiac catheterization for acute myocardial infarction.[74] This is a form of care to which they will be typically denied.[75] Equally, they are significantly less likely to access coronary artery bypass grafting even after controlling for appropriateness and medical necessity.[76] These findings are not related to patient refusal of care or other demographic factors.[77]

Nelson eds., 2003) (explaining the disparities between black and white patients in myriad medical contexts), https://www.ncbi.nlm.nih.gov/books/NBK220358/pdf/Bookshelf_NBK220358.pdf [https://perma.cc/386H-FCHY].

68 *See* COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 55–56.

69 *See id.* at 64–65.

70 *See* Green et al., *supra* note 66, at 281; Vickie L. Shavers, Alexis Bakos & Vanessa B. Sheppard, *Race, Ethnicity, and Pain Among the U.S. Adult Population*, 21 J. HEALTH CARE FOR POOR & UNDERSERVED 177, 180, 183 (2010); Alexie Cintron & R. Sean Morrison, *Pain and Ethnicity in the United States: A Systematic Review*, 9 J. PALLIATIVE MED. 1454, 1456, 1468 (2006).

71 *See* Green et al., *supra* note 66, at 277, 286.

72 *E.g.*, Edward L. Hannan et al., *Access to Coronary Artery Bypass Surgery by Race/Ethnicity and Gender Among Patients Who are Appropriate for Surgery*, 37 MED. CARE 68, 75 (1999).

73 *E.g.*, COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 173.

74 *See* Alain G. Bertoni et al., *Racial and Ethnic Disparities in Cardiac Catheterization for Acute Myocardial Infarction in the United States, 1995–2001*, 97 J. NAT'L MED. ASS'N 317, 320–21 (2005).

75 *See id.*

76 *See* Hannan et al., *supra* note 72, at 75.

77 *See id.*

The National Academy of Medicine (formerly the national Institute of Medicine) defines disparities in care "as racial or ethnic differences in the quality of healthcare that are not due to access-related factors or clinical needs, [patient] preferences, and appropriateness of intervention."[78] From this definition, disparities may be investigated on two levels in the American medical system. First, at the macro-level of healthcare systems and regulatory climate, disparities can be tracked. Second, disparities may also be rendered visible at the micro-level by identifying discriminatory behavior occurring at the patient-provider level.[79] Importantly, these types of "differences in care . . . result from biases, prejudices, stereotyping, and uncertainty in clinical communication and decision-making."[80]

Even while implicit biases may explain various types of discrimination in the delivery of healthcare and may contribute to poor patient outcomes, recognizing explicit bias in medicine is also important. In other words, sometimes the biases contributing to disparate health outcomes result from explicit discriminatory intent,[81] and at other times cognitive biases influence medical provider behavior.[82] In the former, differentials in care result from direct and even calculated, unjust or unethical intent, and in the former they are driven by cognitive heuristics.

Research over the past twenty years offers myriad examples and indicators of implicit bias occurring at both the macro- and micro-levels.[83] The impact of implicit bias at the systems level can be seen in disparate geographic positioning of healthcare facilities.[84] Equally, implicit bias can be evidenced in institutional limitations placed on resource allocation of ventilators or interpreter and translation services. Implicit biases at the systems level may also relate to institutional restrictions imposed on the number of patients seen by payer status and rigid time structures ordering the medical visit.

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78 COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 32.

79 *See id.*

80 *Id.*

81 *See* Baker, *supra* note 61, at 479; *see also* Sidhu, *supra* note 62 ("[T]he AMA worked to close down African-American medical schools.").

82 *See* COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 10–11, 162–63.

83 *See id.* at 172–73, 543.

84 *See id.* at 543.

Implicit personal preferences and biases also operate within the medical sphere. As distinguished from explicit biases, implicit cognitive biases are not readily accessible to the medical professional engaged in sex or race discriminatory conduct, even when it may seem obvious.[85] However, patients pick up on these cues and biases, which may operate in the form of non-verbal body language of the provider,[86] which is readily interpreted by the patient. Equally, objective evidence may be overlooked or disregarded in favor of cognitive shortcuts, rooted in stereotypes, population-based heuristics, and social categorizations, which may be further consonant with underlying preformed opinions. In the case of implicit personal bias, cognitive shortcuts often form and influence biases that drive decision-making, diagnostic judgments, and recommendations regarding treatment.

B. COVID-19: Race and Sex Disparities

As the discussion from Subpart A shows, racial disparities in the quality of health care and health outcomes for people of color are evidenced in our nation's hospitals and clinics every day.[87] The disparities are not adequately explained by differences in patient education, income, insurance status, expressed preference for treatments, and severity of disease.[88] Currently, the COVID-19 pandemic in the United States follows a similar trend, where "stark racial/ethnic inequities" have emerged "in diagnosed cases and in deaths due to the virus."[89]

According to Centers for Disease Control and Prevention ("CDC"), in survey data compiled even during the early spread of the novel coronavirus, racial disparities in the contraction and deaths associated with COVID-19 were significantly pronounced.[90] Even while Black Americans represent 12.4% of the United States population, they accounted for 22.1% of

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85 *See id.* at 10.

86 *See id.* at 172.

87 *See supra* subpart I.A.

88 *See, e.g.*, Green et al., *supra* note 66, at 281 ("[A]fter adjustment for demographic, clinical, and psychosocial variables, African Americans with chronic knee and hip pain had lesser [quality of life] than Caucasians.") (citation omitted).

89 Ford, *supra* note 39, at 184; *see also Health Equity Considerations and Racial and Ethnic Minority Groups*, *supra* note 58 (enumerating the "social determinants of health that put racial and ethnic minority groups at increased risk of getting sick and dying from COVID-19").

90 *See* Shikha Garg et al., *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019—COVID-NET, 14 States, March 1–30, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 458, 459 (2020).

known COVID-19 cases during the early stages of tracking the virus.[91] Months later, Black Americans, Indigenous populations, and members of Latinx communities remain over-represented in deaths and contractions of COVID-19.[92]

Data from a 2020 American Public Media study, *The Color of Coronavirus*, provides important insights regarding the deadly racialized reach of COVID-19 in communities of color.[93] The study's findings are alarming, even if predictable based on social determinants of health and racial bias in medicine. They write, "Black, Indigenous, Pacific Islander and Latino Americans all have a COVID-19 death rate of *triple* or more White Americans (age-adjusted)."[94] Even as they adjusted their findings based on age, "Black Americans continue to experience the highest COVID-19 mortality rate."[95] In fact, by adjusting for age factors, the "Black and White mortality" gap widens "from 2.2 to 3.6 times as high."[96]

Based on the most recent data available, the authors paint a grim picture of the racial disparities that mark COVID-19 death rates:

- 1 in 1125 Black Americans has died (or 88.4 deaths per 100,000)
- 1 in 1375 Indigenous Americans has died (or 73.2 deaths per 100,000)
- 1 in 1575 Pacific Islander Americans has died (or 63.9 deaths per 100,000)
- 1 in 1850 Latin[x] Americans has died (or 54.4 deaths per 100,000)
- 1 in 2450 White Americans has died (or 40.4 deaths per 100,000)
- 1 in 2750 Asian Americans has died (or 36.4 deaths per 100,000).[97]

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91 APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RES. LAB (Aug. 19, 2020), https://www.apmresearchlab.org/covid/deaths-by-race?fbclid=IWAR1AFTKAmRLzMz5IUj_8YLrr9WdY4Uh4EEiBmrogNKRqI-5jFld54gctJeg#data [https://perma.cc/49J7-UYF2].

92 *See* Tiffany N. Ford, Sarah Reber & Richard V. Reeves, *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS INST. (June 16, 2020), https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/ [https://perma.cc/TBR6-LDSH].

93 *See* APM Research Lab Staff, *supra* note 91.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

These datapoints are glaring, but what more can we learn from them? According to researchers, these rates of death indicate that "many *younger* Americans who are Black, Latino, Indigenous, or Pacific Islanders are dying of COVID-19—driving their mortality rates far above White Americans'."[98] Thus, it is not the death rate alone that should cause alarm. That young people of color are dying from COVID-19 is particularly worrying, highlighting the importance of such data, especially as "youth" is considered a safety guardrail *against* COVID-19. Research from the Brookings Institute framed the matter this way: "in every age category, Black people are dying from COVID at roughly the same rate as white people more than a decade older."[99] Substantively, this indicates that the racial disparities that mark COVID-19 deaths are "even bigger than they appear."[100]

Yet, an examination of race alone does not begin to capture the unique devastations visited by COVID-19 in communities of color. That is, the COVID-19 pandemic exposes the unique ways in which social determinants of health, racial biases, *and sex* biases merge to undermine the health and safety of children and women of color. And while the devastating impacts of COVID-19 also cut short the lives of men, this Article seeks to illume these concerns as they relate to girls and women, particularly as their concerns are more likely to be rendered invisible. In common among the brief sampling of cases below are valuable narratives of being turned away from care, complaints ignored, and ensuing deaths, across an age spectrum. Unlike numeric data, narratives serve to humanize the people whose concerns we study.

1. *Skylar Herbert*

On April 19, 2020, Skylar Herbert, a five-year-old, African American died from complications relating to COVID-19 after enduring two weeks on a ventilator.[101] Skylar had tested positive for the virus in March 2020 and then later developed a rare form of meningitis, leading to brain swelling.[102] News reports

98 *Id.*
99 Ford, Reber & Reeves, *supra* note 92.
100 *Id.*
101 *See* Jasmin Barmore, *5-Year-Old with Rare Complications Becomes First Michigan Child to Die of COVID-19*, DETROIT NEWS (Apr. 19, 2020), https://www.detroitnews.com/story/news/local/detroit-city/2020/04/19/5-year-old-first-michigan-child-dies-coronavirus/5163094002 [https://perma.cc/4RFV-R3PN].
102 *See id.*

highlighted that Skylar was among the first children in the United States to die from COVID-19[103] at a time when politicians downplayed that possibility.[104] Yet, it was not simply the fact that a child could die from COVID-19 that was concerning about her death.

Rather, prior to Skylar's hospitalization, her parents, Ebbie and LaVondria Herbert, both Detroit-area first responders, sought medical attention for their daughter.[105] Like Breonna Taylor, Skylar's parents served the public.[106] LaVondria was a police officer for 25 years and Ebbie was a firefighter for 18 years.[107]

First, the Herberts brought their daughter to a pediatrician, explaining her fever and the child's complaints of discomfort, aches, and pain.[108] It does not appear that a COVID-19 test was administered.[109] Medical staff prescribed antibiotics and advised that Skylar rest.[110] Skylar's symptoms did not abate. Her parents reached out to their pediatrician and even after they advised that the medications provided did not appear to reduce Skylar's symptoms or ease her pain, they were told to wait 48 hours for the medicine to take effect.[111]

Skylar's parents took her to the local hospital's emergency room.[112] After a COVID-19 test was finally administered, a positive result was detected.[113] Skylar had contracted COVID-19 and it killed her. At the time of her death, she was one of the youngest people to die from the disease in the United States

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103 *See, e.g.*, Chelsea Janes & Vicki Elmer, *'The Numbers Are Low Until It's Your Child': The Coronavirus Can Be Deadly for Children, Too*, WASH. POST (April 21, 2020), https://www.washingtonpost.com/health/the-numbers-are-low-until-its-your-child-the-coronavirus-can-be-deadly-for-children-too/2020/04/21/0f5ab28a-83e9-11ea-ae26-989cfce1c7c7_story.html [https://perma.cc/J4UT-ZK3Z].

104 *See* Valerie Strauss, *The Weird Things Sen. Rand Paul Said About Reopening Schools*, WASH. POST (May 12, 2020), https://www.washingtonpost.com/education/2020/05/12/weird-things-sen-rand-paul-said-about-reopening-schools/ [https://perma.cc/N4TS-ZTBB].

105 *See* Barmore, *supra* note 101.

106 *See id.*

107 *See id.*

108 *See id.*; Maria Moseley, *5-Year-Old Daughter of Detroit First Responders Dies from Coronavirus Complications*, ABC NEWS (Apr. 25, 2020), https://abcnews.go.com/US/year-daughter-detroit-responders-dies-coronavirus-complications/story?id=70256558 [https://perma.cc/C2BC-UR8D].

109 *See* Barmore, *supra* note 101 ("After testing positive for strep throat, [Skylar's] doctor gave her antibiotics and sent [her] home to rest.").

110 *See id.*

111 *See id.*

112 *See id.*

113 *See id.*; Moseley, *supra* note 108.

and the youngest person on record to have died from the virus in Michigan.[114]

2. *Kimora "Kimmie" Lynaum*

Similarly, Kimora "Kimmie" Lynum, also African American, holds the tragic distinction of being the youngest COVID-19 fatality in Florida at age nine.[115] Her untimely death due to coronavirus complications gave further evidence that not only could a young person contract the virus, but also she could die from it.[116] According to her family and medical reports, Kimmie had no preexisting or underlying health conditions.[117]

Sadly, the patterns of bias that mark disparate healthcare treatment also manifested in her case. When Kimmie fell ill, her family sought medical care.[118] Despite the fact that her temperature was 103 degrees, doctors sent Kimmie home without the care or treatment that could possibly have saved her life.[119] As her mother sorrowfully recounted, "I thought they would have jumped on that when they saw her fever."[120] Rather, Kimmie was not tested for coronavirus at the hospital and, days after returning home, she laid down to take a nap and did not wake up.[121] She was posthumously tested and found to be COVID-19 positive.[122]

Kimmie supplanted Daequan Wimberly, an eleven-year-old African American, as the youngest COVID-19 death in the state of Florida.[123] Daequan died only weeks before.[124]

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114 *See* Moseley, *supra* note 108.

115 *See* Gabrielle Chung, *Florida's Youngest Coronavirus Victim Identified as 9-Year-Old Kimora 'Kimmie' Lynum*, PEOPLE (July 27, 2020), https://people.com/health/florida-youngest-coronavirus-victim-identified-as-9-year-old-girl-with-kimora-kimmie-lynum-no-preexisting-health-issues/ [https://perma.cc/H52S-28MT].

116 *See id.*

117 *See* Denise Royal & Rosa Flores, *A 9-Year-Old Who Died of Coronavirus Had No Known Underlying Health Issues, Family Says*, CNN (July 26, 2020), https://www.cnn.com/2020/07/25/us/kimora-lynum-dies-of-coronavirus/index.html [https://perma.cc/3FY5-Y4SD].

118 *See* Chung, *supra* note 115.

119 *See id.* ("Though [Kimmie's] temperature was 103 degrees, Kimmie was diagnosed with a urinary tract infection and sent home . . . .").

120 *Id.*

121 *See id.*

122 *See id.*

123 *See* David Ovalle & Michelle Marchante, *Miami Boy, 11, is Florida's Youngest Death from COVID-19*, TAMPA BAY TIMES (July 3, 2020), https://www.tampabay.com/news/health/2020/07/03/miami-boy-11-is-floridas-youngest-death-from-covid-19/ [https://perma.cc/N3MU-PMK9].

124 *See id.* (Daequan passed away on June 30, 2020, while Kimmie passed away on July 18, 2020).

3. *Deborah Gatewood*

Deborah Gatewood, a 63-year-old Black phlebotomist from Detroit, Michigan, died on April 17, 2020 from symptoms related to coronavirus.[125] Similar to the cases described above, Ms. Gatewood was turned away from diagnosis and care.[126] According to reports, prior to her positive diagnosis, she was denied a coronavirus test four times by her employer: Beaumont Hospital, Farmington Hills.[127]

Despite articulating her health concerns, including discomfort, fever, and difficulty breathing, Ms. Gatewood was denied the care she sought.[128] Initially, Ms. Gatewood sought tests from the hospital's emergency room on March 18.[129] However, she was denied care and turned away because she was not perceived as sick enough; doctors informed her that her symptoms were not severe.[130] A day later, she returned to the hospital on March 19, 2020, again complaining of conditions indicative of COVID-19. She was provided a prescription for cough medicine.[131]

Two days later, on March 21, 2020, Ms. Gatewood returned to the hospital.[132] Her temperature had spiked.[133] Even though medical providers speculated that she "most likely had COVID-19," they did not test her, ultimately denying Ms. Gatewood the care she sought.[134] Yet again, she sought care. On March 23, Ms. Gatewood made a fourth trip to the hospital but was not tested for COVID-19.[135] Finally, nine days after her first attempts to receive the care she sought and deserved, she was taken to Sinai-Grace Hospital by ambulance and admitted as a patient.[136] Ms. Gatewood tested positive for coronavirus and eventually had to be intubated for more than two weeks

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125 Janelle Griffith, *Detroit Health Care Worker Dies After Being Denied Coronavirus Test 4 Times, Daughter Says*, NBC NEWS (Apr. 25, 2020), https://www.nbcnews.com/news/us-news/detroit-health-care-worker-dies-after-being-denied-coronavirus-test-n1192076 [https://perma.cc/J5Z2-CMX3].

126 *See id.* ("They said she wasn't severe enough and that they weren't going to test her.").

127 *See id.*

128 *See id.*

129 *See id.*

130 *See id.*

131 *See id.*

132 *See id.*

133 *See id.*

134 *Id.*

135 *See id.*

136 *See id.*

after developing pneumonia.[137] Shortly thereafter, her kidneys and heart failed, and she was declared dead on April 17.[138]

4. *Brittany Bruner-Ringo*

Like Ms. Gatewood, Brittany Bruner-Ringo also worked in medicine as a nurse.[139] In fact, she represented her family's third generation of nurses.[140] Also like Ms. Gatewood, she was ignored by her employer when she raised health concerns based on her medical judgement.[141] Yet, unlike Ms. Gatewood, it was Ms. Bruner-Ringo's medical assessments about a patient that her colleagues ignored, which her family members attribute to her death.[142]

In Ms. Bruner-Ringo's case, the 32-year-old cared for patients at an elite dementia care center in Los Angeles, California, where costs can exceed $15,000 per month.[143] The facility was already "under lockdown to prevent the sort of COVID-19 outbreaks that were cropping up in [New York City]."[144] Despite this fact, Brittany's supervisors "instructed her to admit a new resident, a retired doctor flown in from New York City."[145] Ms. Bruner-Ringo advised against it.[146] After all, in California shelter-in-place orders were already in effect. Family visits to the facility had been canceled.[147] And, nonessential employees were prohibited from coming to the facility.[148] According to her family, when she warned that the doctor should not be admitted, supervisors "ignored her suggestion."[149]

Ms. Bruner-Ringo's mother—Kim Bruner-Ringo—a veteran nurse in Oklahoma City, described her daughter as "uncharacteristically rattled" by this and sought her advice.[150] As she explained to her mother, the doctor "was showing signs of

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137 *See id.*
138 *See id.*
139 *See* Harriet Ryan, *A Nurse Died From COVID-19. Her Family Says Elite L.A. Care Home Ordered Her to Admit A Sick Man*, L.A. Times (May 1, 2020) https://www.latimes.com/california/story/2020-05-01/coronavirus-silverado-nurse-death [https://perma.cc/YX6F-UTBG].
140 *See id.*
141 *See id.*
142 *See id.*
143 *See id.*
144 *Id.*
145 *Id.*
146 *See id.*
147 *See id.*
148 *See id.*
149 *Id.*
150 *Id.*

illness—profuse sweating, a 'productive' cough and a fever close to 103 degrees."[151]

As news reports would later reveal, within a day of the doctor's arrival, he was "so ill that Bruner-Ringo called 911 for an ambulance."[152] He tested positive for COVID-19.[153] In text messages to her sister, Brittany confirmed her fears.[154] Concerned that she may have contracted COVID-19 when checking in the patient, she self-quarantined at a hotel to reduce the possibility of transmission to her roommate.[155] Eventually, she too tested positive and, in the weeks after, more than sixty residents and employees of the care center contracted COVID-19 and nine died, including Ms. Bruner-Ringo.[156]

Her sister, Breanna Hurd, told reporters, "I was just praying every day that Brittany would be able to [live and] tell her own story."[157] Brittany fought hard to survive, even while in intensive care. She died while still on a ventilator.[158] The doctor, however, survived and is now a resident at the facility where Brittany worked.[159]

Even while Brittany's tragic story and that of similarly situated Black women may appear anecdotal, the cruel realities of being unheard, ignored, and overruled in the medical setting are not unusual or uncommon. Mostly, law has done little to address this. According to researchers, "Black women, who live at the intersection of racism and sexism, may be harmed when their unique experiences as Black women are not recognized."[160] This "intersectional invisibility" can operate to deadly effect.[161]

II
WOMEN'S LABOR AND INVISIBILITY

As demonstrated in Part I, underlying social inequities manifest in health disparities, including who contracts diseases, the types of diseases they contract, access to healthcare, and whether women of color receive the medical care they seek.

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151 *Id.*
152 *Id.*
153 *See id.*
154 *See id.*
155 *See id.*
156 *See id.*
157 *Id.*
158 *See id.*
159 *See id.*
160 Coles & Pasek, *supra* note 31, at 314.
161 *Id.*

COVID-19 places these matters in plain sight. Additionally, this national crisis places prevailing, preexisting forms of labor inequality in stark relief. This headline says it all: *The US Economy Lost 140,000 Jobs in December. All of Them Were Held by Women.*[162] Indeed, women lost more than five million jobs in 2020.[163]

The pandemic exposes the myriad institutional and infrastructural social and economic conditions that undermine women's equality and progress toward overcoming sex-based gaps in salary, economic advancement, job attainment, seniority, and leadership. However, COVID-19 also renders these matters visible in the domestic context too. In this Part, the Article turns to women's labor.

To level set, it unpacks the interconnected dimensions of women's lives, illuming the lines between domestic life, the professional, and law which too often are amputated from the other. By isolating or fragmenting women's full experience from home to work an incomplete picture dominates. In other words, to tell the story of economic disenfranchisement properly, homelife must be considered, which COVID-19 teaches us. When homelife is considered, systemic inequalities and even abuses in homelife emerge and form a fuller picture of some women's lived lives.

Thus, Subpart A briefly examines how law is implicated in women's homelife disenfranchisement. Subpart B then turns to the pre-COVID-19 sex gaps to make visible the hidden ways in which women continue to experience disparities in the workforce independent of pandemic. Subpart C examines how such harms manifest during pandemic and add burdens on women.

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162 Annalyn Kurtz, *The US Economy Lost 140,000 Jobs in December. All of Them Were Held by Women*, CNN (Jan. 8, 2021), https://www.cnn.com/2021/01/08/economy/women-job-losses-pandemic/index.html [https://perma.cc/BC5R-RCEM]. *See also* Maria Aspan, *Nearly 80% of the 346,000 Workers Who Vanished from the U.S. Labor Force in January Are Women*, FORTUNE (Feb. 5, 2021), https://fortune.com/2021/02/05/covid-unemployment-rate-january-jobs-report-2021-jobless-job-loss-us-economy-working-women/ [https://perma.cc/FQP8-AN5C]; Maggie McGrath, *American Women Lost More Than 5 Million Jobs in 2020*, FORBES (Jan. 12, 2021), https://www.forbes.com/sites/maggiemcgrath/2021/01/12/american-women-lost-more-than-5-million-jobs-in-2020/?sh=6c36eba12857 [https://perma.cc/WPZ4-YLA9].

163 McGrath, *supra* note 162.

A. Law, Sex, and Violence

The culture of sex-based disenfranchisement begins with government.[164] Legislatures and courts legitimized status-based harms against women such as slavery[165] and coverture,[166] and physical harms such as marital rape[167] and domestic violence.[168] According to Professor Anita Bernstein, "[t]he two oppressions of slavery and coverture, unalike in so many respects, both let [women] down by failing to honor their right to put themselves first."[169] In each category, legislatures and courts denied the full personhood of women, including the right to be free, autonomous, and independent of the harms of men.

Even more, laws endowed white men with the power to inflict themselves on women—regardless of race and often without serious repercussion—physically in the form of battery

164 *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *442–45 (discussing the "chief legal effects of marriage during the coverture").

165 *See, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263, 267–68 (1829) (determining that slave owners could not be found guilty for committing acts of violence against their slaves because they had "full dominion" over them); MELTON A. MCLAURIN, CELIA, A SLAVE 93 (1991) ("Judge Hall's denial of the defense's instruction to acquit Celia because of Newsom's [raping of her] was practically a foregone conclusion."); HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 35 (1861) ("The secrets of slavery are concealed like those of the Inquisition. My master was, to my knowledge, the father of eleven slaves. But did the mothers dare to tell who was the father of their children? Did the other slaves dare to allude to it, except in the whispers among themselves? No, indeed! They knew too well the terrible consequences.").

166 *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389–92 (2000); *see also* Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 21 (1997) (describing that "women under the common law regime of marriage were legally subject to a husband's . . . disciplinary authority").

167 *See* Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105, 112 (2009); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 64–65 (1990) (explaining that "the common law[ ] assum[es] that marriage results in the unification of husband and wife and that marital rape thus constitutes rape of oneself, [which is] a legal impossibility").

168 *See, e.g.*, Abbott v. Abbott, 67 Me. 304, 305, 309 (1877) (ruling that a divorced woman cannot sue her ex-husband for assault committed upon her coverture); State v. Oliver, 70 N.C. 60, 62 (1874) (explaining that "it is better [for courts] to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive" in a case of domestic violence where a woman's husband has not inflicted a permanent injury or shown malice); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 5 (2000) ("[T]he distinction between the market and the family, and the distinction between the state and civil society . . . both . . . characterize violence against women as belonging to the private sphere, removed from the realm of law and politics.").

169 ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY 27 (2019).

and sexually.[170] As law disempowered one group, it empowered the other. As such, historically, women's diminished liberty has not been a concern for courts. For centuries, the common law was weaponized against the interests of women.[171] Cynthia Grant Bowman articulated nearly thirty years ago that law has generally ignored sex-based harms that men do not experience as a problem.[172] Indeed, one area in which the common law (judge-made law) could cohere was in the unified view of the subordination of women.

1. *Domestic Violence*

American legal norms, including policies, laws, and cases, inform its history. Its history—American history—is not forged simply of mundane facts, but rather of principles, processes, values, and philosophies.[173] And, this history is replete with violence, including sex-based violence from the colonial period to the present.[174] And historically, this sex-based American violence primarily involved men harming women and girls.[175] Indeed, "[i]t is the historic oppression of women through physical and sexual abuse which paved the way for male economic dominance over women."[176] In *An Economic History of Women in America*, Julie A. Matthaei writes, "The key to understanding woman's present and future economic position in the capitalist world lies in history."[177]

When courts sanctioned intimate partner violence or domestic abuse—which they uniformly did—they betrayed recognition of women's personhood and human dignity.[178] As such, historically, American courts complicitly participated in the

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170 *See id.* at 26–27.

171 *See id.* at 25.

172 *See, e.g.*, Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 520 (1993) (discussing the failure of the American legal system to provide effective remedies for women who have endured street harassment).

173 *See* JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM 3 (1982).

174 *See* Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 343 (2014).

175 *See, e.g.*, Sally F. Goldfarb, *supra* note 168, at 5, 22 (describing how an "ideology of nonintervention in the family [permitted] . . . violence against women [and girls]" through "[d]octrines like interspousal tort immunity, parental tort immunity, and the marital rape exemption in criminal law").

176 Conner, *supra* note 174, at 343.

177 MATTHAEI, *supra* note 173, at 3.

178 *See, e.g.*, Bowman, *supra* note 172, at 552 ("In a 1985 Georgia case, for example, four motorcyclists at a gas station propositioned four women customers in extremely obscene language and, when asked by the female station attendant to leave, verbally abused and threatened her. However, because the attendant

creation of systems of oppression and the establishment of sex-based hierarchies sanctioned by law.

In the United States, courts granted *gentle restraint* as a type of physical punishment men could legally inflict on their wives.[179] If the restraint was "gentle," husbands could avoid criminal punishment or civil liability.[180] Tort exemption doctrines, such as spousal immunity, served to foreclose civil legal remedies to battered wives.[181]

Gentle restraint was perceived as more progressive than prior legal doctrines that explicitly empowered men to inflict *non-gentle* restraint.[182] Judges also claimed their thinking had evolved.[183] In reality, law related to domestic violence shifted only from arcane monstrousness to modern cruelty and courts across the country were generally aligned.

Thus even in the wake of modern enlightenment, the North Carolina Supreme Court opined, "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[184] Similarly, throughout the United States, courts adopted parallel rules of law related to domestic violence, stressing the social importance of maintaining "domestic harmony" as a public policy value and goal.[185]

Courts advanced various legal fictions to justify upholding a legal system that permitted men to impose violence on their wives.[186] This included the legal fiction that husbands and wives were one legal person.[187] Courts claimed women were legally subsumed within the identities of their husbands.[188]

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was inside the station and seventy feet away from the bikers . . . the appellate court overturned the bikers' assault convictions.") (citations omitted).

179 *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122, 2124–2125, 2125 n.25 (1996).

180 *See* Goldfarb, *supra* note 168, at 23.

181 *See id.* at 22.

182 *See generally* Siegel, *supra* note 179, at 2121–25 (quoting William Blackstone, who stated that a husband could subject his wife to "chastisement" if she defied his authority but that this "power of correction" was to be confined within reasonable bounds).

183 In one illustrative case, the North Carolina Supreme Court noted that "[w]e may assume that the old doctrine, that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina." State v. Oliver, 70 N.C. 60, 61 (1874).

184 *Id.* at 61–62.

185 *See* Goldfarb, *supra* note 168, at 22 n.92.

186 *See id.* at 21–23.

187 *See id.* at 21.

188 *See id.* at 21 n.90.

Sophistry dominated domestic violence jurisprudence. *Could a man unlawfully rape himself? Could a man unlawfully harm himself with a switch or whip?* If a man could not be punished for inflicting harm on himself, then neither could he be guilty of doing so to his wife.

Courts in Maine and elsewhere adopted the general principle that men could not be liable criminally or civilly for imposing physical violence on their wives.[189] In *Abbott v. Abbott*, the court denied Mrs. Abbott relief to recover for injuries sustained during the attack by her husband, which required hospitalization.[190] In denying Mrs. Abbott relief, the court underscored that the "husband and wife are one person."[191]

As tort law is the product of judge-made law, courts played a crucial role in legitimizing and providing safe harbor for domestic violence. Courts legalized inequality and the common law served as a powerful tool to advance male-centered jurisprudence. Courts established the interspousal immunity doctrine, shielding men from liability in domestic violence cases.[192] And courts upheld spousal immunity in cases where men sought to use it as a defense from liability.[193] These were choices courts made and positions they adopted until relatively recently.

Some scholars may perceive this record as one of "more passive than active" betrayal in the common law "as a jurisprudential system did not actively issue orders or judgments to oppress."[194] But, such a view ignores the agency of courts, the lawmaking performed within the tort system, and the values actively expressed. Courts *actively* issued rulings denying women relief from physical and sexual harm imposed by men and in doing so cast judgements about women's personhood, autonomy, and liberty.[195]

Judges claimed that spousal immunity advanced important policy goals, including discouraging intrafamilial litigation.[196] As a public policy matter, courts regarded it in society's interest that women reside in harmonious compan-

189 *See, e.g.*, Abbott v. Abbott, 67 Me. 304, 309 (1877); *see also* Goldfarb, *supra* note 168, at 23 ("The denial of criminal and tort remedies for violence committed within marriage has a legal pedigree reaching back hundreds of years.").

190 Abbott, 67 Me. at 305.

191 *Id.* at 306.

192 *See* Goldfarb, *supra* note 168, at 22.

193 *See* Siegel, *supra* note 179, at 2163–66.

194 BERNSTEIN, *supra* note 169, at 27.

195 *See* Goldfarb, *supra* note 168, at 22 n.92.

196 *See* Siegel, *supra* note 179, at 2165.

ionship with their husbands, unimpaired by the tensions that could arise from litigation.[197] As such, many courts refused to acknowledge that avoiding the marital tensions and disharmony that could possibly result from litigation did not cure physical, emotional, and sexual abuse in the marital homes.[198] This judicial philosophy did not consider, let alone ensure, the safety, care, and betterment of women and girls.

2. *Sexual Violence*

The history of which Part II speaks resonates today. Even as women demand change in laws historically permitting marital battery and sexual assault, the vestiges of such laws and judicial opinions continue to resonate and inform social norms. In 2015, President Donald Trump's then-lawyer, Michael Cohen, responded to allegations that his client had raped his first wife,[199] by declaring that "by the very definition, you can't rape your spouse."[200] He claimed, "It is true . . . . You cannot rape

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197 *See id.* at 2162, 2165 ("Interspousal litigation violated fundamental precepts of the doctrine of marital unity.").

198 *See* Goldfarb, *supra* note 168, at 22 n.92.

199 Ivana Trump issued a statement on the eve of a publication that reported on a deposition she gave during divorce proceedings against Donald Trump. The deposition described a violent encounter with her then-husband that included physical and sexual assault. The deposition was later written about in a 1993 book, *Lost Tycoon: The Many Lives of Donald J. Trump,* by journalist Harry Hurt III. Prior to the book's release, Donald Trump and his lawyers provided a statement from Ivana Trump, which is now posted in the book.

> During a deposition given by me in connection with my matrimonial case, I stated that my husband had raped me . . . . [O]n one occasion during 1989, Mr. Trump and I had marital relations in which he behaved very differently toward me than he had during our marriage. As a woman, I felt violated, as the love and tenderness, which he normally exhibited towards me, was absent. I referred to this as a 'rape,' but I do not want my words to be interpreted in a literal or criminal sense.

Brandy Zadrozny, *Ex-Wife: Donald Trump Made Me Feel 'Violated' During Sex*, DAILY BEAST (Feb. 27, 2019, 11:17 AM), https://www.thedailybeast.com/ex-wife-donald-trump-made-me-feel-violated-during-sex [https://perma.cc/HF52-QX3R] ("Not only does the current frontrunner for the Republican presidential nomination have a history of controversial remarks about sexual assault, but as it turns out, his ex-wife Ivana Trump once used 'rape' to describe an incident between them in 1989. She later said she felt 'violated' by the experience.").

200 Tanya Basu, *Donald Trump Lawyer Sorry for Saying 'You Can't Rape Your Spouse'*, TIME (July 28, 2015), https://time.com/3974560/donald-trump-rape-ivana-michael-cohen [https://perma.cc/QKL7-R8BS]; *see also* Dara Lind, *Donald Trump's Lawyer Said It's Legal to Rape Your Spouse. Nope.*, VOX (July 29, 2015), https://www.vox.com/2015/7/28/9057911/donald-trump-rape-ivana [https://perma.cc/5PH2-ZSEE] (writing that Michael Cohen's statement is false, as "[e]very state and the federal government allows people to prosecute their spouse for rape").

your spouse. And there's very clear case law."[201] Despite women's advocacy organizations rightfully chiding Donald Trump's lawyer for being "absurdly behind the times,"[202] in reality some states continue to regard married women "differently when it comes to rape."[203]

Notwithstanding recent progress in repealing marital rape laws,[204] some legislators and judges maintain the view that marriage both uniquely denies or disqualifies women the personhood and autonomy to refuse sexual intercourse from their spouses and empowers men to impose sexual demands without legal consequence.[205] In 2017, Richard "Dick" Black, a Virginia state representative running for Congress, queried, "How on earth you could validly get a conviction of a husband-wife rape when they're living together, sleeping in the same bed, she's in a nightie, and so forth, there's no injury, there's no separation or anything."[206] Perhaps as a former military prosecutor, Black's experiences led him to conclude such cases were difficult to prosecute. Even so, his view that "no injury" could be shown or established in marital rape cases reflected the tendency even among prosecutors to view marital rape not only as lawful and defensible but also *unharmful.*

Senator Black's views were not much different than those uttered decades prior in 1979 by California state senator Bob Wilson, chair of the Judiciary Committee, when he questioned, "If you can't rape your wife . . . who can you rape?"[207] Or South

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201 Zadrozny, *supra* note 199. Donald Trump also denied the allegation, claiming, "It's obviously false . . . . It's incorrect and done by a guy without much talent . . . . He is a guy that is an unattractive guy who is a vindictive and jealous person." *Id.* (second omission in original).

202 Danielle Paquette, *Nearly Half of States Treat Married Women Differently When It Comes to Rape*, WASH. POST (July 29, 2015, 10:23 AM), https://www.washingtonpost.com/news/wonk/wp/2015/07/29/the-ancient-sexist-roots-of-what-donald-trumps-adviser-said-about-rape/ [https://perma.cc/266F-YDHU].

203 *Id.*

204 *See* Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119, 121 (1999) ("Women's groups . . . lobbied state legislatures to revise antiquated rape laws . . . .").

205 *Cf.* Michael D.A. Freeman, *"But If You Can't Rape Your Wife, Who[m] Can You Rape?": The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 21–22, 25–26 (1981) (discussing courts that have recognized marital exemption and states whose statutes preserve the marital exemption rule).

206 Lizzie Crocker, *Virginia Legislator Running for Congress Says Spousal Rape Should Be Legal*, DAILY BEAST (Apr. 14, 2017, 1:04 PM), https://www.thedailybeast.com/virginia-legislator-running-for-congress-says-spousal-rape-should-be-legal [https://perma.cc/S4YN-LMBX].

207 DIANA E.H. RUSSELL, RAPE IN MARRIAGE 18, 18–20 (1990); Freeman, *supra* note 205, at 1; Carol Tavris, Opinion, *What We Talk About When We Talk About*

Carolina representative Charles Sharpe, who believed the state "need[s] to stay out of a man's bedroom."[208] Sharpe was later charged with federal crimes involving the violent, illegal enterprise of cockfighting while he was the commissioner of agriculture for the state.[209]

And, despite repeals of marital rape statutes, states continue to draft loopholes and exceptions.[210] In West Virginia, "sexual contact" excludes contact with a person *you are married to*.[211] Similar to domestic violence, courts and legislatures created the legal standards or *legal fictions* by which men and women would abide.[212] As the New York Supreme Court acknowledged in *Thaler v. Thaler*, "[T]his Court has previously observed [that] at common law the husband and wife were one, and the husband was the one."[213] These were not the conditions for which women foisted upon themselves. Rather, legislatures and courts declared sexual violence was irrevocably and implicitly consented to (if not explicitly) in the marital contract.[214] And even while the court intimated a significant per-

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Rape, L.A. TIMES (Oct. 4, 2015), https://www.latimes.com/opinion/op-ed/la-oe-1004-tavris-what-is-rape-20151004-story.html [https://perma.cc/NA4L-EX45].

208 *Marital Rape Bill Advances in House*, SPARTANBURG HERALD-JOURNAL, Jan. 30, 1991, at 8, https://news.google.com/newspapers?nid=1876&dat=19910130&id=srAeAAAAIBAJ&sjid=q84EAAAAIBAJ&pg=4995,4286589&hl=en [https://perma.cc/PMS3-K8YE]; Joann M. Ross, Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage 201 n.574 (Dec. 2015) (Ph.D. dissertation, University of Nebraska-Lincoln) (on file with the Dissertations, Theses, & Student Research, Department of History, University of Nebraska-Lincoln) (citing Cindy Ross Scoppe, *Clock Running Out for House Action on Marital Rape Bill*, THE STATE, (May 31, 1990)).

209 *See* Ron Menchaca, *Ex-lawmaker Finds Life After Prison*, POST & COURIER (Mar. 23, 2008), https://www.postandcourier.com/news/ex-lawmaker-finds-life-after-prison/article_513fa3ca-c36f-5ffe-b903-63690407124b.html [https://perma.cc/MW6H-AAUS] ("[T]o many South Carolinians, the former state lawmaker and former state agriculture commissioner's name is synonymous with cockfighting, the shadowy bloodsport in which chickens brutally ravage one another with razor-sharp spurs.").

210 *See, e.g.*, MODEL PENAL CODE § 213.1(1) (AM. LAW INST. 2020) (containing the language "with a female not his wife" in its definition of rape offenses).

211 W. VA. CODE ANN. § 61-8B-1 (West 2019).

212 *See* Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347 (1979).

213 391 N.Y.S.2d 331, 336 (Sup. Ct. 1977) ("But, with the advent of the married woman's property acts, L.1848, c. 200, §§ 1, 2, allowing married women to own and control property, any previous justification for this one-way support duty faded. With the current status of women and perceptions of equality, it disappears.").

214 *See* Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution To Extinction*, 43 CLEV. ST. L. REV. 351, 353–54 (1995) ("For more than 330 years [Hale's] statement has been the justification for the marital rape exemption, as well as serving as the backbone for judicial recognition of spousal immunity in the United States since 1857."); Linda Jackson, *Marital Rape: A Higher Standard Is in*

centage of married women feel "compelled" by a sense of "marital duty" to have sex with their male partners, it is worth noting that a deep sense of conflict arises when they lack the desire for sexual intimacy.[215]

Myriad defenses have been offered over the past four centuries to justify marital sexual violence.[216] For example, Blackstone's commentaries are traditionally cited for the proposition that women are property or chattel of their husbands,[217] the legal rule being men can do what they will with their property.[218] This latter notion brought into stark reality with American slavery: sexual assault, rape, battery, and even murder.

Contemporary justifications are rooted in traditional rationales harmful toward women's equality, including that the marital rape exemption must survive as "the marital exemption protects against governmental intrusion into marital privacy and promotes reconciliation of the spouses."[219] Even as judicial doctrine on marital rape evolves, recognizing that rape "is the 'ultimate violation of self,'"[220] the influence of traditional rationales in justifying sexual violence against women remains in the present.

Law played a non-insignificant role in shaping women's internalization of "fault" and sense of obligation to have sex under any circumstances with their spouses as part of the marital contract.[221] Sometimes women feared physical violence against themselves or their children if they resisted sexual violence.[222] However, their concerns for safety and skepticism about the legal system to keep them safe were quite distinct from women who opposed marital rape reform based

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Order, 1 WM. & MARY J. WOMEN & L. 183, 185–86 (1994); Sandra L. Ryder & Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 J. MARSHALL L. REV. 393, 394–95 (1991).

215 Kathleen C. Basile, *Prevalence of Wife Rape and Other Intimate Partner Sexual Coercion in a Nationally Representative Sample of Women*, 17 VIOLENCE & VICTIMS 511, 518–19 (2002).

216 *See* Siegel, *supra* note 214, at 354–57.

217 *See* Jackson, *supra* note 214, at 187.

218 *Cf.* Freeman, *supra* note 205, at 8 ("[T]he law regarding rape developed to protect the interests of men, not women.").

219 People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984).

220 *Id.* at 575 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (holding that the death penalty for rape was excessive and unconstitutional)).

221 *See, e.g.*, Freeman, *supra* note 205, at 7 ("Some [women] consider it their fault; others are ashamed to talk about it. Many have adopted cultural definitions of the act [of rape] and see themselves as property at their husband's disposal.").

222 *See, e.g.*, Ross, *supra* note 208, at 9 (stating that women exhibit "concern about retribution from an abuser").

on the notion that marriage obligated women to have sex with their husbands under any and all circumstances.

For example, some women, even politicians, perceived sexual violence as part of the marital contract.[223] Irin Carmon writes, "Conservative activist Phyllis Schlafly . . . repeatedly said she doesn't believe that marital rape exists."[224] Schlafly, most closely associated with opposing ratification of the Equal Rights Amendment ("ERA"), persisted in the view that, "[b]y getting married, the woman has consented to sex, and I don't think you can call it rape."[225] Nor was Schlafly necessarily an outlier among conservative women who lobbied legislatures and lectured on college campuses that both marital rape and campus sexual assaults unfairly targeted men.[226]

In the 1980s as courts began repealing marital rape exemptions, the New York Court of Appeals stated, "The fact that rape statutes exist, however, is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault."[227] This stratification of rape into degrees of harm or *mens rea* reified the underlying problem of women's disempowerment and invisibility and preserved antiquated principles of male supremacy in law. Courts analogized these rankings of rape according to general physical assault.[228] In *People v. Liberta,* according to the court, this meant "if the defendant had been living with [his wife] at the time he forcibly raped and sodomized her he probably could not have been charged with a felony, let alone a felony with punishment equal to that for rape in the first degree."[229]

Courts justified marital rape exemptions on myriad grounds. Among the theories was the idea that "elimination of

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223 *Cf.* Irin Carmon, *Meet the Marital Rape Deniers*, MSNBC (July 28, 2015), http://www.msnbc.com/msnbc/meet-the-marital-rape-deniers [https://perma.cc/4NB5-DFUD] (stating that Schlafly has said "when you get married you have consented to sex . . . . When it gets down to calling it rape though, it isn't rape . . . .").

224 *Id.*

225 Sarah A. Harvard, *8 Worst Things Phyllis Schlafly Ever Said About Women's Right*, MIC (Sept. 6, 2016), https://www.mic.com/articles/153506/8-worst-things-phyllis-schlafly-ever-said-about-women-s-rights [https://perma.cc/WX4C-BP3V]; Amanda Marcotte, *Phyllis Schlafly in Her Own Words: Her Many Opinions About Women, Sex, and Equality*, SALON (Sept. 6, 2016), https://www.salon.com/2016/09/06/schlafly-in-her-own-words-her-many-opinions-about-women-sex-and-equality [https://perma.cc/LEL4-WXGT].

226 *See, e.g.*, Marcotte, *supra* note 225 (recognizing that Schlafly's views "turned out to be effective tools for organizing the right").

227 People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984).

228 *See id.* at 575.

229 *Id.*

the exemption would be disruptive to marriages."[230] Or that it would impede or even discourage reconciliation.[231] Other rationales included doubts of provability, the questionable seriousness of the crime, and unfairness to defendants.[232]

On one hand, courts became an obstacle to pursuing and vindicating marital rape claims. On the other, legislatures equally weaponized law in the service of marital rape. That is, throughout the United States, state legislatures enacted laws *decriminalizing* marital rape.[233] Adopting a similar posture, courts followed suit by granting marital status a viable tort defense in civil litigation.[234] Until recent legislative repeal starting in the late 1970s[235] and judicial repeal in the 1980s,[236] marital rape was legal.[237] When courts finally began the process of repeal, they noted there was no rational basis by which to justify holding rape during marriage as distinct from that involving unmarried individuals.[238]

Judicial repeal gained momentum on the heels of a particularly heinous New York case, *People v. Liberta*.[239] In this case, Mario Liberta, already under court order to live apart from his wife, "forcibly raped and sodomized her in the presence of their $2^1/_2$-year-old son."[240] The trial court granted the defendant's motion to dismiss the case.[241] The court found that the "marital exemption" applied.[242]

On appeal, however, the court denied Liberta marital statutory protection because he was under a family court order, which the court interpreted as granting the parties the status

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230 *Id.* at 574.

231 *See id.*

232 *See id.*

233 *See infra* notes 252–254 and accompanying text (discussing marital rape exemption statutes in Oklahoma, Montana, and Colorado).

234 *See* Freeman, *supra* note 205, at 21–22.

235 *See Liberta*, 474 N.E.2d at 571.

236 *See* David Margolick, *New York Joins 17 States That Deny Wives Are Property; Rape in a Marriage Is No Longer Within Law*, N.Y. TIMES (Dec. 23, 1984), https://www.nytimes.com/1984/12/23/weekinreview/new-york-joins-17-states-that-deny-wives-are-property-rape-marriage-no-longer.html [https://perma.cc/RV5M-RHXK].

237 Les Ledbetter, *Oregon Man Found Not Guilty on a Charge of Raping His Wife*, N.Y. TIMES (Dec. 28, 1978), https://www.nytimes.com/1978/12/28/archives/oregon-man-found-not-guilty-on-a-charge-of-raping-his-wife-husband.html [https://perma.cc/HY4L-9SSA].

238 *See Liberta*, 474 N.E.2d at 573.

239 *Id.*

240 *Id.* at 569.

241 *See id.* at 570.

242 *See id.*

of being "unmarried" for purposes of criminal violations.[243] Tellingly, even at the appellate court level, the court would have upheld the marital exemption so long as it could be proved that a marriage "existed" at the time of the sexual battery.[244] In this case, the relevant question was the status of the marriage in light of the court order.[245]

Interestingly, Liberta argued the statutes—"rape in the first degree (Penal Law, § 130.35) and sodomy in the first degree (Penal Law, § 130.50)"—violated equal protection under the Fourteenth Amendment.[246] He claimed that the laws burdened some men, but not others.[247] The direct implication was that, at least in his case, rape should be exempt from prosecution whether one is married or not.[248] The court averred on Liberta's constitutional arguments that the penal code uniquely burdened him and men like him.[249] The court concluded there was "no rational basis for distinguishing between marital rape and nonmarital rape."[250]

People v. Liberta was a watershed moment in that it represented the first judicial repeal of a marital rape law. Until then, state laws generally permitted marital rape.[251] For example, Oklahoma defined rape as "an act of sexual intercourse . . . accomplished with a [person] who is not the spouse of the perpetrator . . . ."[252] Similarly, Montana's Rape Exemption Statute prior to 1983 read in relevant part: "Sexual intercourse without consent. (1) A person who knowingly has sexual intercourse without consent with a person of the opposite sex *not his spouse* commits the offense of sexual intercourse without consent."[253]

In Colorado, the legislature specified, "(1) The criminal sexual assault offenses of this part 4 shall not apply to acts between persons who are married, either statutorily, putatively,

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243 *See id.*
244 *Id.* at 571.
245 *See id.* at 570.
246 *Id.* at 569.
247 *See id.* at 570.
248 *See id.*
249 *See id.* at 571–72.
250 *Id.* at 573.
251 *See* Helaine Olen, *The Law: Most States Now Ban Marital Rape: Until the '70s, the Act Generally Was Not a Crime. In California, It Can Be Treated as a Misdemeanor or Felony*, L.A. TIMES (Oct. 22, 1991), https://www.latimes.com/archives/la-xpm-1991-10-22-mn-163-story.html [https://perma.cc/J8C7-2XWP].
252 OKLA. STAT. tit. 21, § 1111 (2018).
253 MONT. CODE ANN. § 45-5-503 (1977) (amended 1985) (emphasis added).

or by common law."[254] Notably, Colorado, Montana, and Oklahoma were not outliers; nearly all states adopted some version of a marital rape exception.[255] Until 2015, Louisiana had in its law language distinguishing "who is not the spouse" in its sexual battery statute.[256]

These legislative enactments categorically undermined the dignity and bodily autonomy of married women. Equally, marital rape exemptions conferred significant power and legal protections in men who violate their wives. They created asymmetries in marital relationships, which shaped domestic norms that extended into the social sphere. In case after case, courts chose to uphold state legislation protecting the interests of men who sexually violate and rape their wives.[257]

The Alabama Supreme Court ruled "a husband may enforce sexual connection[ ] and . . . in the exercise of his marital right he cannot be guilty of the offense of rape."[258] Consistently courts ruled against married women in cases involving rape.[259] In *State v. Paolella*, the Connecticut Supreme Court considered (on two separate appeals in the same year) a grisly, though not particularly unusual marital rape case. Joseph Paolella plotted to kidnap and rape his estranged wife.[260] He succeeded in both. According to the court on the second appeal:

> During the course of the argument, the complainant tried to escape from the house through both the doors and windows; however, the defendant forcibly prevented her from doing so. When she attempted to use the phone again, the defendant hit her with it. Still holding his rifle, the defendant then grabbed the complainant, hit her, and pushed her against a wall with such force that her head and heel went through the wall . . . .

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254 COLO. REV. STAT. § 18-3-409 (1973) (amended 1988).

255 *See* Briana Bierschbach, *This Woman Fought to End Minnesota's 'Marital Rape' Exception, and Won*, NPR (May 4, 2019; 7:52 AM), https://www.npr.org/2019/05/04/719635969/this-woman-fought-to-end-minnesotas-marital-rape-exception-and-won [https://perma.cc/DZ93-HNCH] (noting that "[m]ost states had marital rape exceptions as part of their law until 1979," and while "marital rape was technically illegal in all 50 states" by 1993, there are still loopholes).

256 2015 La. Sess. Law Serv. Act 256 (S.B. 117) (West).

257 *See* Hasday, *supra* note 166, at 1465–66.

258 Anonymous, 89 So. 462, 463 (Ala. 1921) (citing 13 R. C. L. pp. 987, 988, § 6).

259 *See, e.g.*, State v. Paolella, 554 A.2d 702, 708 (Conn. 1989) (pointing to Connecticut law for the proposition that a finding by a trier that the alleged offender and the victim were married exonerates the alleged offender, regardless of the proof of forcible sexual intercourse); *see also* CONN. GEN. STAT. § 53a-70(a), 53a-70a(a) (2019) (defining aggravated sexual assault in the first degree in Connecticut).

260 *Paolella*, 554 A.2d at 704.

> Carrying the rifle, the defendant dragged the complainant by her hair down the stairs to the basement, where he pointed the rifle at her head and threatened to kill her. He then tied her wrists and legs to his weightlifting bench with a telephone cord while he berated her and called her names . . . . The defendant then untied the complainant's legs, removed her pants, retied her legs above her head to the bar over the weight bench, and had sexual intercourse with her.[261]

Like similar marital rape violence, the case turned on whether the survivor and rapist were married at the time of the rape. In this case, they lived apart and both had filed for divorce.[262] Turning to Connecticut law, the court acknowledged that "[c]ertainly there is ample evidence at this point for the court to find that the . . . basic elements of the rape have been proven."[263] Nevertheless, the court on the first appeal held:

> As noted . . . General Statutes § 53a-65(2), which defines the sexual intercourse prohibited under §§ 53a-70(a) and 53a-70a(a), excludes married people. Under this statutory scheme, a defendant married to the alleged assault victim cannot be found guilty of violating those sexual assault statutes. A finding of non-culpability based on the "marital exemption" of § 53a-65(2) necessarily depends upon proof of the fact that the victim and the defendant were legally married . . . [and] a finding by the trier that the alleged offender and the victim were married exonerates the alleged offender, regardless of the proof of forcible sexual intercourse.[264]

Understandably, one might struggle to understand such judicial conclusions, given the psychological terror, physical punishment, and underlying domestic, sexual violence in such cases. Notwithstanding judicial deference to the legislatures, judges are not automatons and courts are not agencies of lawmakers. Even while dispassionate judicial review of marital rape cases could be argued to serve a broader purpose in law, which is commonly understood to suggest that calm judicial temperament, cool deliberation, and objective neutrality serve the interests of justice, ironically, the exercise of such values in the marital rape context consistently resulted in harm to the interests of marital rape survivors.

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261 State v. Paolella, 561 A.2d 111, 113–14 (Conn. 1989).

262 *Id.* at 113.

263 *Paolella*, 554 A.2d at 705 (quoting the trial court, which clarified that "[t]he basis of the ruling as I indicated is the opinion of the Court that the spousal exemption is valid and the evidence indicates clearly . . . that these parties were still legally married on that day, and it is for that reason I am granting the Judgment of Acquittal as to these two counts").

264 *Id.* at 708.

According to Professor Robin West, "Marital rape exemptions are strikingly easy to trace to misogynist roots, from Hale's infamous argument that a married woman is presumed to consent to all marital sex and, therefore, cannot be raped, to the common law's assumption that marriage results in the unification of husband and wife . . . ."[265] Sir Matthew Hale's 1736 treatise, *Historia Placitorum Coronae, History of the Pleas of the Crown*, theorized that a "husband cannot be guilty of a rape" because marriage conveys unconditional consent.[266] According to Hale, the fulfillment of men's sexual desires is a part of the marital contract and a married woman "hath given up herself in this kind unto her husband, which she cannot retract."[267]

Similarly, Blackstone claimed married women's identities and legal rights should be subsumed under the broader scope of their husbands' identities.[268] American courts adopted this principle, borrowing from European coverture laws. Thus, not only were married women powerless in relation to forced sex but also rendered invisible in terms of their identities. Courts claimed that coverture preserved legal and social order and promoted familial harmony.[269] In reality, coverture instantiated male dominance and rule, situated power in the hands of men, and forged a legal culture of misogyny and violence in American households. According to Blackstone,

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-[F]rench a *feme-covert* . . . .[270]

In short, it is hard to ignore the role of legislatures and courts in weaponizing law for the protection of men and harm

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265 West, *supra* note 167, at 64–65 (citations omitted).

266 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 628 (1736).

267 *Id.*

268 *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *442–45 (discussing the "chief legal effects of marriage during coverture").

269 *See id.*

270 *Id.* at *442 ("Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage . . . . For this reason, a man cannot grant any thing [sic] to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.") (citations omitted).

of women.[271] In other words, legislatures and courts provided legal sanctuary or safe harbor for men who raped their wives[272] and even their daughters.[273] In *Roller v. Roller,* the Washington Supreme Court held that a minor could not maintain a cause of action against her father for rape.[274] The fact of the rape was not at issue in the case.[275] Rather, the court claimed public policy dictated its holding; a sexually-assaulted daughter should not be able to recover against her father as it was presumed disruptive to the family household.[276] The justices asserted maintaining "harmony in the domestic relations" necessitated such an outcome.[277]

From the judicial perspective, society's interest in preserving domestic tranquility manifested in the "earliest organization of civilized government . . . [and was] inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state."[278] And, while the court acknowledged that rape is a terrible crime, the justices juxtaposed the daughter's harm against "any other tort," opining that any generic tort compared to a rape "would be different only in a degree."[279]

Time and again, courts gave their imprimatur to systemic harms foisted on girls and women. In *Commonwealth v.*

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271 The "marital exception," for example, shielded husbands from criminal liability for the sexual assaults and rapes perpetrated against their wives. According to the American Law Reports 4th Edition on marital rape, "Until very recently, the courts were nearly unanimous in their view that a husband could not be convicted of rape, or assault with intent to commit rape, upon his wife as the result of a direct sexual act committed by him upon her person." *See e.g.*, Walsh, *supra* note 167, at § 2[a] (explaining that the exception was said to "serve a legitimate state interest in encouraging the preservation of family relationships"). *See also* MISS. CODE ANN. § 97-3-99 (Supp. 1991) ("A person is not guilty of any offense under sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart . . . .").

272 *See, e.g.*, Davis v. State, 611 So. 2d 906, 912 (Miss. 1993) (citing MISS. CODE ANN. § 97-3-99 (Supp. 1991)). Davis challenged his conviction of aiding and abetting in the rape of his wife. His defense, that he could not be prosecuted (and therefore convicted) if he raped his wife, was supported by the majority: "Davis is, of course, correct that if he had himself solely perpetrated this atrocity, then under Miss.Code Ann. § 97-3-99 he was immune from prosecution." *Id.*

273 Roller v. Roller, 79 P. 788, 788 (Wash. 1905).

274 *Id.* at 788–89.

275 *See id.* at 788.

276 *Id.* at 789.

277 *Id.* at 788.

278 *Id.*

279 *Id.* at 789.

Fogerty,[280] a case involving the gang rape of a ten-year-old girl, the Supreme Court of Massachusetts acknowledged that the men who "ravished" the child could not plead exceptions.[281] However, in an utterly unnecessary, but nonetheless revealing dicta, the justices declared, "Of course, it would always be competent for a party indicted to show, in defence [sic] of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife."[282]

Given this history, are there lessons for law, policy, and society? Sadly, the concerns articulated herein are not confined to the past. Recently a Montana judge overturned a 25-year plea deal negotiated in the case of a forty-year-old man that serially raped his twelve-year-old daughter.[283] Prosecutors claimed that the father habitually raped his daughter—a crime he later admitted having committed.[284] Prosecutors recommended a sentence of one hundred years, with seventy-five years suspended, which would result in twenty-five years' incarceration.[285] Prosecutors informed Judge John McKeon that such a sentence was what Montana law called for.[286] After taking the prosecutors' recommendation under advisement, Judge McKeon sentenced the father to sixty days.[287]

Judge McKeon voiced doubts about the appropriateness of the prosecutors' recommended punishment, determining that the father had already suffered separation from his family and was remorseful.[288] Judge McKeon offered credit for the seventeen days the abuser already served in jail, thereby reducing his sentence to a mere forty-three days.[289] Even if rare, rulings such as McKeon's send a troubling signal to all victims and their advocates. Such a lenient sentence for an admitted serial child rapist with intimate and unfettered access to the victim

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280 74 Mass. (8 Gray) 489 (1857).

281 *Id.* at 490–91.

282 *Id.* at 491; *see also* People v. Henry, 298 P.2d. 80, 84 (Cali. Dist. Ct. App. 1965) (stating that "[a]n essential element of the crime of rape is that the female is 'not the wife of the perpetrator'").

283 *See* Travis M. Andrews & Fred Barbash, *Father Who 'Repeatedly Raped His 12-Year Old Daughter' Gets 60-Day Sentence. Fury Erupts.*, WASH. POST (Oct. 19, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/10/19/father-who-repeatedly-raped-his-12-year-old-daughter-gets-60-day-sentence-fury-erupts/ [https://perma.cc/WG4P-HVR7].

284 *See id.*

285 *See id.*

286 *See id.*

287 *See id.*

288 *See id.*

289 *See id.*

undoubtedly places the child at risk. Such lenient sentences send clear and traumatizing messages to other young rape victims who experience similar crimes against their dignity, leaving them emotionally and mentally vulnerable. Who would risk telling her story and confronting an abuser if the legal system returns him to the neighborhood, let alone the family home, in a few weeks?

B. Law and Station: Revisiting Women and Slavery

Understanding the correlation between sex, race, and power is crucial to comprehending and addressing patriarchal discrimination embedded in American law.[290] From the earliest foundations of American law, lawmakers settled on the notion that women were destined to a subordinate status and instantiated that thinking into law.[291] And, in the context of human slavery, lawmakers explicitly tied capitalism to sexual subordination, rape, and American economics.[292] Even so, studies in American history and law generally render enslaved Black women invisible, incidental, and dispensable to studies in American law, feminism, and civil rights, erasing them from their own American legal story. Humanizing the accounts of vulnerable women and rescuing their stories from the dustbins of history offers legal scholars and students of the law a more expansive lens through which to study the intersections of race, sex, and the law.

For example, a recent study on the genetic consequences of slavery provides a DNA roadmap of the politics of sexual subordination, uncompensated forced labor, and political inequality.[293] Researchers investigating the genetic underpinnings of slavery report "the brutal treatment of enslaved people has shaped the DNA of their descendants."[294] Scientists analyzed genotype array data from over 50,000 research participants, combining their genetic data with historical shipping records to

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290 *See, e.g.*, Michele Gillespie, *The Sexual Politics of Race and Gender: Mary Musgrove and the Georgia Trustees*, *in* THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH 187 (Catherine Clinton & Michele Gillespie eds., 1997) (researching the rape and torture of Black women on American plantations).

291 *See* Michele Goodwin, *A Different Type of Property: White Women and the Human Property They Kept*, MICH. L. REV. (forthcoming 2021).

292 *See id.*

293 *See* Steven J. Micheletti et al., *Genetic Consequences of the Transatlantic Slave Trade in the Americas*, 107 AM. J. HUM. GENETICS 265, 274 (2020), *available at* https://doi.org/10.1016/j.ajhg.2020.06.012 [https://perma.cc/Z52K-NEFK].

294 Christine Kenneally, *Large DNA Study Traces Violent History of American Slavery*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/science/23andme-african-ancestry.html [https://perma.cc/7SRC-U2SV].

document the current genetic landscape of Black Americans in accordance with "slave voyages."[295] They found a greater contribution of Black women to the American Black gene pool than Black men.[296] Even more revealing was the conclusive genetic data that explained it, namely the dramatic tie to white American men.[297]

Their research adds to the vault confirming slavery as "one of the darkest chapters of world history, in which 12.5 million people were forcibly taken from their homelands in tens of thousands of European ships."[298] The import of this research is not in the basic fact of slavery, but rather the evidence of wide-scale, normalized sexual assaults committed by white men against Black, enslaved women.[299]

These important findings fill in the gap of American history and law that denied such experiences and rebuffed Black women's allegations of them.[300] For example, for nearly two centuries, most white historians discredited accounts that President Thomas Jefferson fathered children by Sally Hemings, an enslaved teenager who was the biological half-sister of his white wife.[301] In the process, they wrote Sally Hemings out of Thomas Jefferson's life despite the fact that she mothered six of his children, traveled to and lived in Europe with him, and slept in a windowless chamber next to his.[302] In fact, her existence was literally papered over at Monticello—Jefferson's plantation—as managers and curators of his estate converted her dark chamber into a men's bathroom, quite literally erasing her very existence.[303] In recent years, Jefferson's estate has

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295 Micheletti et al., *supra* note 293, at 265.

296 *See id.* at 270.

297 *See id.* at 273.

298 Kenneally, *supra* note 294.

299 *See* Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship with Sally Hemings*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html [https://perma.cc/ZD8G-RF4E].

300 *See id.*

301 *See, e.g.*, ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 586–606 (2008).

302 *See The Life of Sally Hemings*, MONITCELLO.ORG (last visited Sept. 11, 2020), https://www.monticello.org/sallyhemings [https://perma.cc/S5BK-L3AH]; Michael Cottman, *Historians Uncover Slave Quarters of Sally Hemings at Thomas Jefferson's Monticello*, NBC NEWS (July 3, 2017), https://www.nbcnews.com/news/nbcblk/thomas-jefferson-sally-hemings-living-quarters-found-n771261 [https://perma.cc/M7GG-G6TD].

303 *See* Phillip Kennicott, *Jefferson's Monticello Finally Gives Sally Hemings Her Place in Presidential History*, WASH. POST (June 13, 2018), https://www.washingtonpost.com/entertainment/museums/jeffersons-monticello-finally-gives-sally-hemings-her-place-in-presidential-history/2018/06/12/

revisited this record, acknowledging Sally Hemings and that she "bore children fathered by her owner"—nearly two hundred years after her death.[304]

Most of the sexual carnage of slavery was so common as to be taken for granted. Some cases, however, became newsworthy. According to abolitionist Levi Coffin, "Perhaps no case that came under my notice, while engaged in aiding fugitive slaves, attracted more attention and aroused deeper interest and sympathy than the case of Margaret Garner, the slave mother, who killed her child rather than see it taken back to slavery."[305] Years later, an abolitionist wrote:

> Who can fathom the depths of her heart as she brooded over the wrongs and insults that had been heaped upon her all her life? Who can wonder if her faith staggered when she saw her efforts to gain freedom frustrated, when she saw the gloom of her old life close around her again, without any hope of deliverance?[306]

When Margaret Garner, the real-life subject of Toni Morrison's *Beloved*,[307] "absconded" with her four children to Cincinnati in 1856, she was charged with "stealing" the property of Abner Gaines, her owner.[308] Cincinnati was a "free" city in Ohio and a critical passage point for enslaved Black people fleeing slavery.[309] As such, it came to be known as an important destination on the "Underground Railroad."[310]

Many speculated that Gaines fathered some of her children, including her youngest daughter and the daughter she killed.[311] An abolitionist in Cincinnati described her slain

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55145ac0-6504-11e8-a69c-b944de66d9e7_story.html [https://perma.cc/873K-NMEB].

304 *See The Life of Sally Hemings*, *supra* note 302.

305 LEVI COFFIN, REMINISCENCES OF LEVI COFFIN, THE REPUTED PRESIDENT OF THE UNDERGROUND RAILROAD 557, 563 (2d ed. 1880) ("The case seemed to stir every heart that was alive to the emotions of humanity. The interest manifested by all classes was not so much for the legal principles involved, as for the mute instincts that mold every human heart—the undying love of freedom that is planted in every breast—the resolve to die rather than submit to a life of degradation and bondage.").

306 *Id.* at 564.

307 *See generally* TONI MORRISON, BELOVED (1987).

308 *See generally* STEVEN WEISENBURGER, MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD-MURDER FROM THE OLD SOUTH 56–58 (1998).

309 *See* Julius Yanuck, *The Garner Fugitive Slave Case*, 40 MISS. VALLEY HIST. REV. 47, 50 (1953).

310 *Id.*

311 *See* Nikki Taylor, *The Fugitive Slave Margaret Garner and Tragedy on the Ohio*, AFR. AM. INTELL. HIST. SOC'Y, https://www.aaihs.org/the-fugitive-slave-margaret-garner-and-tragedy-on-the-ohio/ [https://perma.cc/S7TY-EC9E].

daughter as "almost white."[312] Garner's own sexual trauma and forced servitude likely motivated her harrowing escape, which included hiding out and traversing the frigid conditions on foot, aided with a sled, transporting her children from Kentucky to Cincinnati in the dead of winter, navigating a frozen river.[313] At trial, scars on her face were observed and when asked what caused them, she replied, "White man struck me."[314]

As her captors approached— "the masters of the fugitives, with officers and a posse of men"[315] —rather than releasing her daughter to the bounty hunters hired to return Garner and her children to Gaines' plantation, she slashed her daughter's throat.[316] Reports indicate that Garner was attempting to kill the second child before she was subdued.[317]

News of Garner's escape and the killing of her little girl spread rapidly throughout the country.[318] Witness accounts stated that Garner said "[I] would rather kill them all than have them taken back over the river!"[319] Margaret's mother-in-law, Mary, also an enslaved Black woman, testified that Garner cried, "Mother, I will kill my children before they shall be taken back, every one of them."[320] She begged for her mother-in-law's help, "Mother, help me to kill the children."[321]

Abolitionists believed Garner's case provided compelling evidence of slavery's horrors.[322] That a mother would kill her child to prevent its enslavement was perhaps the most salient and powerful condemnation of the enterprise.[323] To them, Garner's act of killing further evidenced the terrors inflicted on Black women and children as part of the slave economy—after

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312 COFFIN, *supra* note 305, at 563.

313 *See* Yanuck, *supra* note 309, at 50–51.

314 COFFIN, *supra* note 305, at 562 ("That was all, but it betrays a story of cruelty and degradation, and, perhaps, gives the key-note to Margaret's hate of slavery, her revolt against its thralldom, and her resolve to die rather than go back to it.").

315 *Id.* at 559.

316 *See* Yanuck, *supra* note 309, at 52.

317 *See* COFFIN, *supra* note 317, at 560.

318 *See The Slave Tragedy in Cincinnati*, N.Y. TIMES, Jan. 29, 1856, https://timesmachine.nytimes.com/timesmachine/1856/02/02/76452571.pdf [https://perma.cc/4X5E-EBTJ].

319 *Id.*

320 *Id.*

321 *Id.*

322 *See* Yanuck, *supra* note 309, at 47.

323 *See id.*

all why else would a mother kill her child?[324] Lucy Stone, an ardent abolitionist, addressed the court, expressing to the judge, "I told [Margaret Garner] that a thousand hearts were aching for her, and that they were glad one child of hers was safe with the angels."[325] Stone gave voice to slavery's dirty secret:

> "The faded faces of the negro children tell too plainly to what degradation female slaves must submit. Rather than give her little daughter to that life, she killed it. If in her deep maternal love she felt the impulse to send her child back to God, to save it from coming woe, who shall say she had no right to do so?"[326]

Garner's attorney argued that the Fugitive Slave law was unconstitutional, because it was this law that would return Garner and her children back to slavery even while they were apprehended in a "free" territory.[327] According to Levi Coffin, the Fugitive Slave law had driven a frantic mother to murder her own child rather than see it carried back to the seething hell of American slavery. This law was of such an order that its execution required human hearts to be wrung and human blood to be spilt.[328]

At trial, Garner was prosecuted not for murder, but for violating the Fugitive Slave Act.[329] According to local reports, the murder charge "was practically ignored."[330] Black children were not presumed to have emotional value; they were, according to the law, property.[331] To the commissioner who oversaw the trial, "the law of Kentucky and of the United States made it a question of property."[332]

Because Garner was "property" in American law, she had no entitlement to property or legal relationship to her children.[333] In law, her children belonged to her owner, Gaines,

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324 *See* NIKKI TAYLOR, DRIVEN TOWARDS MADNESS: THE FUGITIVE SLAVE MARGARET GARNER AND TRAGEDY ON THE OHIO 3–4, 92–109 (Ohio Univ. Press, 2017).

325 COFFIN, *supra* note 305, at 564–65 (quoting Lucy Stone).

326 *Id.* at 565.

327 *See* Yanuck, *supra* note 309, at 55.

328 COFFIN, *supra* note 305, at 561.

329 *See* Yanuck, *supra* note 309, at 51.

330 COFFIN, *supra* note 305, at 566.

331 *See, e.g.*, Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 330 (1996) (describing the inheritance system that ensured the continual supply of slaves).

332 COFFIN, *supra* note 305, at 566.

333 Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 111–12 (Jean Allain ed., 2012).

not as his children but as his property. Interestingly, a murder conviction would have kept Garner in prison, but that would have required recognizing the personhood in both Garner and her daughter. Punishment as a fugitive slave simply returned Garner to Gaines' plantation and involuntary servitude. Shortly after her trial, Garner was sent to various other plantations and eventually sold to DeWitt Clinton Bonham, a Mississippi plantation owner.[334]

What contemporary lessons can be drawn from peering into the antebellum archive? If we are to take seriously the history of women in America, this intergenerational sexual violence committed against Black girls and women has an important place for acknowledgement and study. For example, what were the legal structures that created a sexual caste of Black women and girls, including hypodescent laws?[335]

In other words, the sexual subordination of Black women and the active sexual batteries committed upon them constituted pathologies in law. These pathologies were not incidental nor accidental, but part of debated processes and systems and not mere happenings. Implicitly and explicitly, sexual battery against Black women and girls was part of a system of social codes, legislative enactments, and judicial opinions.[336]

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334 *See* Steven Weisenburger, *A Historical Margaret Garner*, MODERN MEDEA, http:/mullinspld.weebly.com/uploads/1/9/7/9/19799485/mgarner_history.pdf [https://perma.cc/M3S7-4785].

335 Otherwise regarded as "one drop rules," hypodescent statutes created American caste systems whereby children born of enslaved mothers took their status regardless of their father's race and social status. Christine B. Hickman, *The Devil and The One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1175 (1997); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1719 (1993).

336 *See* Paul Finkelman, *Crimes of Love, Misdemeanors of Passion: The Regulation of Race and Sex in the Colonial South*, in THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH 124-25, 129 (Catherine Clinton & Michele Gillespie eds., 1997) (describing the "perverse result that masters who fathered children with their female slaves would end up enslaving their own mixed-race children"); Katharine Gerbner, *Most People Think 'Whiteness' is Innate. They're Wrong: It Was Created To Keep Black People From Voting*, WASH. POST (Apr. 27, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/04/27/most-people-think-whiteness-is-innate-theyre-wrong-it-was-created-to-keep-black-people-from-voting [https://perma.cc/N4K5-EXFT]; *see also* Rebecca Carroll, *Margaret Garner*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/obituaries/margaret-garner-overlooked.html [https://perma.cc/M9S4-JZHV] (noting that white slave owners raped black slave mothers and recognizing cruel treatment by slave owners drove enslaved families to try to escape); JACOBS, *supra* note 165, at 29 ("I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things."); MCLAURIN, *supra* note 165, at 110.

The point here, is to understand law as a dynamic force with significant reach into the most intimate spaces of our lives. And as such, the historic record begs acknowledgment that Black women's antebellum oppression was not an account of *passive human enslavement and trafficking*. Rather, active predation inflicted on Black girls and women fueled the American economy and its international trade.[337] Slavers sought to maximize and extract profit from Black women by whatever means they could, including sexually.[338] Black women's centrality to the American economy extended beyond southern agrarian plantations to the nation's economic prosperity.[339] In fact, "slave-grown cotton was the most valuable export made in America."[340]

Owners of human beings understood the value in enslaved persons "exceeded the combined value of all the nation's railroads and factories."[341] Black bodies were leveraged in trade, paving the way for foreign investment to "underwr[i]te the expansion of plantation lands in Louisiana and Mississippi."[342] As such slavery was not mildly lucrative, but it was an important economy in the U.S.[343] In fact, the "highest concentration of steam power in the United States was . . . along the Mississippi rather than on the Merrimack."[344] William Gregg, a South Carolina industrialist claimed that northern cities prospered on the system slavery "built by the capital of Charleston."[345] Others proclaimed slavery the "nursing mother of the prosperity of the North."[346]

This system of human trafficking was also deliberate sex trafficking, reifying and regenerating slavery through means of rape and reproduction.[347] For example, in debating *whether*

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337 *See* SVEN BECKERT & SETH ROCKMAN, SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 11 (2016).

338 *See* Finkelman, *Slavery in the United* States, *supra* note 333, at 112; MCLAURIN, *supra* note 165, at 105, 114 (describing the sexual abuse and exploitation leading to Celia's trial).

339 *See* BECKERT & ROCKMAN, *supra* note 337, at 11.

340 *Id.* at 1.

341 *Id.*

342 *Id.*

343 *See id.*

344 *Id.* at 1–2.

345 *Id.* at 2.

346 *Id.* (citing GENERAL CONVENTION OF AGRICULTURISTS AND MANUFACTURERS, AND OTHERS FRIENDLY TO THE ENCOURAGEMENT AND SUPPORT OF THE DOMESTIC INDUSTRY OF THE UNITED STATES 15 (Baltimore 1827)).

347 *See, e.g.*, Carroll, *supra* note 335 (mentioning that Margaret Garner, an enslaved woman, was the product of the rape of her Black slave mother by a White slave owner); *see also* RICHARD BELL, STOLEN: FIVE FREE BOYS KIDNAPPED INTO SLAVERY AND THEIR ASTONISHING ODYSSEY HOME 33–35 (2019).

the offspring of a white man and an enslaved Black woman would be "free" or enslaved, legislatures chose the latter.[348] In 1662, the Virginia Grand Assembly enacted one of its first "slave laws" related to sex, race, and power.[349] The legislature affirmed, "[Whereas] some doubts have arrisen [sic] whether children got by any Englishman upon a [N]egro woman should be slave or ffree [sic], [b]e it therefore enacted and declared by this present [G]rand [A]ssembly, that all children born[ ] in this country shalbe [sic] held bond or free only according to the condition of the mother."[350] In essence, Black women were clearly foundational to the southern and national economies as uncompensated laborers but also as conscripted sexual chattel in a system that fought to keep them subordinate and disempowered.[351]

C. Law's Suppression of Women

If we turn the knob once more, we may see through additional lenses ways in which legislatures and courts historically disserved the basic interests of women in political, legal, and social contexts. A thoughtful reading of sex-based discrimination tells the story of lawmakers (legislatures, courts, judges, and other lawmakers) not as accomplices, but as chief conspirators and architects in denying women's equality and personhood, while at the same time privileging men and creating systems of male dominance and supremacy. It is within American law that its sex-based caste system is born.

This point is not trivial. Lawmakers and judges positioned women as invisible, incapable, unendowed with the essence of personhood, and ultimately undeserving of certain legal protections depending on a woman's social and or racial and immigration status. Their efforts embedded stereotypes about women's capacities into law. These stereotypes were of legislators' and judges' own creation even though they ascribed their opinions and presentments to natural law or the nature of law.

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348 *See* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 45 (1999).

349 *See* Act XII of December 1662, *reprinted in* 2 WILLIAM WALLER HENING & JOHN CAMPBELL, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 170 (New York, R. & W. & G. Bartow, 1823).

350 *Id.*

351 *See* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 257, 264 (1999).

Law serves a profound role in the making and unmaking of persons, particularly women, and especially women of color.[352] In cases relevant to women's autonomy and privacy, including *Maher v. Roe*,[353] *Beal v. Doe*,[354] and *Harris v. McRae*[355] the Supreme Court asserted that poor women were responsible or the cause for their vulnerable economic conditions—not the state. Thus, if impoverished, women created that on their own. As such, states were simply bystanders as women failed to accord themselves in a manner that might relieve them of poverty or afford them economic stability and attainment.[356]

By denying that states share at least some responsibility or complicity in poor women's indigence, the Court showed an unwillingness to recognize government's investment in constructing a sex-based American caste system—one that shackled women to subordinate lives. When the Court expresses that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation," it ignores centuries of state legislation that place obstacles in the path of women making choices about their lives.[357]

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352 *See generally* COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 52–53, 164–65, 240 (2013) (discussing the various ways certain groups, such as women, and particularly women of color, have been deprived of personhood by the law).

353 *See* 432 U.S. 464, 474 (1977) ("The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.").

354 *See* 432 U.S. 438, 445–46 (1977) ("That interest [in protecting human life] alone does not, at least until approximately the third trimester, become sufficiently compelling to justify unduly burdensome state interference with the woman's constitutionally protected privacy interest. . . . Absent such a showing, we will not presume that Congress intended to condition a State's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the costs of nontherapeutic abortions.").

355 *See* 448 U.S. 297, 316 (1980) ("[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty . . . , it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."). According to the Court, indigent women set the conditions for their own poverty. *See* Maher, 432 U.S. at 474; Beal, 432 U.S. at 445–46; Harris, 448 U.S. at 316.

356 *See* Maher, 432 U.S. at 464, 474 ("An indigent woman who desires an abortion suffers no dis-advantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."); Harris, 448 U.S. at 316 ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency[.]").

357 *Harris*, 448 U.S. at 316.

Long before the sophistry articulated in *Maher*, *Beal*, *and Harris*, stereotypes rooted in claims that women lacked intellectual acumen and dexterity to reason stigmatized whole classes of women and defined the limits of their personhood and citizenship.[358] These presentments sprang forth from law. Whether imposing constraints on women's exercise of bodily autonomy, denying their right to vote, or prohibiting their employment, law conveyed these limitations. And as law does not self-propagate or create itself from thin air, the roles of courts and legislatures in law must be acknowledged in the enduring subordination of women.[359]

By marking women's capacities almost exclusively along the lines of duties to a father or husband, mothering, reproducing, and as obligatory sexual chattel, lawmakers and courts scripted women's destinies. They conscripted women into the army of domestic servitude. Stereotypes shaped and cultivated by legislation and applied by courts framed social and legal expectations between men and women.[360] Common law granted men recovery for the losses associated with their wives' sexual unavailability under the *loss of consortium* causes of action and even for the debauchery of their daughters.[361]

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358 *See* Jerry Bergman, *Darwin's Teaching of Women's Inferiority*, INST. FOR CREATION RESEARCH (Mar. 1, 1994), https://www.icr.org/article/darwins-teaching-womens-inferiority/ [https://perma.cc/J8VA-CVV2] (discussing Charles Darwin's misleading and disparaging teachings that women are biologically inferior to men).

359 The Court barred them equal rights to contract for longer workdays as men could, which compressed women's wages, creating a wage gap. The Court upheld legislation exempting women from jury service, thereby limiting their engagement across various systems of justice. The Court upheld dubious restrictions related to women's range of employment (ironically banning them from work as bartenders even in establishments they owned). *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421–23 (1908) (upholding Oregon legislation limiting the number of hours women were permitted to work); Hoyt v. Florida, 368 U.S. 57, 65 (1961) (upholding a statute allowing women to automatically be exempted from serving on juries), *overruled by* Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

360 *See, e.g.*, In re Bradwell, 55 Ill. 535, 538 (1869), ("Upon this question, it seems to us neither this applicant herself, nor any unprejudiced and intelligent person, can entertain the slightest doubt."), *aff'd sub nom.* Bradwell v. Illinois, 83 U.S. 130, 139 (1872) (upholding the denial of a married woman's application for a license to practice law).

361 *See, e.g.*, Parker v. Elliott, 20 Va. (6 Munf.) 587, 587–88 (1820) (affirming a man's claim for loss of services of his daughter, who was "debauch[ed] and g[ot] with child"); Hyde v. Scyssor (1620) 79 Eng. Rep. 462, 462; Cro. Jac. 538, 538 (concluding that the loss of consortium applied to a suit brought by a husband for "loss and damage[s]" and "for want of [his wife's] company"); Ohio & Miss. Ry. v. Cosby, 7 N.E. 373, 375 (Ind. 1886) (indicating that the husband was permitted to submit a claim to recover for "loss of service, and of the society of his wife"); Birmingham S. Ry. v. Lintner, 38 So. 363, 365 (Ala. 1904) (recognizing the husband's right of consortium). *See also* Susan G. Ridgeway, *Loss of Consortium and*

In *Minor v. Happersett,* the Supreme Court upheld a law that denied women voting rights.[362] The Court acknowledged women's citizenship on one hand and denied them the benefits of that citizenship on the other. Shortly thereafter in *Bradwell v. Illinois*, the U.S. Supreme Court upheld a law barring women law graduates from practicing law.[363] Justice Joseph Bradley claimed that nature and law deemed it "repugnant" for a woman to adopt "a distinct and independent" civic life from her husband.[364] Explicit in the Court's reasoning were stereotypes about women's capacities. Subsequently, the Wisconsin State Supreme Court in *In re Goodell* articulated a similar principle:

> We cannot but think the common law wise in excluding women from the profession of the law. . . . The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. . . . There are many employments in life not unfit for female character. The profession of the law is surely not one of these.[365]

The court also stated, "The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife."[366] Women did not frame their destinies as such, but lawmakers and courts presumed women as a class of persons unfit for the pursuit of life and livelihoods independent of the men in their lives.

A mere few years after women secured voting rights through the Nineteenth Amendment, the Supreme Court issued the landmark decision of *Buck v. Bell*, upholding the constitutionality of Virginia's Eugenical Sterilization Act.[367] In an 8–1 decision, the Court ruled the power that grants states the authority to vaccinate is broad enough to compel the forced sterilization of girls and women deemed unfit.[368] Writing for the majority, Justice Holmes issued a haunting condemnation

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Loss of Services Actions: A Legacy of Separate Sphere, 50 MONT. L. REV. 349, 352–53 (1989).

362 88 U.S. 162, 176 (1874).

363 83 U.S. at 139.

364 *Id.* at 141.

365 39 Wis. 232, 244–45 (1875) ("Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things.").

366 *Id.* at 245.

367 274 U.S. 200, 207 (1927).

368 *See id.*

of the female sex, declaring "[t]hree generations of imbeciles are enough."[369]

This case involved Carrie Buck, whom Justice Holmes described as, "a feeble minded white woman."[370] He claimed that she was the "daughter of a feeble minded mother" and "the mother of an illegitimate feeble minded child."[371] These statements were inaccurate.[372] Nevertheless, Carrie's poverty, perceived intellectual shortcomings, teenage pregnancy (the result of a rape), and family history of alcoholism served to justify the state's reprisal and her sterilization.[373] Justice Holmes declared:

> It would be strange if [the legislature] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[374]

Justice Holmes concluded, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[375] In the wake of the Supreme Court declaring the Virginia eugenics law constitutional, sixty thousand Americans were convicted of social unfitness and surrendered to public health officials for compulsory sterilizations.[376] Most victims were girls and women.[377] In North Carolina, nearly 30% of forced sterilizations were forced on children "under age 18" and 60% of all sterilization victims were Black.[378] Notably,

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369 *Id.*

370 *Id* at 205.

371 *Id.*

372 *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 51–52 (1985). The state of Virginia had claimed that Buck possessed low social character and intelligence; it predicted that were she to have more children they would be born of inferior intelligence. She and others like her were collected by public health officials to be sterilized. However, years after the case, Holmes and public health officials in Virginia were proven wrong, Buck's daughter, Vivian, was a successful student—well above average. *Id.* at 61

373 *Id.* at 50 (noting that the Defendant's attorney, Aubrey Strode, "presented eight witnesses from the area near Carrie's home in an attempt to prove her social inadequacy.'").

374 *Buck*, 274 U.S. at 207.

375 *Id.*

376 Kim Severson, *Thousands Sterilized, A State Weighs Restitution*, N.Y. TIMES, Dec. 10, 2011 at A1; Lombardo, *supra* note 372, at 31.

377 *Id.*

378 *See* Lutz Kaelber, *Eugenics/Sexual Sterilizations in North Carolina*, UNIV. OF VT., https://www.uvm.edu/~lkaelber/eugenics/NC/NC.html [https://perma.cc/

years after in *Oklahoma v. Skinner*,[379] the Supreme Court overturned a state's law that would impose reproductive constraints on a male petty-thief, while never overturning *Buck v. Bell.*

The legacy of implicit and explicit sex bias and discrimination informs the present status(es) of women in relation to their labor, caregiving, and invisible work. This is particularly so in the present moment, marking the 100th year anniversary of the Nineteenth Amendment's ratification, which coincides with global coronavirus pandemic and racial unrest. The former places demand on women as visible and invisible caregivers and COVID-19 sets the stage for interrogating women and work generally, and specifically in times of national or state crisis.

III
WOMEN ON THE FRONTLINES: GLASS CEILINGS, GLASS CLIFFS, AND PINK GHETTOES

In March 1986, the *Wall Street Journal* issued a special report on the "glass ceiling." The authors identified imperceptible impediments that hindered female managers from advancing and that stymied their progress because of what they described as a "corporate tradition and prejudice."[380] Rather than overt prejudice of the type embedded in legislation explicitly denying women entry in particular professions, the glass ceiling operates in plain view of law in covert ways. Even then, the term was not new as it had been introduced by others.

The term glass ceiling has been attributed to Marilyn Loden, who, in *Implementing Diversity* and a speech delivered in 1977 to the Women's Action Alliance, posed critical data about the impediments in women's full progress toward employment equity and attainment.[381] She described invisible barriers to women's advancement to leadership positions, de-

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V83U-XWBY] (last updated Oct. 30, 2014); Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims*, WALL ST. J. (July 26, 2013, 1:46 PM), https://www.wsj.com/articles/SB10001424127887323971204578629943220881914 [https://perma.cc/DD4X-SFVD].

379 316 U.S. 535, 542–43 (1942).

380 *See* Ben Zimmer, *The Phrase 'Glass Ceiling' Stretches Back Decades*, WALL ST. J. (Apr. 3, 2015, 3:23 PM) ("They detailed imperceptible obstacles faced by female managers, stymied by 'corporate tradition and prejudice' rather than overt discrimination."), https://www.wsj.com/articles/the-phrase-glass-ceiling-stretches-back-decades-1428089010 [https://perma.cc/2TQG-L2QR].

381 Molly Carnes, Claudia Morrissey & Stacie E. Geller, *Women's Health and Women's Leadership in Academic Medicine: Hitting the Glass Ceiling*, 17 J. WOMEN'S HEALTH 1453, 1453 (2008).

spite important civil rights gains.[382] In recent years, the "glass ceiling" framework has been adopted by government in the establishment of the Federal Glass Ceiling Commission, established by the Civil Rights Act of 1991. The Commission, launched by President George Bush, operates "with a mandate to identify barriers that have prevented the advancement of women and minorities in the labor force."[383]

Today, women's progress is not only measured by glass ceilings but also by a lexicon of terminologies and metaphors to describe and capture impediments to full inclusion and advancements. These include glass *walls* (barriers that hold women in the pink collar); *glass escalators* (occupational segregation where men in female dominated occupations are promoted to leadership positions at a much faster rate); *sticky floors* (where women are held "down to low level jobs" that prevent them from seeking management positions), *and glass cliffs* (where women in leadership are precariously positioned to fail).[384]

In other words, even when women reach senior leadership, they continue to encounter obstacles and challenges, including tending to be "evaluated less favorably, receive less support from their peers, [be] excluded from important networks, and receive greater scrutiny and criticism even when performing exactly the same leadership roles as men."[385] When women in leadership encounter an "uphill battle with these challenges which may set them up for failure, thus pushing them over the edge [they experience] a phenomenon [known] as 'glass cliff.'"[386]

A. Labor's Glass Ceiling: Law Firms

Professor Naomi Cahn recently wrote, "Even before the pandemic, women of color often stood at the intersection of multiple barriers," including exclusions at the top of America's

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382 *Id.*

383 *Id. See also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR (2004), https://www.eeoc.gov/special-report/glass-ceilings-status-women-officials-and-managers-private-sector [https://perma.cc/2SR2-EQEX]; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1082, § 203.

384 Meghna Sabharwal, *From Glass Ceiling to Glass Cliff: Women in Senior Executive Service*, 25 J. PUB. ADMIN. RES. & THEORY 399, 399–400 (2013); Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions*, 32 ACAD. MGMT. REV. 549, 549–50 (2007).

385 Sabharwal, *supra* note 384, at 400.

386 *Id.*

business industries—as less than "1% of Fortune 500 CEOs."[387] Her observation illuminates a significant workforce problem. In fact, not one Black woman holds a Fortune 500 CEO seat.[388] Labor's glass ceiling affects women at both ends of the labor spectrum as discussed in Subpart A.

A 2017 report by Vault and the Minority Corporate Counsel Association ("MCCA") on diversity in law firms illuminates the problem related to women and elite employment, at least within law. Their research presents alarming data, noting for example that at law firms, the rate of recruiting and hiring Black lawyers "remains below pre-recession levels."[389] For more than a decade, the MCCA and Vault have collected data and gathered detailed "breakdowns of law firm populations by race/ethnicity, gender, sexual orientation and disability status across attorney levels—from summer associates hired to partners promoted, from the lawyers who serve on management committees to the attorneys who leave their firms."[390] This comprehensive collection of data on placement in the legal profession offers a detailed "demographic snapshots of the nation's leading law firms as well as of the industry as a whole."[391]

Most tellingly, despite women's advancements as law students and stature as junior associates, the decline in employment at the nation's law firms "is primarily among women."[392] Troubling for many reasons, researchers explain that, "in both 2007 and 2008, more than 3 percent of lawyers hired were African American women; since 2009 that number has not climbed above 2.77%, the most recent figure."[393] Women of color are also overrepresented in departures from law firms.[394]

In 2016, according to Vault's most recently available research, Black women attorneys resigned their firms at the

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387 Naomi Cahn, *COVID-19's Impact On Women of Color*, FORBES (May 10, 2020, 6:01 PM), https://www.forbes.com/sites/naomicahn/2020/05/10/mothers-day-and-covid-19s-impact-on-women-of-color/?sh=7ed4017541ac [https://perma.cc/TC2F-5QSN].

388 Phil Wahba, *The Number of Black CEOs in the Fortune 500 Remains Very Low*, FORTUNE (June 1, 2020, 11:19 AM), https://fortune.com/2020/06/01/black-ceos-fortune-500-2020-african-american-business-leaders/ [https://perma.cc/T8D3-LMW8].

389 VAULT & MCCA, 2017 VAULT/MCCA LAW FIRM DIVERSITY SURVEY 12 (2017), https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf [https://perma.cc/VW82-FERA].

390 *Id.* at 3.

391 *Id.*

392 *Id.* at 12.

393 *Id.*

394 *Id.*

highest rates among all women at 18.4 percent.[395] Similarly, Asian American women departed elite law firms at a high rate (14.4 percent), followed by Latinas (12.4 percent).[396] Notably, white women were the least likely among women to depart law firms (11.6 percent).[397] Even so, their resignations remained higher than that of white men (9.1 percent).[398]

Women comprise nearly fifty percent of associates at law firms, yet they account for less than twenty percent of equity partners.[399] *What accounts for such sex disparities? Why are women making such limited progress in these spheres?*

Notably, these conditions and the disparities that emerge from them are not confined to law firms. General counsel positions are equally stratified.[400] For example, even while "progress has certainly occurred since . . . there were only 11 minorities who were general counsel" at Fortune 500 companies in 1999.[401] According to a study focused on diversity and the legal profession, much of the slow but seemingly steady progress among women as general counsels has been concentrated among white women.[402] Women of color are essentially shut out.

Prior work speculated whether the social sorting of women law graduates resulted in a stratification into law's invisible pink collar.[403] My co-author and I noted that women who place at elite firms might find the environments unwelcoming, unsupportive, and quite frankly, toxic.[404] This might contribute to the sex flight from top firms. But, even if those are the reasons why women leave elite firms, it begs the questions why such cultures persist at law firms and why the conditions continue to be tolerated?

Moreover, these pipeline trends may affect the highest reaches of law in legislatures—state and federal—as well as

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395 *Id.*

396 *Id.*

397 *Id.*

398 *Id.*

399 *Women in Law: Quick Take*, CATALYST (Oct. 2, 2018), https://www.catalyst.org/knowledge/women-law [https://perma.cc/L35B-8ZSC].

400 *See id.*

401 *Breaking Through the Concrete Ceiling: One Woman at a Time*, DIVERSITY & BAR MAG., Dec. 27, 2017, at 9, https://issuu.com/mcca10/docs/05_-_db_winter_2017 [https://perma.cc/57RL-D45J].

402 *Id.* at 13.

403 *See, e.g.*, Michele Goodwin & Mariah Lindsay, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 FORDHAM L. REV. 2337, 2347 (2019) (examining the underrepresentation of women on the federal judiciary).

404 *Id.* at 2347–48.

courts. In 2018, women held barely twenty percent of elected federal offices[405] and roughly twelve percent of federal judgeships.[406] A year later, a study conducted by the Inter-Parliamentary Union—based on information provided by national governments as of February 2019—ranks the United States seventy-sixth worldwide in women's federal leadership.[407] There are greater percentages of women in central government leadership in developing nations such as Nicaragua, Rwanda, and Ecuador than in the U.S. Congress.[408]

B. Glass Cliffs: U.S. Courts

Data on American courts reveal a similarly daunting story. According to Sherrilyn Ifill, the president of the NAACP Legal Defense Fund, "[w]e pretend that these monumental questions of who sits on the Supreme Court have nothing to do with how equality is defined in our country."[409] Who sits on our courts matters and this, according to Ifill, is deeply relevant to dignity, equality and opportunity for all the people in the United States.[410] She's right.

Researchers at the Gavel Gap project, sponsored by the American Constitution Society for Law and Policy, report "troubling differences between the race and gender composition of the courts and the communities they serve."[411] The Gavel Gap research studies diversity on state courts and their data provides an important lens for examining and measuring

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405 *Women in Elective Office 2018*, CTR. FOR AM. WOMEN & POL'Y, http://www.cawp.rutgers.edu/women-elective-office-2018 [https://perma.cc/8ZAH-DFRY] (last visited Apr. 18, 2021).

406 In our research, we tracked appointments of women to federal appellate courts. As of 2018, 754 judges had served on the U.S. courts of appeals and only 91 of those judges were women. That is, roughly 12 percent of all court of appeals judges have been women. Mariah Lindsay & Michele Goodwin, *Study of Female Representation on the Federal Bench 1790–2017* (2018) (unpublished study) (on file with authors).

407 *See Women in National Parliaments*, INTER-PARLIAMENTARY UNION (Feb. 1, 2019), http://archive.ipu.org/wmn-e/classif.htm [https://perma.cc/EBZ8-BMUG].

408 *Id.*

409 Vandana Menon, *Sherrilyn Ifill Explains the Racial Politics Behind the Supreme Court Nomination Process During Public Interest Week Lunch Talk*, PENN L., https://www.law.upenn.edu/live/news/8531-sherrilyn-ifill-explains-the-racial-politics/news/publicervice-news (Oct. 5, 2018) [https://perma.cc/AXU9-3Y47].

410 *Id.*

411 Introduction Webpage to *Who Sits in Judgment on State Courts?*, THE GAVEL GAP, *available at* http://gavelgap.org (last visited Sept. 13, 2020) [https://perma.cc/SV4X-GMSC].

the glass ceiling and cliff. For instance, "[p]eople of color are 40% of the population, but less than 20% of state judges."[412]

In state courts, only thirty percent of judges are women, and, overall, eighty percent of judges are white.[413] This disconcerting data cannot be explained by women not attending law school in critical mass. Nor can it be explained by women's performance or accomplishments in the early stages of their law careers. They write, "We find that courts are not representative of the people whom they serve—that is, a gap exists between the bench and the citizens."[414]

Research exposes similar patterns in the federal judiciary, highlighting a persistent sex gap on the bench. Despite the additions of Justices Sotomayor and Kagan to the Supreme Court (both appointed by President Barack Obama), women remain critically underrepresented in the judiciary at every level. They remain less than one third of judges presently serving on courts.[415] This long-standing problem of imbalanced representation by women in the American judiciary dates back to the founding and incorporation of the judiciary itself.

Of the 114 justices who have served on the Supreme Court since 1790, only five have been women. Barack Obama appointed forty percent of them. In more than 225 years, only three justices have been persons of color (two of whom are presently serving on the court).[416] Women were essentially excluded from attaining the federal judiciary ranks until well after the courts of appeals were established. Florence Allen, the first woman appointed to a U.S. Court of Appeals (in 1934) by President Franklin D. Roosevelt[417] remained the only woman to serve on a U.S. Court of Appeals until her departure in 1959. The next woman judge on the U.S. Court of Appeals would not be confirmed until 1968, when President Lyndon B. Johnson

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412 *Id.*

413 TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 10, 18 (2016), http://gavelgap.org/pdf/gavel-gap-report.pdf [https://perma.cc/C98U-4B3N].

414 *Id.* at 2.

415 COMM'N ON WOMEN IN THE PROFESSION, AMERICAN BAR ASSOC., A CURRENT GLANCE AT WOMEN IN THE LAW 5 (Jan. 2018), https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authcheckdam.pdf [https://perma.cc/B7TE-39RP].

416 *See* Jessica Campisi & Brandon Griggs, *Of the 113 Supreme Court Justices in US History, All But 6 Have Been White Men*, CNN (Sept. 5, 2018, 8:56 AM), https://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html [https://perma.cc/7LYV-YA6D].

417 *See Florence Ellinwood Allen*, NAT'L WOMEN'S HALL FAME, http://www.womenofthehall.org/inductee/florence-ellinwood-allen (last visited Sept. 13, 2020) [https://perma.cc/CS8B-N6M5].

nominated Shirley Ann Mount Hufstedler to the Ninth Circuit.[418]

Prior research tracked these appointments.[419] As of 2018, 754 judges had served on the U.S. courts of appeals and only ninety-one of those judges were women.[420] That is, roughly twelve percent of all court of appeals judges have been women. Again, as of 2018, there were 269 sitting judges in the federal circuit courts, but only seventy-three of those judges were women.[421] Two important datapoints can be extrapolated and analyzed from this tracking. First, as of a few years ago, of the ninety-one women to ever sit on the courts of appeals, 73 were currently serving. This datapoint underscores both the historic legacy of women's exclusion and the recent trickling of inclusion. Second, women only represented roughly twenty percent, barely over a fourth, of the judges then serving on the bench. In some circuits, as few as two women have ever served as a judge.[422] On some, there have never been a woman of color.[423]

For example, as of 2018, no women of color had ever served as circuit judges in the Third, Fifth, Eighth, Tenth, and Eleventh Circuits.[424] That these circuits include Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, New Mexico, and Texas, among other states is revealing and should cause concern. Common among each of the states are dense populations of people of color and legacies of slavery and Jim Crow. In these states, histories of race and sex subordination instantiated by government and the private sector are hard to erase and have affected nearly every aspect of life.

This sex gap on America's courts was further magnified under the Trump administration. More than ninety percent of President Donald Trump's nominees were white and more than eighty percent male.[425] According to one report, this placed President Trump on pace to nominate more white men than

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418 *See Hufstedler, Shirley Ann Mount*, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/hufstedler-shirley-ann-mount (last visited Sept. 13, 2020) [https://perma.cc/2KWU-UHHV].

419 Goodwin & Lindsay, *supra* note 403, at 2352.

420 *Id.*

421 *Id.*

422 *Id.*

423 *Id.*

424 *See id.* at 2353 tbl.2.

425 Catherine Lucey & Meghan Hoyer, *Trump Choosing White Men as Judges, Highest Rate in Decades*, AP NEWS (Nov. 13, 2017), https://apnews.com/a2c7a89828c747ed9439f60e4a89193e/Trump-choosing-white-men-as-judges,-highest-rate-in-decades [https://perma.cc/X5AT-Q7UX].

any president in nearly thirty years.[426] According to the Brennan Center, "[n]ot a single one of Trump's 53 confirmed appeals court nominees [was] Black. Only a single confirmed appeals court nominee is Latino."[427] President Trump ultimately appointed three in ten federal appellate judges and more than one in four federal district court judges.[428] Given that federal judicial seats come with life appointments, women will be shut out for decades to come. Similar patterns are detected within the ranks of U.S. attorneys: "There are 93 offices around the country" and as of 2020 "just seven [U.S. attorneys] who are women. There are only two who are Black."[429]

Importantly, the sex gap on the federal bench is also racialized. The vast majority of female judges serving on both state and federal courts are white. White women are more likely to be nominated than women of color to the federal judiciary. A look at appointments by presidents over the past fifty years (and more) illustrates the slow change in the federal judiciary's composition. For example, President Carter expanded the number of women nominated to the federal bench.[430] Indeed, he nominated more black judges to federal courts than all prior presidents combined.[431] Even so, according to the Congressional Research Service, "of all the district court judges appointed by President Carter, 67% were white men; 11% were white women; 19% were non-white men; and 3% were non-white women."[432]

In those instances, clearly women broke glass ceilings—and yet they lacked a critical mass,[433] which affects a group's

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426 *Id.*

427 *See* Andrew Cohen, *Trump and McConnell's Overwhelmingly White Male Judicial Appointments*, BRENNAN CTR. JUSTICE (July 1, 2020), https://www.brennancenter.org/our-work/analysis-opinion/trump-and-mcconnells-overwhelmingly-white-male-judicial-appointments [https://perma.cc/NLD5-VDE7].

428 John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH CTR.: FACT TANK (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/BX7W-GD6U].

429 Cohen, *supra* note 427.

430 *See The Higher Education of the Nation's Black Women Judges*, 16 J. BLACKS IN HIGHER EDUC. 108, 108 (1997) ("Jimmy Carter appointed seven black women to federal judgeships.").

431 *Id.*

432 BARRY J. MCMILLION, CONG. RSCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 22 (2017).

433 *See, e.g.*, ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 206–21 (1977) (discussing how female employees' status as "tokens" at a large corporation in the 1970s "set in motion self-perpetuating cycles that served to

ability to influence and wield power and authority. As prior research reports, "[a] lack of critical mass in any polity risks producing both sociological and normative illegitimacy, including within courts."[434] Normative illegitimacy on the federal bench means that while women's presence on the bench is crucial, when there are too few it may offer underserving legitimacy or cover to the court that may yet be hostile to the concerns of women or women of color. In other words, institutions that lack "a critical mass of women can produce and reify tokenism, and it can create barriers to meaningful participation and persuasion."[435]

Finally, even under President Barack Obama's administration, women of color were less likely as a group to be nominated to the federal judiciary—by a significant margin.[436] During the Obama administration, 15.7 percent of district court appointees were women of color, while 20.9 percent where nonwhite men and 25.4 percent were white women.[437] If one were to closely examine federal judgeships under President Obama, he appointed seven of the nine Asian American women (or seventy-eight percent) "to ever serve as federal district court judges. He also appointed each of the four multiracial women to ever serve as district court judges."[438] In total, "he . . . appointed 42 (or 45%) of the 93 non-white women to ever serve as U.S. district court judges."[439] Even so, almost forty percent of President Barack Obama's district court appointees were white men.[440] President Obama's nomination of women of color to the federal judiciary was often hailed as historic and unprecedented. Sadly, while true, it also likely reflects the near absence and isolation of non-white women in federal judgeships during prior administrations.

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reinforce the low numbers of women and . . . to keep women in the position of token"); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 966, 969–77 (1977) (discussing how the numerical dominance of a majority group shapes members of a minority's status as "tokens"); Pamela Oliver, Gerald Marwell & Ruy Teixeira, *A Theory of the Critical Mass. I. Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 AM. J. SOC. 522, 524 (1985) (calling attention to collective action depending on a critical mass).

434 Goodwin & Lindsay, *supra* note 403, at 2361 (footnote omitted).

435 *Id.*

436 MCMILLION, *supra* note 432, at 22.

437 *Id.*

438 *Id.*

439 *Id.*

440 *Id.*

C. The Academic Pink Collar

Law firms and courts represent only slices of America's labor glass ceiling. In academia similar patterns of the "hemorrhaging" effect persists. That is, nearly fifty years since "Title IX and affirmative action policies promised to transform the demographic profile of the American faculty, how far has American higher education progressed toward the goal of diversification?"[441] Persistent and discernible sex gaps, revealing women's marginalization in the academy are well documented.[442]

John Curtis, Director of Research and Public Policy at the American Association of University Professors, warns against what he describes as a "common presumption, both within and outside the higher education community, that as bastions of innovation and consideration of ideas and people on their merits, colleges and universities must be at the leading edge of efforts to implement equitable employment practices in their own organizations"[443] However, the empirical data amassed by social scientists who study gender and sex disparities in the academy simply does not support that presumption.[444] It is worth considering why the presumption holds, however. Even ten years ago nearly sixty percent of both undergraduates and graduate students were women.[445] At each level at which degrees are awarded, women will make up the majority.

In view of such data, some researchers raise alarm, questioning, "[w]here are the men?" rather than considering who are the mentors for these women and are they mentored?[446] The trends, despite women's expanded enrollment, "is slow—actually, very slow—progress."[447] For example, "after graduate school . . . the precipitous declines begin, as the number of women falls approximately ten percentage points each at the stages of assistant and associate professorship, so that finally

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441 MARTIN J. FINKELSTEIN, VALERIE M. CONLEY, & JACK H. SCHUSTER, TIAA INST., TAKING THE MEASURE OF FACULTY DIVERSITY 1 (2016), https://www.tiaainstitute.org/sites/default/files/presentations/2017-02/taking_the_measure_of_faculty_diversity.pdf [https://perma.cc/6LHA-B248].

442 John W. Curtis, AM. ASS'N UNIV. PROFESSORS, PERSISTENT INEQUITY: GENDER AND ACADEMIC EMPLOYMENT 1–12 (2011), https://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent_inequity.pdf [https://perma.cc/4J2U-M9DR].

443 *Id.* at 1.

444 *Id.*

445 *Id.*

446 *Id.*

447 *Id.* at 2 (emphasis omitted).

the percentage of female full professors hovers around 32 percent."[448]

Despite women's progress at the undergraduate and graduate levels, their numbers fall sharply when attempting to gain a foothold as professors. According to an often-cited report, *Taking the Measure of Faculty Diversity*, "[a]s recently as 20 years ago, men dominated women in the tenured ranks at research universities by a whopping 4.4 to 1."[449] The study's authors report that "[w]hile that gender gap has shrunk by nearly half over the ensuing twenty years, it nonetheless remains fairly substantial (2.3 men to 1 woman) among tenured appointments at the research universities, especially the private research universities."[450] One researcher speculates that "[w]hile there were significant gains during much of the 20th century, feminist progress in the academy . . . may have already come to a halt."[451]

Professor Troy Vettese points to the fact that "[s]ince the 1970s, an increasing number of women have joined university faculties, but this obscures the fact that in the last thirty years much of that influx has been directed toward non-tenure-track positions."[452] Women are overrepresented in contingent or non-tenure track positions, which have become pink collar academic mills. As of a decade ago, "three quarters of the total instructional staff [was] in contingent positions, including full- and part-time non-tenure-track faculty and graduate student employees" and women were disproportionately "overrepresented in each of the contingent faculty categories."[453]

It appears that women are in the most marginalized positions throughout the academy, whether as a version of contin-

448 Troy Vettese, *Sexism in the Academy: Women's Narrowing Path to Tenure*, N+1 (2019), https://nplusonemag.com/issue-34/essays/sexism-in-the-academy/ [https://perma.cc/U54U-AUVE].

449 Finkelstein, Conley & Schuster, *supra* note 441, at 5.

450 *Id.*

451 Vettese, *supra* note 448.

452 *Id.*

453 Curtis, *supra* note 442, at 2.

gent faculty,[454] adjunct faculty,[455] or as part-time faculty.[456] This may be invisible to the students they teach. Students may believe that their universities, law schools, and medical schools are advancing diversity, equity, and inclusion, but there are hidden, internal hierarchies. Moreover, "[t]here's a myth about adjuncts that just won't die: that most have well-paying day jobs and teach as a hobby . . . Just 15 percent of adjuncts said they are able to comfortably cover basic expenses from month to month."[457]

To place the overrepresentation of women among the lowest ranks of professors and teaching in context, "[n]early 25 percent of adjunct faculty members rely on public assistance, and 40 percent struggle to cover basic household expenses."[458] These women are less likely to receive paid family leave (seventeen percent) or paid parental family leave (fourteen percent).[459] A 2020 report by the American Federation of Teachers, *An Army of Temps*, "the first nationwide survey of contingent faculty conducted since 2013" illustrates how "precarious academic work was even before the coronavirus pandemic, which has made a grave situation even worse."[460] Among the key takeaways:

- "[N]early 20 percent rely on Medicaid";
- "About 45 percent of faculty members surveyed have put off getting needed healthcare, including mental healthcare";
- "65 percent forgo dental care";
- "41 percent struggle with job security, reporting that they don't know if they will have a teaching job until one month before the beginning of the academic year";

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454 *Id.* at 2 ("But here, too, the proportion of women in that contingent situation has been and remains larger; the gap is not closing.").

455 Colleen Flaherty, *Barely Getting By*, INSIDE HIGHER ED. (April 20, 2020), https://www.insidehighered.com/news/2020/04/20/new-report-says-many-adjuncts-make-less-3500-course-and-25000-year [https://perma.cc/3FM7-QDQH] ("It is well established that underrepresented minorities and women are overrepresented among adjuncts. The [American Federation of Teachers] sample is 64 percent female, 33 percent male, 1 percent gender nonconforming and 0.1 percent transgender."); *see also* American Federation of Teachers, *An Army of Temps: AFT 2020 Adjunct Faculty Quality of Work/Life Report* (2020), https://www.aft.org/sites/default/files/adjuncts_qualityworklife2020.pdf [https://perma.cc/7G8M-G5NH] (providing the source of the statistics previously cited).

456 Curtis, *supra* note 442, at 2 ("As of fall 2009 more than half of all faculty members are employed part time, and there is a significant gap between women and men in the proportion in that situation.").

457 Flaherty, *supra* note 455.

458 *Id.*

459 American Federation of Teachers, *supra* note 455, at 6.

460 *Id.* at 1.

- "For 3 out of 4 contingent faculty, employment is only guaranteed from term to term."[461]

These jobs, which once provided a middle-class wage, have, with the entry of women, become low wage positions. According to a 2014 report commissioned by Congress, adjunct and contingent employees now make up a "'just-in-time' workforce, with lower compensation and unpredictable schedules for what were once considered middle-class jobs."[462] Congressional investigators offer the following conclusion: "[A]djuncts and other contingent faculty likely make up the most highly educated and experienced workers on food stamps and other public assistance in the country."[463] The report makes clear that not only do the women who take on these jobs suffer, but the quality of education their students receive may be compromised, too.[464]

Furthermore, after entering the tenure track, "[i]n the US, the share of female full professors as a proportion of all female faculty remains stuck in the single digits, increasing only modestly since the early 1990s."[465] Notwithstanding their pace of enrollment and rates of graduation with terminal degrees, "[t]he culmination of a faculty career, full professor status, remains an elusive goal for women."[466] Even in law and medicine, where the "increase in the proportion of degrees earned by women has been especially dramatic . . . rising from only 3 percent in 1960-61 to a projected 51 percent [in 2011]," still the overall percentage of full professors lags woefully behind.[467]

In U.S. medical schools, "[w]omen represent 17% of tenured professors, 16% of full professors, 10% of department chairs, and 11% of medical school deans at U.S. academic medical centers."[468] This rate of progress belies the high rate of women entering and successfully graduating from medical

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461 *Id.*

462 Colleen Flaherty, *Congress Takes Note*, INSIDE HIGHER ED. (Jan. 24, 2014), https://www.insidehighered.com/news/2014/01/24/house-committee-report-highlights-plight-adjunct-professors [https://perma.cc/2GMU-FMWY]; *see also* STAFF OF H. COMM. ON EDUC. AND THE WORKFORCE: 113TH CONG. REP. ON EFORUM RESPONSES ON THE WORKING CONDITIONS OF CONTINGENT FACULTY IN HIGHER EDUCATION 2 (2014) (Democratic Staff).

463 STAFF OF H. COMM. ON EDUCATION AND THE WORKFORCE, *supra* note 463, at 26.

464 *Id.* at 27 ("Since I need to teach so many classes and have to work a third job right now, I cannot put in as much time with my students as I would like to.").

465 Vettese, *supra* note 448.

466 Curtis, *supra* note 442, at 2.

467 *Id.*

468 Carnes, Morrissey & Geller, *supra* note 381, at 1455.

schools. As researchers suggest, despite evidence of progress, "the rate of advancement of women into leadership positions in academic medicine is slower than would be predicted by their numbers in medicine for the past 35 years."[469]

Even while the AFT and congressional studies do not investigate race or racism at the frontlines of American institutions of higher education, other reports do. There has been exponential growth of women of color in the academy, given that they were almost entirely shut out just two decades ago. Asian American and Latinx women have made great strides. However, their relative climbs must be evaluated over the whole, which remains predominately male and overwhelmingly white.[470] According to Troy Vettese, "[a]mong the most serious expressions of women's hardship in the academy is the case of US black female scientists, who often experience desolate isolation in addition to sexual and racial harassment."[471] Black and Latino faculty grew only from 8.2 percent to 11.1 percent from 1993 to 2013.[472] However, rather than climbing, the "proportion of black women among tenured female faculty in the U.S. has actually fallen since 1993."[473]

D. Sticky Floors and Low Wage Jobs

Even while women's inability to gain a foothold in the nation's most competitive and lucrative industries is problematic, equally so are the depressed, lower wage conditions to which women are relegated. Women are compressed in the lower tiers of the nation's economy as much as they are shut out at the higher tiers. Thus, despite marked advancements in educational attainment and "sharp increase in credentials, women are still far more likely than men to work for low pay."[474]

Notwithstanding decades of effort and advocacy across various spheres of employment, women are nearly sixty percent

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469 *Id.*

470 Finkelstein, Conley & Schuster, *supra* note 441, at 13 ("Asian-American women showed robust growth rates across all appointment types, ranging from 238.4% (among tenure-track, full-time faculty) to 321.6% (among tenured faculty); and 321.3% (among part-time faculty)"—yet this represents only an increase from 2.9% to 7.2% of tenured women faculty overall).

471 Vettese, *supra* note 448.

472 Finkelstein, Conley & Schuster, *supra* note 441, at 8.

473 Vettese, *supra* note 448; *see also* Finkelstein, Conley & Schuster, *supra* note 441, at 13.

474 Jasmine Tucker & Kayla Patrick, *Low-Wage Jobs Are Women's Jobs: The Overrepresentation of Women In Low-Wage Work*, NAT'L WOMEN'S L. CTR. 1, 1 (Aug. 2017), https://nwlc.org/wp-content/uploads/2017/08/Low-Wage-Jobs-are-Womens-Jobs.pdf [https://perma.cc/Q7PM-DREV].

of the "26 million workers in low-wage occupations that typically pay less than $11 per hour."[475] Moreover, according to a report commissioned by the National Women's Law Center, "the lower paid the job, the greater women's overrepresentation: women make up close to seven in ten workers in jobs that typically pay less than $10 per hour."[476]

The reality of women working on the frontlines but being financially relegated to the backlines persists. This is so regardless of "education level, parental status, race or ethnicity, regardless of whether they are foreign born or native born, women generally make up larger shares of the low-wage workforce than do their male counterparts."[477] To extrapolate further, no matter women's demographic background, they are "overrepresented in the low-wage workforce compared to their representation in the workforce overall."[478]

When considering race, women account for "larger shares of the low-wage and lowest-wage workforce than their male counterparts, even though their shares of the overall workforce are similar or smaller."[479] White women are also disproportionately represented on the bottom of the pay scale when compared to white men.[480] By contrast, white men are "dramatically underrepresented in the low-wage workforce."[481] For example, even though white men make up over a third of the overall national workforce in the U.S., they comprise seventeen percent "in jobs that typically pay less than $10 per hour."[482] And while Black and Latinx men are "slightly overrepresented" in the low-wage workforce, compared to Black and Latinx women, "they make up much smaller shares."[483]

Even when they have earned college degrees, women are far more likely than men to work in the low-wage workforce.[484] Men without any academic credentials, including high school diploma, are better off than their female counterparts in the workforce.[485] Women without high school diplomas are more likely to be stuck to the floor, unable to climb out of the low-wage workforce. However, even when they do have a high

475 *Id.*
476 *Id.*
477 *Id.*
478 *Id.*
479 *Id.* at 2.
480 *Id.*
481 *Id.*
482 *Id.*
483 *Id.*
484 *Id.* at 4.
485 *Id.*

school diploma—and nearly 80 percent of women in low-wage jobs do—the sticky floor latches them down, making it difficult to rise in their workplaces.[486]

In a pivotal study tracking employment opportunities of working-class women, Sally Hillsman Baker and Bernard Levenson found dramatic racial discrepancies associated with job placement and attainment.[487] They described how deep patterns of racial inequality and discrimination negatively affected working-class women's job opportunities, resulting in Black women earning lower wages and working in the least desirable jobs.[488] Professor Patricia Collins similarly documents this pattern. She explains, "[s]ome of the dirtiest jobs in [American] industries were offered to African-American women," including in the cotton mills, "as common laborers in the yards, as waste gatherers, and as scrubbers of machinery."[489] One of the reasons for this, as she explains, is that in the 1970s, "Black women could find work, but it was often part time, low paid, and lacking in security and benefits."[490]

Despite the gains of the civil rights movement and resultant civil rights laws, "[s]ince the 1970s, U.S. Black women have been unevenly incorporated into schools, jobs, neighborhoods, and other U.S. social institutions that historically have excluded [them]."[491] The removal of explicit barriers reduced *de jure* discrimination, but *de facto* discrimination prevails, and "[a]s a result, African-American women have become more class stratified than at any period in the past."[492] Black women can and do find work, but the present too closely resembles the past with their work "often part time, low paid, and lacking in security and benefits."[493]

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486 Kayla Patrick, *Low-Wage Workers are Women: Three Truths and a Few Misconceptions*, NAT'L WOMEN'S L. CTR. (Aug. 31, 2017), https://nwlc.org/blog/low-wage-workers-are-women-three-truths-and-a-few-misconceptions [https://perma.cc/58RT-8V86] ("However, among women in low-wage jobs paying $11 or less per hour, seventy-nine percent have a high school diploma or more education.").

487 Sally Hillsman Baker & Bernard Levenson, *Job Opportunity of Black and White Working-Class Women*, 22 SOC. PROBS. 510, 531 (1975).

488 *Id.*

489 PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 45, 57 (2d ed. 2000); *see also* Evelyn Nakano Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender and Class Oppression*, 17 REV. RADICAL POL. ECON. 86, 96 (1985) ("Manufacturing and white collar jobs were closed to black women, though some of the dirtiest jobs in industry were offered to them.").

490 Collins, *supra* note 489, at 58–59.

491 *Id.* at 110.

492 *Id.*

493 *Id.* at 58–59.

Women are more likely to be at the bottom of the ladder, while also caring for children and older relatives. Despite the presumption that most women in low-wage work are teenagers, the data does not bear that out. Instead, "nearly nine in ten women in jobs that typically pay less than $11 per hour are age 20 or older."[494] In fact, twenty percent of women working in low-wage jobs "are in their prime working years–ages 25–49."[495]

According to the NWLC study, "[w]hile mothers and fathers who live with their children are both underrepresented in the low-wage workforce compared to their share of the overall workforce, fathers are dramatically underrepresented."[496] Nearly one third of America's low wage-earning women are also mothers,[497] supporting their children on such low pay that it places them at the poverty line. These mothers have children that are under age eighteen and who live at home with them. By contrast, just twenty-two percent of men in the low-wage workforce report supporting children.[498] Among the lowest wage earners, women are more than twice the number who are working parents.[499]

As low-wage workers, poor women, and particularly women of color are disproportionately represented among low-wage essential care workers at the frontlines of disaster—not only during pandemic. California is notorious for its incarcerated women fighting its blazing wildfires.[500] The arid conditions and the effects of global warming make the state particularly vulnerable to devastating wildfires. With limited rainfall, the fires are a real danger each year. To put them out, the state calls upon incarcerated women and men.[501] The women take pride in their work—but they are nonetheless exposed to grave dangers and receive virtually *no pay* to do this labor.[502] States take advantage of an exception carved out in

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494 Patrick, *supra* note 486.

495 *Id.*

496 Tucker & Patrick, *supra* note 474, at 3.

497 *Id.*

498 *Id.*

499 *Id.* at 4.

500 *See* Jaime Lowe, *The Incarcerated Women Who Fight California's Wildfires*, N.Y. TIMES (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/magazine/the-incarcerated-women-who-fight-californias-wildfires.html?mcubz=1&_r=0 [https://perma.cc/STR7-2ZV3].

501 See *id.* ("The inmates — including men, roughly 4,000 prisoners fight wildfires alongside civilian firefighters throughout California. . . .").

502 *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 902–04 (2019)

the Thirteenth Amendment that permits slavery as a condition of punishment for those who are convicted of crimes.[503]

Despite the dangerousness of the work, toxic conditions, and lack of training, women convicted of crimes in California may find themselves in the precarious position of putting out these fires. Notably, they are denied the wages civilians earn for putting out fires. Civilian firefighters typically apprentice for three to four years and after completion of their program, receive a competitive wage.[504] Not these women. By contrast, after "as little as three weeks" training, the women who make it into the program are sent out to contain wildfires.[505] And after release these formerly incarcerated women's criminal records will follow them, which may preclude not only employment as firefighters but also hundreds of other jobs due to penal disenfranchisement.[506] Ironically, the first woman firefighter in the US was an enslaved woman in New York, Molly Williams, who was also forced to put out fires without pay.[507]

Women serve on the frontlines of the lowest wage, essential, but forgotten and overlooked work across multiple sectors. In a telling *New York Times* report, "[o]ne in three jobs held by women has been designated as essential."[508] They write, "[f]rom the cashier to the emergency room nurse to the drug-

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(describing how inmates receive "cents on the dollar" for performing incredibly dangerous work with little training).

503 *Id.* at 902–07; *see also* U.S. CONST. amend. XIII (exempting from the prohibition on slavery "punishment for crime whereof the party shall have been duly convicted").

504 Goodwin, *supra* note 502 at 903; *see also* U.S. Dep't of Labor, *How to Become a Firefighter*, OCCUPATIONAL OUTLOOK HANDBOOK (Apr. 24, 2018), https://www.bls.gov/ooh/protective-service/firefighters.htm#tab-4 [https://perma.cc/B4BY-FFQ8] ("Those wishing to become wildland firefighters may attend apprenticeship programs that last up to 4 years").

505 Lowe, *supra* note 500.

506 *See, e.g.*, *Barriers to Work: People with Criminal Records*, NAT'L CONF. OF ST. LEGISLATURES (July 17, 2018), https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx [https://perma.cc/S46H-G7CX] ("The National Inventory of Collateral Consequences of Conviction (the NICCC), catalogs over 15,000 provisions of law in both statute and regulatory codes that limit occupational licensing opportunities for individuals with criminal records.").

507 Ginger Adams Otis, *Molly Williams, a Black Woman and a Slave, Fought Fires Years before the FDNY Was Formed Was a Pioneer for Fellow Female Smoke-Eaters*, N.Y. DAILY NEWS (Apr. 26, 2015, 12:01 AM), http://www.nydailynews.com/new-york/woman-slave-molly-williams-fought-fires-early-1800s-article-1.2197868 [https://perma.cc/B9RQ-JQ6L].

508 Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html [https://perma.cc/PW2C-V4KP].

store pharmacist to the home health aide taking the bus to check on her older client, the soldier on the front lines of the current national emergency is most likely a woman."[509] These women serve as waitresses,[510] cashiers,[511] in meatpacking,[512] in agriculture—exposed to high levels of toxins and pesticides[513]—in clinics and hospitals,[514] and virtually every aspect of work that serves the public.

The numbers are stunning. Nearly 90 percent of nurses and nursing assistants are women.[515] Relevantly to coronavirus, most respiratory therapists are women as well as a "majority of pharmacists and an overwhelming majority of pharmacy aides and technicians."[516] More than two-thirds of the people packing groceries, working at food shops, and fast-food cashiers are women.[517] Thus, even though men were the majority of the workforce pre-pandemic, COVID-19 has changed that. However, what has not changed are the social narratives and stereotypes that cling to women and work.

And, because these various jobs have been designated "essential," their doors do not close. This means every day, during pandemic, these women show up to serve. However, it does not mean that these women are treated as if they are essential or important.[518] As one essential worker in the food industry la-

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509 *Id.*

510 Sara Selevitch, *The Un-Heroic Reality of Being an "Essential" Restaurant Worker*, EATER (May 12, 2020), https://www.eater.com/2020/5/12/21251204/being-an-essential-restaurant-worker-during-coronavirus-pandemic [https://perma.cc/K5CE-XTBX].

511 Robertson & Gebeloff, *supra* note 508.

512 Matt Perez, *87% of Meatpacking Workers Infected with Coronavirus Have Been Racial and Ethnic Minorities, CDC Says*, FORBES (July 7, 2020, 4:47 PM), https://www.forbes.com/sites/mattperez/2020/07/07/87-of-meatpacking-workers-infected-with-coronavirus-have-been-racial-and-ethnic-minorities-cdc-says/#548bd83634f5 [https://perma.cc/GZ7M-HYD7]; Brian Stauffer, *When We're Dead and Buried, Our Bones Will Keep Hurting*, HUM. RTS. WATCH (Sept. 4, 2019), https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat [https://perma.cc/B7ZF-9B76]; Vivian Ho, *"Everyone Tested Positive": Covid Devastates Agriculture Workers in California's Heartland*, GUARDIAN (Aug. 8, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/aug/08/california-covid-19-central-valley-essential-workers [https://perma.cc/M36Y-2VBX].

513 Hossain & Triche, *supra* note 42, at 3.

514 Robertson & Gebeloff, *supra* note 508.

515 *Id.*

516 *Id.*

517 *Id.*

518 *See, e.g.*, Selevitch, *supra* note 510 ("The unacknowledged absurdity of the situation is almost comical. *I am handing you noodles wearing gloves and a mask because we are in the midst of a global pandemic!* I want to yell. *I am risking my health for your greasy meal!*").

ments, "[c]ustomers want their shelves stocked and their takeout delivered. The labor that makes their leisure possible remains, essentially, an afterthought."[519]

Finally, alongside whatever employment women engage in, invisible work follows. During crisis, the percentage of their work increases. Men report that they are doing the majority of homeschooling during COVID-19, but only three percent of women concur.[520] Despite how men see themselves, homeschooling during COVID-19 "is being handled disproportionately by women."[521] About eighty percent of mothers report spending more time on child-learning during COVID-19.[522] In fact, mothers are primarily responsible for homeschooling, "even when couples otherwise shared child care responsibilities."[523]

Women also disproportionately spend more time on domestic work. Again, during a crisis that necessitates more time at home, there are significant consequences. As commentators note, during a crisis such as the pandemic, "[women are] spending even more time on these chores" and "the repercussions could worsen."[524] Those who study women and labor fear that women "[b]eing forced to be at home is amplifying the differences we already know exist," and particularly concerning is the possibility of women being pushed "out of the labor force in a way that will be very hard to overcome."[525]

IV
REREADING, REDEEMING, AND REMEDYING WOMEN'S LABOR

According to Professor Catharine A. MacKinnon, "whose legal theories laid the basis for sexual harassment being defined as a form of sex discrimination," when "[y]ou go after sexuality and economics, you've gone to the heart of misogyny."[526] Over the past forty years, feminist scholars articulated various approaches to equalizing women's placement in the

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519 *Id.*

520 Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree.*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html [https://perma.cc/FQP7-MF68] (updated May 8, 2020).

521 *Id.*

522 *Id.*

523 *Id.*

524 *Id.*

525 *Id.* (quoting Professor Barbara Risman).

526 Susan Chira, *Do American Women Still Need an Equal Rights Amendment?* N.Y. TIMES (Feb. 16, 2019), https://www.nytimes.com/2019/02/16/sunday-review/women-equal-rights-amendment.html [https://perma.cc/GCE8-GC33].

workforce. This Article briefly shines a light on that important scholarship.[527] As a general matter, advancing women's labor equality must also include elevating their reproductive rights; recognizing and fairly compensating caregiving; reducing economic barriers to childcare; establishing pipelines in the workforce; and mentoring.

As Parts II and III demonstrate, women's efforts to thrive within the American economy is affected by historic, intergenerational discrimination—both *de facto* and *de jure.* Legal institutions and infrastructures chiefly contributed to the marginalization women historically endured and the legacies of explicit and implicit discrimination and bias prevail in society today.

The outlawing or repeal of *de jure* discriminatory laws did very little to create and maintain robust *affirmative* programs that benefit women across industries, despite impressive gains in education. Indeed, what studies examining education attainment between the sexes reveals is that although women now obtain undergraduate and graduate degrees at rates that exceed men, that has not and likely will not change the structure of the American labor force. That women now represent the majority in higher education does not in itself alter patterns of advantage bestowed on men or the power dynamics that undergird America's labor forces from elite jobs to those at the margins.

As described throughout this Article, history matters. Canvasing American history reveals women forced into sexually exploitative uncompensated labor, during the antebellum period. Later, during Jim Crow, with whatever skillsets they possessed, all women suffered marginalization in the labor market, being shut out through *de jure* laws and *de facto* social practices from full economic participation. Critically, this history reveals an American labor force built on exclusion rather than inclusion and monopolies in male labor.

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527 *See, e.g.*, Katharine K. Baker, *The Problem with Unpaid Work*, 4 U. ST. THOMAS L.J. 599, 601 (2007) (discussing two standard explanations—biological and patriarchal—used to address why women do more unpaid work than men); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 82 (1997) (defending the use of an economic view of domestic labor); Beth Anne Shelton & Juanita Firestone, *Household Labor Time and the Gender Gap in Earnings*, 3 GENDER & SOC'Y 105, 105 (1989) (finding the impact of women's unpaid labor on their paid employment is essential to understanding the relative earnings of women to men); Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOC. 652, 652 (1994) (examining economic and gender role symbolic views of housework).

The results are the conditions analyzed in Part III and the conclusion is that although women have made important gains in their education, those attainments have not altered the architecture of male hierarchy and privilege across various disciplines—from law to education and low-wage work. Part IV turns to potential solutions. It takes into account that women's advancement will depend on dismantling barriers and affirmative steps.

A. Redressing the Sex Gap and Sex Trap: Acknowledging the Problem

To borrow from the late social science researcher James Jackson, rather than asking the inane: *what's wrong with women? Why can't they move ahead? If they only tried harder, wouldn't they crack that glass ceiling? Or, why are they complaining, men take good care of them?* The question should be given the structural impediments that women face, especially those burdened by racism, xenophobia, homophobia, and other biases: Why have they done as well?[528]

Even while history forgot them, or their male colleagues took credit for their labor and discoveries from precisely calculating the trajectories to launch rockets,[529] to discovering sex determination,[530] capturing the images of the double helix before any man had,[531] shaping civil rights most impactful legal theories,[532] or creating America's most successful boardg-

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528 Neil Genzlinger, *James Jackson, Who Changed the Study of Black America, Dies at 76*, N.Y. TIMES (Sept. 14, 2020) https://www.nytimes.com/2020/09/11/us/james-jackson-dead.html [https://perma.cc/55DE-X3C6] (describing how Jackson began all his research with a "positive premise").

529 *See, e.g.*, MARGOT LEE SHETTERLY, HIDDEN FIGURES: THE UNTOLD TRUE STORY OF FOUR AFRICAN AMERICAN WOMEN WHO HELPED LAUNCH OUR NATION INTO SPACE 106 (2016); Margalit Fox, *Katherine Johnson Dies at 101: Mathematician Broke Barriers at NASA*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/science/katherine-johnson-dead.html [https://perma.cc/Y9MJ-MU98] ("Wielding little more than a pencil, a slide rule and one of the finest mathematical minds in the country, Mrs. Johnson, who died at 101 on Monday at a retirement home in Newport News, Va., calculated the precise trajectories that would let Apollo 11 land on the moon in 1969 and, after Neil Armstrong's history-making moonwalk, let it return to Earth.") (last updated July 9, 2020).

530 Stephen G. Brush, *Nettie M. Stevens and the Discovery of Sex Determination by Chromosomes*, 69 ISIS 162, 163 (1978) ("[T]he role of [Nettie] Stevens, who died in 1912 before she could attain a reputation comparable to that of Wilson, has sometimes been forgotten").

531 Editorial, *Rosalind Franklin Was So Much More Than the 'Wronged Heroine' of DNA*, NATURE (July 21, 2020), https://www.nature.com/articles/d41586-020-02144-4 [https://perma.cc/K9FY-D9HH].

532 Kathryn Schulz, *The Many Lives of Pauli Murray*, NEW YORKER (April 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray [https://perma.cc/DU7R-MMUK] (describing how Pauli Murray's

ame, somehow they forged ahead.[533] That some women have done so well, despite barriers and impediments, provides compelling evidence as to how much more they could achieve were those barriers not in place.

A recent audit of sex disparities in medical schools offers important insights and recommendations for the broader labor force.[534] Chief among them is the importance of recognizing the impact of socialized sex and race socialized differences and their impacts on hiring, promotion, and pay.[535] Biases and barriers are the lived experiences of women, but they may not be acknowledged in the workforce.

Even in the wake of numerous empirical studies sponsored by government, the academy, and private industries, employers, managers, and those responsible for hiring and promotion decisions may not be paying attention.[536] And, if they are not paying attention, they may make decisions on hiring and promotion based on implicit biases, perceiving men as more capable and smarter.[537] Their assessments regarding qualifications may be based on standards wholly unrelated to what is necessary to perform the job.

For example, studies show that the standards for entry in most police departments are based on male-centered criteria from fifty years ago.[538] These standards largely favored men but have little to do with successful and effective policing. These standards favor or reward brawn and brute force rather

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legal theories in the 1940s served as the foundation for landmark civil rights litigation, including in *Brown v. Board of Education*).

533 Mary Pilon, *Monopoly's Inventor: The Progressive Who Didn't Pass 'Go'*, N.Y. TIMES (Feb. 13, 2015), https://www.nytimes.com/2015/02/15/business/behind-monopoly-an-inventor-who-didnt-pass-go.html [https://perma.cc/9K95-TXMW] ("Magie's identity as Monopoly's inventor was uncovered by accident. In 1973, Ralph Anspach, an economics professor, began a decade-long legal battle against Parker Brothers over the creation of his Anti-Monopoly game. In researching his case, he uncovered Magie's patents and Monopoly's folk-game roots. He became consumed with telling the truth of what he calls 'the Monopoly lie.'").

534 Carnes, Morrissey & Geller, *supra* note 381 at 1459.

535 *See id.*

536 *See* Felice Klein, *The Gender Pay Gap That No One Is Paying Attention To*, THE CONVERSATION (July 29, 2020, 8:19 AM), https://theconversation.com/the-gender-pay-gap-that-no-one-is-paying-attention-to-142698 [https://perma.cc/MK6B-TFJN]; Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789 (2017).

537 *See* Carnes, Morrissey & Geller, *supra* note 381, at 1458.

538 *See* Laura Goodman et al., *Police Leaders Speak Out: "Women in Law Enforcement Must Have a Seat at the Table"*, MS. MAG. (June 23, 2020), https://msmagazine.com/2020/06/23/police-leaders-speak-out-women-in-law-enforcement-must-have-a-seat-at-the-table/[https://perma.cc/NVU3-NYMN].

than the ability to discern, evaluate, or deescalate conflict.[539] As one study in the *Washington Post* reports, one reason for police violence is that there are "[t]oo many men with badges."[540]

Women make up just 12.6 percent of all persons in police forces and largely this is due to barriers to entry and toxic environments after they make it onto the force.[541] Decades of research[542] demonstrate women's abilities to handle hostile situations and that they are less likely to kill people in the process.[543] In fact, "only 11 percent of female officers reported they had ever fired their weapon while on duty, compared with 30 percent of male officers."[544] Indeed, female officers experiences diverge significantly from their male counterparts. Unlike the spates of police shootings, choke holds, and other practices engaged in by male officers that end in killing civilians, women are less likely to report being in such situations.[545]

According to the Pew Center for research, "when it comes to their experiences in the field, women are less likely than men to say they have physically struggled with a suspect who was resisting arrest in the past month (22% vs. 35% of male officers)."[546] Even while women may experience nearly as much aggression from civilians as men,[547] compelling data demonstrate that they are less likely to respond inappropriately or

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539 Rosa Brooks, *One Reason for Police Violence? Too Many Men with Badges*, WASH. POST (June 18, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/06/18/women-police-officers-violence [https://perma.cc/GMT2-8QCE].

540 *Id.*

541 *Id.*

542 *See* PENNY E. HARRINGTON, NAT'L. CTR. FOR WOMEN & POLICING, RECRUITING & RETAINING WOMEN: A SELF-ASSESSMENT GUIDE FOR LAW ENFORCEMENT 9, https://www.ncjrs.gov/pdffiles1/bja/185235.pdf [https://perma.cc/NW7F-QXGV].

543 Brooks, *supra* note 539.

544 *Id.*; *see also* Renee Stepler, *Female Police Officers' on-the-Job Experiences Diverge from Those of Male Officers*, PEW RESEARCH CTR. (Jan. 17, 2017), https://www.pewresearch.org/fact-tank/2017/01/17/female-police-officers-on-the-job-experiences-diverge-from-those-of-male-officers [https://perma.cc/V966-Q869] ("Female officers are much less likely than male officers to report that they have ever fired their weapon while on duty – 11% of women vs. 30% of men").

545 *See* Timothy Williams & Caitlin Dickerson, *Rarity of Tulsa Shooting: Female Officers Are Almost Never Involved*, N.Y. TIMES (Sept. 24, 2016), https://www.nytimes.com/2016/09/25/us/rarity-of-tulsa-shooting-female-officers-are-almost-never-involved.html [https://perma.cc/CP4V-ZVKF] (suggesting one reason why female officers are less likely to engage in these practices is in part because male officers are more likely to be assigned to difficult situations).

546 Stepler, *supra* note 544.

547 *Id.* ("Six-in-ten female officers say they have been verbally abused by a citizen while on duty in the past month, compared with 69% of men.").

aggressively. These differences remain whether women are patrol officers, detectives, or on field assignments.[548] Simply put, data suggest that women police better than men, cause fewer deaths, deescalate better, and likely save departments from civil litigation over their conduct. Yet, the barriers they face to joining the police force likely have much to do with enduring stereotypes related to the qualifications necessary to be a successful officer.

Thus, so long as employers and supervisors continue to make hiring and promotion decisions based on problematic, outdated myths, women will be harmed in the workforce. These harms will also extend to the fields that continue to bar women's entry. The killings of Natasha McKenna, Michelle Cusseaux, Breonna Taylor, George Floyd, Tamir Rice, Eric Garner, Philando Castille, and too many others were facilitated in a system that shuts out women and promotes male aggression to deadly affect. If the barriers are not acknowledged, resolving them is almost impossible. And, with auditing and recognition of the biases perpetuated within the specific spheres of employment, supervisors and employers should be transparent and disseminate the data related to sex-based, internal glass ceilings, barriers to entry, and pay gaps.

B. Critical Mass, Quotas, and Tokenism

The U.S. sex-gap in employment and representation on corporate boards, in government, on courts, and in various positions of leadership persists, confirmed by numerous studies. For example, as of September 2020, women hold only 6.2 percent of CEO positions at S&P 500 corporations.[549] That amounts to only 31 positions out of 500.[550] By comparison, white men hold two-thirds of board seats on the Fortune 500.[551] In relation to service on corporate boards, women hold barely one quarter of those seats.[552] Most of these gains are

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548 *Id.*

549 *List: Women CEOs of the S & P 500*, CATALYST (Sept. 1, 2020), https://www.catalyst.org/research/women-ceos-of-the-sp-500/ [https://perma.cc/AQE8-XU3U].

550 *Id.*

551 *Too Few Women of Color on Boards: Statistics and Solutions*, CATALYST (Jan. 31, 2020), https://www.catalyst.org/research/women-minorities-corporate-boards/ [https://perma.cc/4Q9H-3GY2].

552 *Women on Corporate Boards: Quick Take*, CATALYST (Mar. 13, 2020), https://www.catalyst.org/research/women-on-corporate-boards/#:~:text=AN%20analysis%20of%20more%20than,up%20from%2015.0%25%20in%202016.&text=companies%20with%20a%20woman%20board,men%20board%20chairs%20(17.1%25) [https://perma.cc/LQ3B-X9KS].

fairly recent; in 2019, "women accounted for almost half . . . of new board directors in the S&P 500."[553] Just a decade ago, more than one third of America's boards had only one woman to serve.[554]

For women of color the problem is even more glaring as they "hold only 4.6 percent of board seats in Fortune 500" corporations,[555] despite advertisement campaigns and public statements from those organizations expressing commitments to diversity, equity, and inclusion (DEI). And although nations around the world have successfully implemented quotas to increase the representation of women, the US lags behind.[556]

Thus, to address the significant sex-based gaps on corporate boards, in law firm hiring, at universities, and in other organizations, coercion may be necessary, including the use of quotas, incentives, and disincentives. In 2018, the California legislature enacted SB 826, a quota policy, mandating a minimal inclusion on boards organized in that state, and despite criticism, the state may be on the right track.[557] The California law, which requires publicly traded companies to add at least one woman to their boards by 2020 and "as many as three by 2021, depending on the size of the board," was criticized as possibly being illegal and a strong-arm tactic.[558] The state imposes a fine of $100,000 for failure to comply by 2020 and failure to meet the 2021 requirements could be as much as a $300,000 penalty "per woman not added to the board."[559]

According to the most recent data available, overwhelmingly California-based companies complied with the state's mandate. Nearly 200 new women-held seats now exist on California boards where previously they had not.[560] Critics claim that the law violates the Fourteenth Amendment's Equal Protection Clause. Even while the law may not be unconstitutional, it certainly is coercive. However, a coercive state

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553 *Id.*

554 *Id.*

555 *Too Few Women of Color on Boards*,*supra* note 551.

556 *See, e.g.*, *Women on Corporate Boards*, *supra* note 552 (highlighting the difference percentages of female board membership between Europe and the United States and attributing this difference to a lack of quotas in the U.S.).

557 The Times Editorial Board, *California Law Forcing Companies to Put Women on Corporate Boards Is Coercion. But It's Working*, L.A. TIMES (Jan. 6, 2020 3:00 AM), https://www.latimes.com/opinion/story/2020-01-06/woman-quota-law-scares-companies-into-doing-the-right-thing [https://perma.cc/UF7W-PBV3].

558 *Id.*

559 *Id.*

560 *Id.*

program is not illegal or unconstitutional simply because it imposes conditions to operate in the state. Would the companies in compliance have added the seats without the law?[561]

In France, Germany, the Netherlands, and Sweden, measurable results are seen in women's corporate leadership since the implementation of quotas. In each country, the percentage of women on corporate boards exceeds that of the US[562] However, even in nations that have not implemented quotas, the percentage of women in those countries serving on boards exceeds that of the US, including in Australia, Canada, and the United Kingdom.[563] Thus, recruiting, hiring and retaining more women across the labor force and onto boards can occur without coercion if the will to do so exists. No matter the method, greater inclusion of women in this sphere is an urgent goal deserving serious attention.

To be clear, a woman's hire even under fraught and marginal conditions that reflect tokenism does remove the barrier of sex-based hiring exclusion at least in that one case. That is a good thing, but it cannot be enough. Nor are women a monolith; some women may be disinterested in inclusive hiring practices that increase the representation of women in the workplace.

However, hiring more women in law firms, in STEM, at universities, in medical spheres, in organizations or recruitment onto corporate boards, or appointments to judicial positions will not be sufficient without attention to and engagement with critical mass practices.[564] Critical mass theory refers to a

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561 *See* Meland v. Padilla, No. 2:19-cv-02288-JAM-AC, 2020 WL 1911545 at *1 (E.D. Cal. Apr. 20, 2020) (involving a shareholder's claim that the law's requirement violated his right to vote for a board member of his choice and thus violates the Fourteenth Amendment. This case was dismissed at the trial court level and appealed before the US Court of Appeals for the Ninth Circuit); Teal N. Trujillo, *Do We Need to Secure a Place at the Table for Women? An Analysis of the Legality of California Law SB-826*, 45 J. LEGIS. 324, 337 (2018) (suggesting the rigid percentage required by the law is an unconstitutional quota).

562 *See, e.g.*, *Women on Corporate Boards*, *supra* note 552 (highlighting the increase in the percentage of female board directorship in France, Germany, Netherlands, and Sweden after implementing quotas in the early 2010s).

563 *See, e.g.*, *id.* (stating that Australia, Canada, and the United Kingdom all have higher percentages of Women Directorships in 2019 than the United States).

564 *See* KANTER, MEN AND WOMEN OF THE CORPORATION, *supra* note 433 at 206–21; Drude Dahlerup, *From a Small to a Large Minority: Women in Scandinavian Politics*, 11 SCANDINAVIAN POL. STUD. 275, 280 (1988); Kanter, *Some Effects of Proportions on Group Life*, *supra* note 432 at, 969–77; *see also* Oliver, Maxwell & Teixeira, *supra* note 433, at 524 (calling attention to collective action depending on a critical mass). *See generally* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 164, Note 102 (1965) (describing the "threshold concept"); Stephanie J. Creary, Mary-Hunter ("Mae") McDonnell,

minimum or sufficient percentage of individuals within an organization who share ideology or affinity and collectively believe in an ideal.[565] With a sufficient baseline of presence on a board or within an organization, the group is able to meaningfully contribute to the culture of the department, firm, board, or court such that they are able to exert influence, inspire interest in their platforms, produce desired outcomes, and avoid tokenism.[566]

According to sociologists W.M. Phillips and Rhoda Blumberg, tokenism is a condition that appears in organizations where discrimination was previously present or subordination by one group, "the dominants, over another group, the minority."[567] They refer to tokenism as "a technique of resistance to change in the relationships between dominant and minority groups."[568] They suggest that it is an "attempt to maintain patterns of . . . dominance."[569] Importantly, tokenism may produce myriad organizational problems, including maintaining cultures of sexism, racism, or homophobia.

That said, tokenism may appear in universities, law firms, courts, and other organizations that actively or passively depress the inclusion of subordinated minority groups. Researchers suggest multiple ways in which tokenism may appear in an organization. For example, it may arise in the form of some concession, as a show of change.[570] Such concessions might include purposefully interviewing, but not hiring more women or hiring one additional woman while hiring several men. Ironically, it may also include hiring "semi-competent" minorities "deliberately over better qualified [minority] candidates[.]"[571]

According to one theory, by purposefully hiring less competent minorities over those who are more capable, the majority in the firm is able to maintain power and influence. Tokenism may also be expressed by addressing a failure to competitively retain women by hosting diversity workshops rather than offer-

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Sakshi Ghai, Jared Scruggs, *When and Why Diversity Improves Your Board's Performance*, HARV. BUS. REV. (Mar. 27, 2019), https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance [https://perma.cc/4834-UX7A] (explaining the benefits of an egalitarian board).

565 Oliver, Maxwell & Teixeira, *supra* note 433, at 523–24.

566 *Id.* at 542.

567 W.M. Phillips Jr. & Rhoda L. Blumberg, *Tokenism and Organizational Change*, 20 EQUITY & EXCELLENCE EDUC. 34, 35 (1982).

568 *Id.* at 34.

569 *Id.*

570 *Id.* at 35.

571 *Id.*

ing competitive financial retention packages.[572] Researchers note that "[a]n early and common ploy is to provide discontented groups with symbolic rewards or reassurances, such as formal acceptance of petitions or grievances."[573] Researchers assert that "limited or superficial change can usually be observed quantitatively."[574]

Tokenism is often expressed by "a large preponderance of one type over another . . . The numerically dominant types . . . control the [organization] and its culture in enough ways to be labelled 'dominants.'"[575] The relative "few" in the minority or "skewed group" are "appropriately called "tokens."[576] Within organizations that express a culture of tokenism, harmful stereotypes against minority groups may persist such that the lone minorities within the firm, university, or court were the only ones of their sex or race "qualified" for the role. A person "serving as token is seen as someone who has made it up through the system, official demonstration that the system works."[577]

Professor Rosabeth Kanter's research and landmark book on men and women in corporations, examines tokenism in the organizational setting. She observes that tokenism relates not only to the suppressed number of the excluded group within the organization but also the manner in which the dominant group establishes the norms within the workplace and controls the culture of the organization.[578] The problem with organizational tokenism is that they create ecosystems wherein it is difficult if not impossible for the thinly represented minority group to express influence whether with hiring, promotion, or shift cultural norms that rely on and perpetuate stereotypes.[579]

As such, tokenism can be very difficult to navigate for marginally represented women within an organization or organizational leadership. For example, "[s]uffering or stress is a natural consequence of the dilemmas and paradoxes inherent in playing or resisting the token role."[580] Phillips and Blumberg explain, "Entry into it constitutes a breakthrough against prior exclusion, and a relative gain in status for the

572 *Id.*
573 *Id.*
574 *Id.*
575 KANTER, MEN AND WOMEN OF THE CORPORATION, *supra* note 433at 208.
576 *Id.*
577 Phillips & Blumberg, *supra* note 567, at 35.
578 KANTER, MEN AND WOMEN OF THE Corporation, *supra* note 433 at 210.
579 *See id.* at 236.
580 Phillips & Blumberg, *supra* note 567, at 36.

chosen individual. At the same time the actor becomes part of a production staged to serve organizational purposes in the face of external and internal pressures."[581] Another tensions that they point to is the possibility of *cooptation,* leading to "the neutralization" of the marginalized woman through her absorption into official structures, such that she defends the organization's exclusionary practices against other women.[582]

Simply put, organizations that engage in tokenism are threatened by the increased number of the subordinated group in the organization.[583] With regard to race, the authors write, "We perceive tokenism as an essential element in the ideological hegemony of the institutional process of racism."[584] Tokenism, however, is not limited to implicitly or explicitly expressing racial bias; it can involve any status where a group has been subordinated or excluded in society generally and specifically within an organization.

For the reasons outlined above, hiring and retaining women without commitment and practice to critical mass can produce tokenism. Tokenism can result in hostile work and learning environments and manifest in women being or perceiving themselves as silenced, their ideas overlooked or discounted, and their ideas passed over. Organizations that express a commitment to diversity, equity, and inclusion, but lack a critical mass of women can produce and reify tokenism. And, tokenism can create barriers to women's meaningful participation and persuasion.[585]

On the other hand, researchers who study "critical mass" theory argue that a baseline of a minority group's representation within an organization avoids the pitfalls of tokenism and produces healthier and advantageous organizational dynamics and outcomes.[586] Women's critical mass within an organiza-

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581 *Id.*

582 *Id.* at 36.

583 *Id.* at 35.

584 *Id.* at 34.

585 *See generally* Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. PERSONALITY & SOC. PSYCHOL., 918, 918–19 (1985) (stating that tokens may experience cognitive and behavioral deficits due to "being the only person of their kind in an otherwise homogeneous group").

586 *See, e.g.*, VICKI W. KRAMER, ALISON M. KONRAD & SUMRU ERKUT, CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE iv (2006), https://www.wcwonline.org/vmfiles/WCW11.pdf [https://perma.cc/657T-MDL6 (arguing that a critical mass of women on the board of directors can enhance corporate governance and fundamentally alter the boardroom); Creary, , *supra* note 563 (arguing that diversity in boards works best when the board is egalitarian and the board seeks out different forms of diversity).

tion has the potential to enhance governance and achieve substantive equality goals.[587] Studies show that boards with more women "lead to better financial performance" and create more dynamic environments, "in which innovative ideas can spring from gender diversity."[588]

Moreover, "women holding leadership positions on boards is positively associated with other women directors having longer board tenures."[589] Data also suggests that women in senior leadership are more successful at recruiting other women into leadership roles. In a study of 8,600 companies in forty-nine countries, fewer women served on boards with men in leadership (seventeen percent) as compared with boards where women led (twenty-eight percent).[590] This data suggests that women in leadership may identify more women for leadership opportunities than men and successfully recruit them into service.[591]

Finally, a note of caution. Women's critical mass representation alone does not achieve sex equality in organizations, dismantle sexism within the labor force, or remove all the barriers to inclusion, hiring, promotion, and retention.[592] While women can be agents of change and sometimes the best advocates on issues that concern them, as a normative matter, men must also play critical roles. Firms and organizations that position women to bear the brunt of equality work perpetuate sex inequality and stereotypes. Rather, men in leadership share the responsibility to reduce and eliminate the barriers to women's entry, retention, fair pay, and fair treatment in the labor force. Men can and should be as forceful as women in dismantling sex-based barriers in the labor force.

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587 KRAMER, KONRAD & ERKUT, *supra* note 585 ("Many of our informants believe that women are more likely than men to ask tough questions and demand direct and detailed answers.").

588 *See, e.g., Women on Corporate Boards: Quick Take, supra* note 552 (stating that women should account for three board seats in order to achieve the benefits of diversity). *But see*, Katherine Klein, *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE@WARTON (May 18, 2017), https://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/ [https://perma.cc/LV52-QXB8] ("Rigorous, peer-reviewed studies suggest that companies do not perform better when they have women on the board. Nor do they perform worse.").

589 *Women on Corporate Boards: Quick Take, supra* note 552.

590 *Id.*

591 *Id.*

592 Colleen Chesterman, Anne Ross-Smith & Margaret Peters, *The Gendered Impact on Organisations of a Critical Mass of Women in Senior Management*, POL'Y & SOC'Y, 1, 20 (2005).

C. Redressing Invisible Labor

Women's labor takes many forms, including some of it being entirely invisible, particularly in the home setting. Studies show that the more men rely on women for household or family-based care work, the less they are likely to do.[593] Even as the social meanings of housework have shifted, such that they are no longer completely defined by sex-role stereotypes, women continue to supply most of the caregiving in heterosexual households.[594]

Unpaid or "shadow" labor is not insignificant, even while it remains largely invisible to economists. According to the Organization of Economic Cooperation and Development (OECD), "unpaid labor" includes time spent shopping for goods, tending to the elderly, performing routine housework, caregiving for childcare, and other "unpaid activities related to household maintenance."[595] According to a 2020 *New York Times* report, unpaid labor exceeds the combined revenue of the 50 largest companies in 2019's Fortune Global 500 list, amounting to $10.9 trillion dollars a year globally.[596]

The authors claim that "[i]f American women earned minimum wage for the unpaid work they do around the house and caring for relatives, they would have made $1.5 trillion [in 2019]."[597] While the U.S. is not the worst among nations in exploiting shadow labor from women, it is certainly not among the best of nations. Canada, Germany, France, the Netherlands, Belgium, and other countries have far greater gender parity.[598] In some countries the problem is more glaring than others; in India women report spending six hours a day managing their homes, while "Indian men spend a paltry 52 minutes."[599] The gaps are least pronounced in Norway, Denmark, and Sweden, where state-subsidized programs "provide care for children and older people."[600]

In 1994, Professor Julie Brines observed that asymmetries in workforce labor correlated to unevenness in household la-

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593 *See, e.g.*, Brines, *supra* note 527.

594 *See id.* at 652.

595 Gus Wezerek & Kristen R. Ghodsee, *Women's Unpaid Labor is Worth $10,900,000,000,000*, N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/interactive/2020/03/04/opinion/women-unpaid-labor.html [https://perma.cc/45VG-PQLJ].

596 *Id.*

597 *Id.*

598 *Id.*

599 *Id.*

600 *Id.*

bor.[601] Such asymmetries resulted in women's tangible, measurable, but uncompensated labor in the household. This creates not only a pay problem, according to Brines, but also results in unequal relationships between men and women in the household.[602] She writes, "The advantage such asymmetry confers upon the main breadwinner paves the way for exploitation, although the extraction of what might be considered the surplus labor of dependents need not arise through direct coercion or exploitation."[603]

Researchers, academics, and more recently policy makers attempt to account for the scope and scale of women's uncompensated household and caregiving labor, and debate whether that labor should be compensated. If it should be compensated, who should pay for it? Should household labor be viewed in market terms or through some other lens? Are women further exploited if their household labor is viewed in economic terms? According to Professor Katharine Silbaugh, denying the reality of an existing market "assists in maintaining the image of the unpaid household laborer as a nonworker" and creates an illusion of work as simply an expression of affections demonstrated through her activities.[604] Does the argument hold up that the difference between household labor and business labor is that the former involves relationships? The majority of America's companies are closely held corporations, the majority of which are family-owned.[605]

Professor Katharine Baker suggested more than a decade ago that there were two possible ways to address uncompensated caregiving and household labor. Men could compensate their wives for household labor[606] or the state could do so.[607] She claimed if men were to do so, it might achieve certain social benefits, such as shifting values about family breadwinner and in turn "decrease[] the amount of control" men exert over women.[608]

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601 Brines, *supra* note 527, at 659.
602 *Id.* at 656.
603 *Id.*
604 Silbaugh, *supra* note 527, at103.
605 Inc. Editorial & Inc. Staff, *Closely Held Corporations*, INC. (Feb. 6, 2020), https://www.inc.com/encyclopedia/closely-held-corporations.html [https://perma.cc/M4VP-KFFH].
606 Baker, *supra* note 527 at 615.
607 *Id.* at 604.
608 *Id.* at 615.

D. Reordered Public Policy: Rethinking Affirmative Action

How do we reframe these debates to forge effective, measurable change? Some scholars suggest that to get to the heart of women's labor inequality more data and auditing are necessary.[609] While auditing and data collection are important, they are not enough. Indeed, dissemination of the data, which is important, is also not enough. Institutions must be committed to alleviating the sex-based pay gaps in their industries and identifying the ways in which the gaps materialize. For example, some pay gaps initiate upon women's entry or reentry into various workforces.[610] Studies often point to women taking breaks in their careers to care for family members (children or senior care) as a reason for gender pay gaps.[611] However, this "does not fully account for the gap. Neither do differences in education, experience, and occupation, as we can see from the controlled gender pay gap. It also doesn't negate sexism in the workplace."[612]

Instead, factors that may be more difficult to measure, such as implicit and explicit bias, may play the biggest role in pay gaps. Moreover, underlying stereotypes may be used as legitimate reasons to undercut women's pay even when doing so does not correlate to effectiveness on the job. For example, that women take a break from employment, seek opportunities to work remotely, or desire to work part time are sometimes used as justifications for unequal and unfair pay, when in fact they have nothing to do with capacities and competencies in job performance. This may account for why forty-two percent of women report experiencing sex discrimination in the workforce compared to twenty-two percent of men.[613]

One pay scale study reports, "[W]omen often incur a pay penalty upon returning to work after an absence."[614] Some gaps reflect the glass elevator, where men are paid more in

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609 *See, e.g.*, Donna Bobbitt-Zeher, *Gender Discrimination at Work: Connecting Gender Stereotypes, Institutional Policies, and Gender Composition of Workplace*, 25 GENDER & SOC'Y 764, 768 (2011), https://journals.sagepub.com/doi/10.1177/0891243211424741 [https://perma.cc/T9AE-8YBT].

610 *The State of the Gender Pay Gap in 2020*, PAYSCALE, https://www.payscale.com/data/gender-pay-gap [https://perma.cc/8TR2-8K4Z] (last visited Sept. 13, 2020).

611 *Id.*

612 *Id.*

613 Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/ [https://perma.cc/DUV7-C58Q].

614 *The State of the Gender Pay Gap in 2020*, supra note 610.

professions that are dominated by women. A few examples of the glass elevator include women elementary school teachers,[615] women flight attendants,[616] and women nurses making less than their male counterparts.[617] These differences are not explained by education or ability. However, they do reflect ingrained practices of discrimination and inequality.

Thus, a failure to identify pay gaps is not the problem. Nor is identifying pay gaps alone the solution. Decades of research outline and document sex-based pay gaps and, in some industries, they commission their own studies.[618] The problem then is the failure to prioritize resolving the pay gap by implementing strategies to standardize pay and promotion scales such that women are not discriminated against on entry or reentry.

Based on data presented in Part III, even after identifying barriers to workforce entry and promotion, industries are not sufficiently engaging in meaningful rigorous steps to turn the page and dismantle enduring obstacles to women's inclusion and ascendance within their organizations. Diversity, equity, and inclusion ("DEI") trainings, while increasingly popular are broadly criticized by those who support dismantling barriers and those who seem indifferent or willing only to take an incremental approach.[619] Those who fall in the former articulate skepticism in trainings producing urgent and meaningful results.[620] Those in the latter category claim DEI trainings trigger guilt and leave them without the tools to make change.[621]

Despite those debates, a trickling of women into various industries challenged by sex gaps will not produce transformative effects, break glass ceilings nor flatten the glass cliff. Neither has incrementalism leveled the playing field. In two generations of women gaining experience through education and licensure across fields ranging from medicine to law, the glass ceiling has been reinforced rather than dismantled. In-

615 *Id.*
616 *Id.*
617 *Id.*
618 *See, e.g.*, MEHUL PATEL, HIRED, THE WEIGHT OF EXPECTATIONS: THE 2020 STATE OF WAGE INEQUALITY IN THE WORKPLACE (2020), https://hired.com/h/wage-inequality-report#wage-gap [https://perma.cc/5MY2-LTWH] (finding a pay gap in the technology industry).
619 *See, e.g.*, Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), https://hbr.org/2016/07/why-diversity-programs-fail [https://perma.cc/PG7W-GFZN].
620 *See, e.g.*, *id.*
621 *See, e.g.*, *id.*

stead, research indicates that incrementalism can and has produced tokenism, isolation, and even backlash.[622]

If the goal of various organizations is to increase the representation of women and improve the likelihood of their success and retention, the targeted solutions should be aggressive, and confirm the probability of achievement. Turning to critical mass indicators, affirmative action, and quotas may hold answers.

Affirmative action has come under attack in American law and society. Among the reasons articulated for opposition to affirmative action are that unqualified individuals receive an unfair advantage, that affirmative action hurts better qualified individuals,[623] and that merit-based decision-making is supplanted by unclear, biased, vague, and ambiguous standards.[624] Some argue that affirmative action has no standards at all.[625] Still others claim that affirmative action programs produce poor results for the people they aim to help.[626] Those who make this claim suggest that ironically, the beneficiaries of affirmative action are worse off for having gained admission or entry.

These suppositions are worth scrutinizing rather than taking for granted as accurate and unbiased. Really, it seems the debate is not over whether affirmative action achieves its goal, such as moving individuals who otherwise would not gain admission, be hired, or advance over the threshold. Affirmative action accomplishes that. The point of resistance seems to be the question argued more than a century ago in Supreme Court cases, whether certain marginalized communities are *deserving* of entry and advancement. *Have they earned it?* Moreover, given the empirical data on hand, "earning it" has less to do

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622 *See* Joyce He & Sarah Kaplan, *The debate about quotas*, INST. FOR GENDER & ECON. (Oct. 26, 2017), https://www.gendereconomy.org/the-debate-about-quotas/ [https://perma.cc/Q5ZY-KQWN].

623 *See* Louis Menand, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action [https://perma.cc/27MM-WMLB].

624 *See* Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action [https://perma.cc/7929-XHTJ].

625 *See* Dorothy Van Soest, *Multiculturalism and Social Work Education: The Non-Debate about Competing Perspectives*, 31 J. SOC. WORK EDUC. 55, 60 (1995).

626 Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, THE ATLANTIC (Oct. 2, 2012), https://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/ [https://perma.cc/BHL8-NWVM].

with objective criteria than subjective notions as to who belongs or is a "good fit."

1. *White Male Public Policy or Affirmative Action?*

In other words, do the anti-affirmative action arguments still hold up given three important datapoints? First, affirmative action achieves transformative results and has for white males and corporations.[627] Historically, government and private industries actively practiced affirmative action to benefit white communities, especially white males, including the Servicemen's Readjustment Act of 1944 (commonly known as the G.I. Bill), which provided a range of benefits for veterans returning from World War II and largely excluded African Americans.[628] Congress enacted the bill in 1944 and President Franklin Roosevelt signed it into law. The bill provided financial benefits for veterans, including low-interest loans, low-cost mortgages, unemployment compensation, and dedicated payments for tuition to attend college, vocational schools, or complete high school.[629]

Some may argue that the G.I. Bill was harmful public policy because of racial discrimination in its implementation.[630] Today, government agencies are more forthright about federal policies that discriminated against African Americans and the G.I. Bill is no exception.[631] That the G.I. Bill excluded African Americans signifies that the policy implementation was normatively wrong, but the policy itself to help provide a foothold for veterans returning from war made for transformational public policy, spurred economic growth, provided the means for a broad scale of men to become educated, and ultimately pro-

627 Ira Katznelson, *Making Affirmative Action White Again*, N.Y. TIMES (Aug. 12, 2017) https://www.nytimes.com/2017/08/12/opinion/sunday/making-affirmative-action-white-again.html [https://perma.cc/9VFZ-UM2X].

628 Erin Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, History (Sept. 30, 2019), http://history.com/new/gi-bill-black-wwii-veterans-benefits [https://perma.cc/CF9J-EN6B]; GLENN C. ALTSCHULER & STUART M. BLUMIN, THE GI BILL: A NEW DEAL FOR VETERANS (2009).

629 Greg Winter, *From Combat to Campus on the G.I. Bill*, N.Y. TIMES (Jan. 16, 2005), https://www.nytimes.com/2005/01/16/education/edlife/from-combat-to-campus-on-the-gi-bill.html [https://perma.cc/JKC9-7AMX].

630 *See* Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, J. BLACKS HIGHER EDUC. 104, 106 (1994-1995).

631 *See, e.g.*, Brandon Weber, *How African American WWII Veterans Were Scorned by the G.I. Bill*, PROGRESSIVE (Nov. 10, 2017), https://progressive.org/dispatches/how-african-american-wwii-veterans-were-scorned-by-the-g-i-b/ [https://perma.cc/K2T5-X4BB].

vided an entry way into the middle class for individuals whose communities had previously been shut out.[632]

Similar public policies included the Homestead Act of 1862 (permitted white Americans to "lay claim to federal lands if they lived on the land and improved it"); New Deal legislation and the creation of the National Housing Act of 1934 (which promoted entry into the middle class through home ownership); the Glass-Steagall Act of 1933 (created the Federal Deposit Insurance Corporation, which "insures that the savings of average Americans are not lost if a bank fails"); and the National Labor Relations Act of 1935 (considered one of the greatest labor achievements by easing the way for union membership and collective bargaining), among others.[633] These affirmative practices have generally fallen under the framework or banner of "public policy" rather than the more taboo-laden term, "affirmative action."

2. *Meeting Systemic Discrimination with Affirmative Action*

Second, the U.S. government and private industries actively practiced *de jure* and *de facto* discrimination to exclude women in education, employment, and civil society based on sex-status. Legislative enactments formally barred women from advancing in myriad ways, with such policies upheld by courts. Courts were not neutral in this regard.[634] They upheld discriminatory laws.[635] In the common law, they objectified women as property or property-life of husbands and fathers.[636] They denied women recourse in cases of sexual and physical battery within marriages. In the criminal law they furthered the exemption of husbands from prosecution in cases of marital rape.[637] In other words, courts monopolized the workplace

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632 *Id.*

633 Nick Bunker, *The Top 10 Middle-Class Acts of Congress*, CTR. FOR AM. PROGRESS (Jan. 19, 2012, 9:00 AM), https://www.americanprogress.org/issues/economy/news/2012/01/19/10944/the-top-10-middle-class-acts-of-congress/ [https://perma.cc/P5ST-3AFG].

634 *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1873); Hoyt v. Florida, 368 U.S. 57 (1961); Muller v. Oregon, 208 U.S. 412 (1908); Minor v. Happersett, 53 Mo. 58 (1873).

635 *See, e.g.*, Bradwell, 83 U.S. 130; Hoyt, 368 U.S. 57; Muller, 208 U.S. 412; Minor, 53 Mo. 58.

636 Wendy Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L. J. 641, 654–55 (1981).

637 Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 n.112, 1162–63 n.192 (1986).

for men and placed their imprimatur on obstacles impeding women's exercise of agency, autonomy, and privacy. When considering the measures necessary for corrective action in women's employment, taking into account past discrimination is relevant. This point related to government is not belabored here as Parts II and III take up those concerns.

However, women experienced systemic *de jure* and *de facto* discrimination not only in the public sector but also in private industry. *International Union v. Johnson Controls*[638] is one example. In the decade preceding *International Union,* leading industrial organizations enacted fetal protection laws framed as "medical regulations" or "medical policies."[639] These policies barred women of a certain age from some occupations.[640] Some policies excluded women from most or all jobs in the companies. Although explicitly discriminatory, the policies were justified based on the possibility that a woman might become pregnant at some point.[641]

Among the companies that enacted fetal protection rules were American Cyanid, Allied Chemicals, General Motors, B.F. Goodrich, St. Joseph Zinc, Gulf Oil, Dow Chemical, DuPont, BASF Wyandotte, Bunker Hill Smelting, Eastman Kodak, Firestone Tire & Rubber, Globe Union, Olin Corporation, Union Carbide and Monsanto.[642] Generally, the companies claimed their policies did not stem from the desire to discriminate against women.[643] Rather, their concern was the protection of fetal life if the women became pregnant.[644] However, the policies blanketly applied and were enforced with no differentiation or accounting for sexual orientation, desire to bear children, or marital status.[645]

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638 499 U.S. 187, 188 (1991). *See* Mary Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Finley, *supra* note 637); Hannah Arterian Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980); Linda G. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798, 802–06 (1981); Williams, *supra* note 636.

639 MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 182 (2020).

640 *See* Joan Bertrin, *Reproductive Hazards in the Workplace*, *in* REPRODUCTIVE LAWS FOR THE 1990S 277, 301 n.5 (Sherrill Cohen & Nadine Taub eds., 1989).

641 Furnish, *supra* note 638, at 75.

642 GOODWIN, *supra* note 639, at 182.

643 *Id.*

644 *Id.*

645 *Id.*

For example, American Cyanide introduced a fetal protection policy in 1978.[646] Its plant, located in the rolling hills of an otherwise economically-depressed state (West Virginia), employed hundreds of workers.[647] The wages were competitive.[648] However, of among 500 employees only five percent were women.[649] Senior management met with its twenty-five female employees to inform them that women fifteen and forty years of age would be prohibited from working in most positions at the plant. Other companies enacted similar fetal protection regulations, effectively barring women from employment in many of the better paying jobs at manufacturing plants.[650]

As civil rights legislation was enacted to reduce or eliminate barriers to women's employment opportunities, companies created a blend of *de facto* and *de jure* discrimination strategies, including fetal protection policies. Fetal protectionist rules in the workplace served not only to bar women from gainful employment but also to secure a monopoly for men in coveted factory jobs. Fetal protection rules provided a proxy for sex-based discrimination. In *International Union,* the company established an internal fetal protection policy much like that of American Cyanide.[651] In the summer of 1977, the company issued "its first official policy concerning its employment of women in lead-exposure work."[652] The policy stated:

> Protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.
>
> . . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.[653]

Several years later, Johnson Controls modified their policy from one that warned female employees about the risks of lead exposure to a company rule that prohibited women from com-

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646 *Id.* at 182–83.
647 *Id.*
648 *Id.*
649 *Id.*
650 *Id.*
651 Int'l Union v. Johnson Controls, 499 U.S. 187, 191–92 (1991).
652 *Id.* at 191.
653 *Id.*

peting for manufacturing jobs that could expose them to lead.[654] The company barred all women, except those who could prove infertility, from holding certain jobs that could expose them to lead.[655] The new fetal protection policy stated: "It is Johnson Controls policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights."[656]

The Court found the fetal protection policy "obvious" in its "bias" against women.[657] The Court noted that fertile men were not subjected to the burdensome employment restrictions imposed on female employees. According to the Court, fertile men were afforded the "choice as to whether they wish to risk their reproductive health for a particular job."[658] The Court revisited Section 703(a) of the Civil Rights Act of 1964,[659] explaining that it "prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status."[660]

In other words, sex-based policy expressed as "protecting women's unconceived offspring" was not benign.[661] To the contrary, such policies constitute sex-based discrimination. Any assumptions otherwise are "incorrect."[662] The Court found the policy facially impermissible discrimination.[663] For example, the fetal protection policy classified its employees on the basis of gender and childbearing capacity rather than just fertility.[664] Moreover, the company did not care to protect its male employee's future born from possible risk of lead exposure, despite, as the record showed, "the debilitating effect of lead exposure on the male reproductive system," only Johnson's female employees.[665]

Given systemic public and private discrimination against women in the labor force, can anything less than concerted

654 GOODWIN, *supra* note 639, at 183.
655 *Int'l Union*, 499 U.S. at 191–92.
656 *Id.* at 192.
657 *Id.* at 197.
658 *Id.*
659 42 U.S.C. § 2000e-2(a) (1964).
660 *Int'l Union*, 499 U.S. at 197.
661 *Id.* at 198
662 *Id.*
663 *Id.*
664 *Id.*
665 *Id.*

action be justified? Decades of empirical data, including legislation, court cases, company policies, and research studies show women who are equally prepared as men—if not more so based on education—still suffer the price of admission and advancement. With this in mind, are the anti-affirmative action arguments even valid? For those who attack affirmative action programs, are they simply unwilling to move the needle and share space with women?[666]

If one is to take seriously a history of employment discrimination that unfairly advantages men (even in the present) to the detriment of women, one way to resolve it, is to implement strategies and policies that discontinue those practices. However, that alone will not achieve workplace parity. *Why?* Given the dramatic disparities that continue to define the American workforce, simply offering women an equal shot at employment or leadership will not reorganize organizations such that parity results sooner than later. Achieving proportional parity at a more rigorous pace will require deliberate or affirmative strategies and actions.

CONCLUSION

On March 13, 2020, Breonna Taylor died in a hail of gunfire. She occupied a duality: essential, but dispensable. Important to the battle on COVID-19, but disposable like the masks and gloves she wore while on duty. Innocent, but also collateral damage in a system wherein racism in policing manifests in devastating, destructive, and structural ways. Her killing invites legitimate expressions of anger and frustration in response to lingering structural inequality. Yet, her death is more than a touchpoint for grief, it is a trigger for reform and an opportunity to reexamine and critique the devaluation of women in society and in the workforce—and hold law to account. In other words, this Article takes seriously the call to shine a light and to render visible that which has been cloaked in darkness.

In that vein, this Article explains how myths persist related to women in the workforce and women's work, including presumptions regarding their levels of educational achievement and seniority in the household. Researching, acknowledging, and dismantling barriers that impede women's entry and advancement into various labor forces will address some of struc-

666 *See generally* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 152 (2006).

tural workforce problems. Providing solutions and pathways forward enables motivated employers with the tools to diversify workplaces and rethink institutional policies that hinder women's growth and success. However, these efforts will not on their own resolve two of the biggest obstacles: social stereotypes that undermine women's credibility in the workforce and male supremacy or misogyny in the workforce.

That is, COVID-19 exposes preexisting institutional and infrastructural social problems laid bare by a suffocating disease. The Article recognizes that far too often women's invisibility reflects dual discriminations of race or ethnicity and sex and sometimes a triad of oppressions, marked by homophobia, racism, and sexism. Even while the concerns of this Article antedated COVID-19, the deadly virus provides a crucial touchpoint for reflection and intervention. For example, with the rise of women in political office and the expanded force of women elected and nominated in the judiciary, some may be doubtful of the Article's premise. In other words, the gains of the few might obscure the deprivation of the many.

Potential doubts or skepticism about the premise of investigating the enduring record of sexism and its contemporary afflictions, during COVID-19 are easily answered by a broader record. In recent years, feminist scholars and journalists intensified the focus on women's invisibility across various discourses. Their effort, to retell and remap science,[667]

667 *See* Margaret W. Rossiter, *The Matthew Matilda Effect in Science*, 23 SOC. STUD. SCI. 325, 325 (1993); Beryl Lieff Benderly, *Rosalind Franklin and the Damage of Gender Harassment,* SCI., (Aug. 1, 2018, 1:20 PM),https://www.sciencemag.org/careers/2018/08/rosalind-franklin-and-damage-gender-harassment [https://perma.cc/QC74-NHYT] ("Franklin, one of the very few women doing world-class research in the 1950s, is among history's most prominent subjects of what historian of science Margaret Rossiter terms the 'Matilda Effect': the practice of ascribing women's accomplishments to men").

technology,[668] law,[669] medicine,[670] history,[671] and other discourses bears fruit and invites deeper examination and further exploration. This Article takes on that challenge.

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668 *See, e.g.*, MARIE HICKS, PROGRAMMED INEQUALITY: HOW BRITAIN DISCARDED WOMEN TECHNOLOGISTS AND LOST ITS EDGE IN COMPUTING 1–19 (2017); Lori Andrews, *The Technology Enterprise: Systemic Bias Against Women*, 9 U.C. IRVINE L. REV. 1035, 1035 (2019) ("Technology could provide a livelihood for women and enhance their lives, but all too often technology is designed by men, evaluated by men, marketed by men, and mandated by men—all in ways that disadvantage and even harm women."); Sage Isabella Cammers-Goodwin, *"Tech:" The Curse and The Cure: Why and How Silicon Valley Should Support Economic Security*, 9 U.C. IRVINE L. REV. 1063, 1071–72 (2019) ("Indeed, the most invisible of San Francisco's housing population are pregnant women.").

669 *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION AND THE MEANING OF LIBERTY 3–22 (1997); GOODWIN, *supra* note 639.

670 *See, e.g.*, Briony Hudson, *The 'Hidden' History of Women in Medicine: A Curator's Thoughts*, ROYAL C. COLLEGE OF PHYSICIANS (Jan. 15, 2019), https://history.rcplondon.ac.uk/blog/hidden-history-women-medicine-curator-sthoughts [https://perma.cc/9XGU-YCUK] ("The hidden nature of women's work often relates to their exclusion from the formal sphere of employment until recent years. This is certainly true for medicine: the Royal College of Physicians (RCP) used the silence on women in its founding documents as its rationale for their exclusion from its membership until the early twentieth century.").

671 *See, e.g.*, MARTHA JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL 227–65 (2020); DAINA RAMEY BERRY & KALI NICOLE GROSS, A BLACK WOMEN'S HISTORY OF THE UNITED STATES: REVISIONING AMERICAN HISTORY 2–9 (2020); MARTHA S, JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 160 (2018).

The Hazards Of Female Lawyers Being 'Office Moms'

By **U.S. Circuit Judge Margaret McKeown and Roberta Liebenberg**

Margaret McKeown

Roberta Liebenberg

Women are frequently credited with being the glue or the office mom who hold teams together and create a supportive office environment. From bringing the birthday cake to being the cheerleaders who lift morale or inspire the team, these tasks fall disproportionately on women in the workplace.

The world of female lawyers is no different. Much like the book by Rebecca Shambaugh from long ago, "It's Not a Glass Ceiling, It's a Sticky Floor," the question is how women can get credit for this important work without getting stuck, becoming glued down or being taken for granted.

A recent New York Times article notes that the COVID-19 pandemic work-from-home model has put an end to much of this extra office work that contributes to an organization's culture and community but, ironically, this absence has drawn attention to its importance.[1]

As lawyers begin to return to work in their offices, now is a good time to recognize and reward office work that promotes morale, camaraderie, loyalty and interpersonal engagement — and thus helps to maintain organizational well-being. This work is generally performed by women, even though they are often burdened with the primary responsibility for child care and other family obligations on top of demanding billable hour requirements.

The ongoing transition to new post-pandemic work models, including hybrid work arrangements, offers a unique opportunity to rethink prior assumptions and practices.

Office work has also been described as office housework, glue work, organizational citizenship, the second shift and the double burden — and those who perform these tasks have many monikers, including "office mom," "good soldier," "model citizen" and "the full package." This work is often associated with low-visibility and low-promotability tasks.

Such work helps to keep the office, the team or the case functioning smoothly, but doesn't contribute positively to an individual's performance evaluation. In contrast, glamour work or high-promotability tasks — such as pitching for a new matter for a major client or a new client or leading a client team — are career-enhancing assignments that get noticed, and more importantly in law firms, get compensated. One step forward would be to recognize and reward those who perform this glue work and find a better moniker.

Notably, office work does not always mean trivial work — it can be critical work that is just undervalued or not rewarded. The reality is that this work includes picking the restaurant for the important client event, intervening as the peacemaker in a team conflict and simply being willing to listen to everyone else's problems — from the exhausted rainmaker partner to the neophyte associate.

Other examples include helping a colleague with a presentation, leading the mentoring program for junior associates, serving on diversity or hiring committees, coordinating the summer program, planning social gatherings, picking up the cake for a colleague's birthday,

cleaning the communal kitchen, taking notes for the group at a case conference, making sure everyone signs the get-well card and holding Zoom check-in meetings with colleagues just to see how they are doing.

The 2021 "Women in the Workplace" study by McKinsey & Company and Lean In highlighted the important glue work performed by female leaders during the pandemic. Survey respondents reported that female managers were far more likely than their male counterparts to check in on employees' well-being, provide emotional support, assist employees in navigating work-life challenges, ensure that employees' workloads were manageable, and help prevent or mitigate burnout.[2]

A separate study found that female leaders are investing 25% more time than their male counterparts in making their teams' workloads manageable and helping them navigate work-life challenges, and 50% more time providing emotional support.[3] Some have characterized this role as talking people off the ledge.

Distressingly, despite its importance, this work goes generally unrecognized and unrewarded. The McKinsey-Lean In study found that senior-level women are twice as likely as senior-level men to spend substantial time on diversity, equity and inclusion work that falls outside their formal job responsibilities.[4] Significantly, although 70% of companies say that work done to promote DEI is critical, over 75% of companies say this work is not recognized or rewarded in formal evaluations or performance reviews.[5]

The examples of glue work and its significant impact on work life are not just anecdotal but are well documented in social science research. For example, a 2001 study in the Journal of Organizational Behavior illustrates how a manager's perception of gender roles can influence the type of jobs and behavior the supervisor expects.[6]

The authors wrote:

> Whether or not these expected behaviors are "objectively" required or not is beside the point: they are expected by the observer as part of the employee's role, and the employee may be implicitly or explicitly rewarded for performing them, or implicitly or explicitly punished for failing to do so.[7]

This finding was underscored by an experiment published in the Journal of Applied Psychology in 2005.[8] The researchers sought to compare reactions to both men and women withholding and demonstrating altruistic citizenship behavior in a work setting. For staying late and helping, a man was rated 14% more favorably than a woman for the same behavior. When declining to stay and help, a woman was rated 12% lower than a man who did the same.

Field and experimental studies also found these gender differentials.[9] The researchers performed two experiments. In one, they gave undesirable tasks in a mixed-gender environment and found that women volunteered twice as often as men, but only when it was clear no one else was going to step forward.

In the second experiment, they gave an undesirable task to an all-male group and found that men volunteered at the same rate as women. Their studies reflected that "an individual's willingness to volunteer is not fixed and responds to the gender composition of the group,"[10] thus undermining the assumption that women just prefer or want to perform these types of jobs.

Regarding lawyers in particular, in 2019 the American Bar Association's Commission on Women In the Profession and the Minority Corporate Counsel Association published an important report, "You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession," using data gathered by the Center for WorkLife Law at the University of California, Hastings College of the Law.[11]

The center gathered data from 2,827 respondents, along with comments from 525 participants. According to the study, white women were 21% more likely — and women of color 18% more likely — than white men to perform administrative tasks, such as taking notes in a meeting.

Given this data as well as the realities in the workplace, law firms and other legal employers should consider implementing the best practices recommended below that are intended to rectify the gender imbalance in office work and ensure that those who perform this work are appropriately recognized and compensated for their contributions.

Recommended Best Practices for Employers

Make the assignments of office work gender-neutral.

Research shows that women are socialized to be helpful and cooperative, thus prompting them to raise their hands and agree to take on office work. Leaders should take concrete steps to rotate assignments of office work so that there is no gender, race or other imbalance.

Many times, male leaders are reluctant to assign these types of tasks to men because they believe men will react adversely to being asked to do them. Utilizing a rotation system makes it clear that both men and women will be responsible for sharing these duties and removes bias or preference, and instead standardizes the responsibility for allocating these duties equally.

Better yet, recognize that these tasks are part of making the office run smoothly and, if possible, respectfully assign some ministerial tasks to administrative staff whose job description includes these tasks. Some law firms have looked to the tech industry, which has created the role of chief people officer, a position that aims to strengthen an organization's culture and sense of community.

Recognize implicit bias.

It is important that leaders examine how they are assigning office work and understand why many female lawyers and female lawyers of color do not want to be pigeonholed as the office mom. Some of these patterns arise from historical practices, not necessarily animus on the part of the supervisor.

Providing training for leaders and others in the organization offers an opportunity to understand unconscious bias and the tools necessary to combat it. Invest in leadership and mentoring programs.

Use metrics.

Office work is often done in the background, so it can be hard to appreciate the work and who is doing it.

Once cognizant of the implicit biases that underlie office work, leaders should use metrics to track who is being assigned the work, what types of work are being assigned and whether this work is included as part of performance evaluations or year-end compensation or bonuses.

A quick survey of lawyers can help ascertain whether lawyers have been asked to volunteer or were "voluntold" to perform office work, how many times they played that role and how many hours they devoted to those tasks. In addition, leaders should take internal surveys to see how their responses match up to their team members' perceptions and responses.

Reward lawyers for office work that builds a more inclusive and supportive culture.

If female lawyers and female lawyers of color are stepping up to perform tasks that enhance team performance, good citizenship and lawyer well-being, and promote morale and a greater sense of belonging, legal organizations should recognize the importance of this work and credit those who do it.

Hours devoted to strengthening the connective tissue of organizations should be included in performance reviews, considered in the calculus for billable hour requirements and factored into compensation and bonuses.

By doing so, leaders can show that they are truly committed to changing workplace culture and are not merely paying lip service to reforms. In the same way that pro bono work often went uncompensated and undervalued for decades but then became part of the expectation for lawyers, so too can glue work become legitimized.

Recommended Best Practices for Individual Female Lawyers (and Others Too!)

Find ways to say yes and just say no.

Despite calls for change, some say BigLaw's "never say no" culture still prevails.[12]

Female lawyers face a Catch-22 — to succeed they need to say yes, even to office work, and yet they are disadvantaged whether they say yes or no.

When office work is being assigned, don't immediately volunteer. Suggest that a rotation system be utilized or that administrative tasks be spread out among the team.

The reality is that women are walking a tightrope in these situations — saying no may be seen as selfish and not collaborative; saying yes may perpetuate an already bad situation. So find ways to say yes and yet be prepared to just say no when appropriate.

Keep your own set of metrics.

Women should make an effort to push their office work out of the shadows and into the daylight. One way to do that is to keep a record of these tasks for purposes of performance reviews and conversations about workload balancing. While bringing a cake for a birthday is not particularly noteworthy, working on a firm committee is important and worth highlighting.

If your organization doesn't track these tasks in a nonbillable category, keep your own log. And keep an eye out for who gets tapped for the high-profile work.

Volunteer for more high-visibility, career-enhancing opportunities.

Female lawyers should volunteer for high-visibility projects on the team, like working directly with the client, participating in or even leading the pitch for new work or speaking at a court appearance.

Consider volunteering for activities that put you in the limelight for client development and showcase your expertise, such as overseeing an in-house continuing legal education session for lawyers and clients, being seconded to a client, writing articles or participating in speaking engagements. It is important that leaders assign projects to women and women of color that will help them to develop their career skills and enhance their profiles with clients and others in the organization.

Volunteering can be a positive experience — just be prepared to excel in what you ask for.

Don't let yourself be seen as the perpetual caterer or party planner.

Once again, women need to be firm that they are not going to be the ones who will always order meals or plan the next office birthday or farewell party.

Spirit events can be fun and productive, but not if you become the perpetual caterer or organizer.

Seek out allies and mentors.

If a leader continues to assign office work only to women on the team, it may be more productive if the whole team — both men and women — collectively approaches the leader to explain why this is unfair.

It is also advisable to seek out a trusted adviser or mentor who can advocate on your behalf so that this imbalance is rectified. Your allies are fellow associates as well as more senior lawyers, plus affinity groups within the organization, such as the women's task force, the diversity task force and the LGBTQ+ task force.

Conclusion

Office work and glue tasks make valuable contributions to the culture of an organization, and therefore these tasks need to be formalized, recognized and celebrated.

Importantly, the work needs to be distributed equitably between men and women, and leaders need to step up to this challenge.

The takeaway of this article is not that women should stop volunteering or contributing to the well-being of the firm or the team, but rather that these efforts should receive credit.

Recognizing and rewarding office work is a win-win, as it incentivizes the performance of this work, contributes to an organization's culture, improves morale and engagement, and enables women who do this important work to have it considered as part of their year-end performance reviews and as part of their salary or bonus.

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Judge McKeown's externs, Lindsey Tanita and Nikta Shahbaz, contributed to this article.

[1] Jessica Grose, Goodbye to the 'Office Mom,' N.Y. Times (Sept. 7, 2021), https://www.nytimes.com/2021/09/03/business/goodbye-office-mom.html.

[2] Women in the Workplace Study (Sept. 2021), at 18.

[3] Reshima Kapadia, "Progress in Promoting Women to Top Corporate Jobs is Still Lacking. Why It Could Get Worse," Barron's (Sept. 27, 2021).

[4] Women in the Workplace Study, at 19.

[5] Id. at 21.

[6] Deborah L. Kidder & Judi McLean Parks, The Good Soldier: Who is S(he)?, 22 Journal of Organizational Behavior 939 (2001).

[7] Id. at 940.

[8] Madeline E. Heilman & Julie J. Chen, Same Behavior, Different Consequences: Reactions to Men's and Women's Altruistic Citizenship Behavior, 90 Journal of Applied Psychology 431 (2005).

[9] Linda Babcock, Maria P. Recalde, Lise Vesterlund & Laurie Weingart, Gender Differences in Accepting and Receiving Requests for Tasks with Low Promotability, 107 American Economic Review 714 (2017).

[10] Id. at 743.

[11] Commission on Women in the Profession & Minority Corporate Counsel Association, "You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession" (2019).

[12] Aebra Coe, BigLaw's 'Never say No' Culture Lasts Amid Calls for Reform, Law 360 (Oct. 26, 2021), https://www.law360.com/articles/1434470/biglaw-s-never-say-no-culture-lasts-amid-calls-for-reform.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

LOCAL RULES OF COURT

EFFECTIVE JANUARY 1, 2017

TABLE OF CONTENTS

Title One. General Governance of Judicial and Non-Judicial Court Operations

Chapter 1. Administrative Rules

Rule 1.1. Adoption and Amendment of Rules

(a) Rules

(1) These rules shall be known and cited as the Local Rules for the Superior Court of California, County of Contra Costa.

(2) Effective January 1, 2015, these rules have been substantially reorganized and renumbered to correspond with the structure of the California Rules of Court. They have also been restructured to incorporate all content previously included as Appendices into the body of the Rules. Nothing in these actions, nor in any subsequent amendments, shall be deemed to make invalid or ineffective any actions taken, before such enactments or amendments, in compliance with a rule or rules in effect at the time of such action.

(Rule 1.1(a)(2) revised effective 1/1/15)

(3) These rules may be amended at any time by a majority of the judges of the Superior Court of Contra Costa County.

(b) Good cause

The Court, for good cause, may waive the application of these rules in an individual case.

(Rule 1.1(b) revised effective 7/1/02)

(Rule 1.1 revised effective 1/1/15)

Rule 1.2. Department Designations

Certain departments shall operate under the following designations: Presiding Judge, Probate, Civil Litigation, Criminal, Juvenile, Family Law and Grand Jury, and they shall exercise the particular functions provided herein. There may be other departments as designated by the Presiding Judge.

(Rule 1.2 revised effective 1/1/15)

Rule 1.3. Presiding Judge

The Presiding Judge and Assistant Presiding Judge shall be selected and have the authority as provided in the California Rules of Court and shall serve for a term of two calendar years.

(Rule 1.3 revised effective 1/1/15)

Rule 1.4. Executive Committee

(a) The Executive Committee

The Executive Committee shall consist of: the Presiding Judge, the Assistant Presiding Judge, the Supervising Judge of the Civil, Criminal, Juvenile, Family Law, Probate and Traffic Divisions; the Supervising Judges in branch court locations, and the immediate past Presiding Judge. The Presiding Judge shall preside over the proceedings of the Executive Committee, but shall not be entitled to vote except to break ties.

(Rule 1.4(a) revised effective 1/1/14)

(b) Duties of the Executive Committee

(1) The Executive Committee shall review, in its discretion, the decisions and actions of the Presiding Judge and the Executive Officer and, where appropriate, recommend Court policy and procedures for implementation by the Presiding Judge and assist the Presiding Judge on all matters related to court administration.

(2) With the assistance of the Executive Officer, the Executive Committee shall adopt an annual budget for submission to the Judicial Council.

(3) The Executive Committee shall review and approve the organizational structure for the administration of the Court under the Court's Executive Officer.

(4) The Executive Committee shall review and recommend major personnel and administrative policies. Adoption of these policies shall be subject to the approval of a majority of the judges of the Superior Court.

(Rule 1.4(b) revised effective 1/1/10)

(Rule 1.4 revised effective 1/1/15)

Rule 1.5. Definition of Vacation for Judge

"A day of vacation" for a judge of the Contra Costa Superior Court is an approved absence of one full business day. Other absences from the court listed in California Rules of Court, Rule 10.603(c)(2) are excluded from this definition.

(Rule 1.5 revised effective 1/1/15)

Chapter 2. Media Coverage

Rule 1.20. Media Coverage

These procedures are adopted by the Court for the protection of all parties to ensure the secure and efficient handling of cases and events in all courtrooms of the Superior Court for Contra Costa County and related facilities including all buildings containing courtrooms. No filming, photography or electronic recording is permitted in the courthouses except as permitted in the courthouse or

the courtroom consistent with California Rules of Court, Rule 1.150 and this Local Court Rule. Violation of this rule may result in termination of media coverage, removal of equipment, contempt of court proceedings, or monetary sanctions as provided by law.

(Rule 1.20 revised effective 1/1/15)

Rule 1.21. Requests for Coverage

Requests for any type of video, still photography, or audio coverage, including pool cameras, must be made in compliance with California Rules of Court, Rule 1.150(e)(1), and submitted to the judicial officer assigned to hear the case on the, "Media Request to Photograph, Record, or Broadcast," (Judicial Council Form MC-500) accompanied by the, "Order on Media Request to Permit Coverage" (Judicial Council Form MC-510). For such requests that do not involve a courtroom, they must be submitted to the Presiding Judge on the same forms.

(Rule 1.21 revised effective 1/1/15)

Rule 1.22. Limitation on Coverage

The following limitations apply, unless an exception is expressly permitted by written judicial order or as permitted by of this rule 1.25.

(1) Videotaping, photographing, or electronic recording by the media and/or the general public is not permitted in any part of the courthouse, including but not limited to, lobby areas, halls, stairs, elevators, clerks' windows, or meeting rooms.

(2) Videotaping, photographic equipment, and electronic recording devices must be turned off while transporting them in any area of the Court.

(3) All audible electronic devices must be turned off when they are in courtrooms.

(4) Any photography of the interior of a courtroom through glass door windows or from between the two sets of doors to a courtroom is prohibited, even if an exception is granted for courthouse areas outside of the courtroom.

(5) When audio and/or video recording is not permitted by the judicial officer assigned to hear a case, electronic recording devices may be taken into the courtroom, only if they are not turned on and remain inside an enclosed case, bag or other container, unless otherwise prohibited by the judicial officer assigned to the case.

(Rule 1.22 revised effective 1/1/15)

Rule 1.23. Prohibited Coverage

In no event will coverage be allowed as to any of the following: [see California Rule or Court 1.150(e)(6)]

(1) A proceeding closed to the public (e.g.: juvenile cases);

(2) Jurors or spectators;

(3) Jury selection;

(4) Conferences between an attorney and client, witness, or aide;

(5) Conferences between attorneys;

(6) Conferences between counsel and a judicial officer at the bench ("sidebars"); or

(7) Proceedings held in chambers.

(Rule 1.23 revised effective 1/1/15)

Rule 1.24. Parking Limitations for Media Vehicles

No media vehicles may be parked in an unauthorized place surrounding the courthouse except with permission from the Presiding Judge. If at any time any vehicle is parked improperly, without such permission, the order permitting photographic and/or electronic coverage, in regard to the operator of that vehicle, may be revoked without further hearing.

(Rule 1.24 revised effective 1/1/16)

Rule 1.25. Areas in Court Facilities Where Media Activities are Authorized

Photos, news conferences, and on-camera statements to members of the media or the general public are allowed only in areas specified for that purpose. The following areas are allowed unless otherwise ordered by the Presiding Judge. Requests for exceptions must be made to the Presiding Judge.

(1) Wakefield Taylor Courthouse [725 Court Street, Martinez]. Front steps and sidewalk area as long as entering or exiting through the related doorways is not blocked in any way.

(2) A. F. Bray Courthouse [1020 Ward Street, Martinez]. Front entryway and sidewalk area as long as access to the exterior entrance to the courthouse is not blocked in any way.

(3) A. F. Bray Courthouse - Court Annex [entrance southeast of entry to courthouse]. Exterior entry to courtrooms or jail as long as access to the exterior entrance to the courthouse is not blocked in any way.

(4) Peter Spinetta Family Law Center [751 Pine Street, Martinez]. Front plaza and outside stairs as long as access to the exterior entrance to the courthouse is not blocked in any way.

(5) Richard E. Arnason Justice Center [1000 Center Drive, Pittsburg]. Area outside front foyer as long as the entrance is not blocked in any way.

(6) George D. Carroll Courthouse [100 37th Street, Richmond]. Courtyard in front of entrance to the courthouse as long as the entrance is not blocked in any way. [Access to adjacent County Health Building also may not be blocked or impacted in any way.]

(7) Walnut Creek Superior Court [640 Ygnacio Valley Road, Walnut Creek]. Southside sidewalk area to the west of the entry doors as long as the entrance is not blocked in any way.

Access to the courthouse means that a person or persons entering or leaving the building can pass by easily maintaining a distance of at least five feet between himself or herself and the media, interviewee, and any spectators to the media interview or conference.

(Rule 1.25 revised effective 1/1/16)

Rule 1.26. Video Recording and Still Photography

Unless otherwise specifically prohibited by a judicial officer, video recording and still photography are allowed for non-adversarial proceedings such as weddings or adoptions.

(Rule 1.26 revised effective 1/1/15)

Title Two. General and Administrative Rules

Chapter 1. Jurors

Rule 2.1. Selection of Prospective Jurors

Persons qualified to perform the public duty of jury service shall not be excused from such service except for the causes specified by Code of Civil Procedure Section 204. The Jury Commissioner shall be fair and impartial in the selection of prospective jurors, using the methods and processes under the supervision and control of the Court, best suited for these purposes. No prospective juror shall be rejected because of political affiliation, religious faith, disability, race, ethnicity, national origin, social or economic status, occupation, gender, sexual orientation, or gender identity.

(Rule 2.1 revised effective 1/1/16)

Rule 2.2. Juror Source Lists

The names of prospective trial jurors shall be taken from the last published and available registered voters list of Contra Costa County and the Department of Motor Vehicles list (see California Code of Civil Procedure Section 197(b)).

(Rule 2.2 revised effective 1/1/16)

Rule 2.3. Determining Juror Qualifications, Excluding Prospective Jurors

The Jury Commissioner shall determine the statutory qualifications of each prospective juror and the existence of any illness or ailments which would impair due performance of jury duty. The Jury Commissioner shall exclude from service all those he or she shall find are not competent to serve by law.

(Rule 2.3 revised effective 1/1/16)

Rule 2.4. Statutory Excusals of Jurors

The Jury Commissioner may grant an excuse from jury service to prospective jurors who qualify for excuse pursuant to statute and the California Rules of Court. Before granting or refusing any excuse from jury service, the Jury Commissioner shall fairly weigh and consider all pertinent data, documents and information submitted by or on behalf of the prospective juror and may require any person to answer under oath, orally or in written form, questions necessary to determine the person's qualifications and ability to serve as a prospective trial juror.

(Rule 2.4 revised effective 1/1/16)

Rule 2.5. Employment While Serving as Juror

The Court, counsel and litigants are entitled to the full attention of jurors and therefore jurors are not permitted to engage in any employment or occupation that would affect their ability to properly serve as jurors.

(Rule 2.5 revised effective 1/1/15)

Rule 2.6. Period of Juror Service

Jurors and prospective jurors shall be excused from further service or further call after they have appeared for one day or served upon a jury to a verdict, unless otherwise directed by the Court, until summoned again.

(Rule 2.6 revised effective 1/1/15)

Rule 2.7. Juror Telephone Standby

The Jury Commissioner shall utilize telephone standby for prospective jurors whenever practicable. Prospective jurors placed on telephone standby shall be given credit for service. Telephone standby jurors will not receive compensation.

(Rule 2.7 revised effective 1/1/15)

Rule 2.8. Jury Assembly Room

A jury assembly room has been provided for prospective jurors. Attorneys, litigants or witnesses are not permitted in the jury assembly room.

(Rule 2.8) revised effective 1/1/15)

Rule 2.9. REPEALED

Rule 2.10. Jury Fees

Jury fees shall be deposited and may be refunded as provided in Code of Civil Procedure Sections 631 and 631.3. No refund of the jury fees deposited shall be made unless the party making the deposit has given the Jury Commissioner written notice of settlement, of the granting of a motion

for continuance, or of the waiving of a jury, at least two (2) court days before the date set for trial, or by Order of Court.

(Rule 2.10 revised effective 1/1/15)

Chapter 2. Grand Jury

Rule 2.30. Grand Jury Impanelment

A Grand Jury shall be drawn and impaneled once each fiscal year by the appointed Grand Jury Judge.

(Rule 2.30 revised effective 1/1/16)

Rule 2.31. Solicitation for Grand Jury Applications

(1) On or before the first court day in March, the Jury Commissioner shall seek applications for appointment to the Grand Jury as follows:

(A) Mail or email notices to all relevant media outlets and public agencies;

(B) Post the application and information about grand jury service on the court's website at: www.cc-courts.org/grandjury

(C) Solicit referrals from social, community and political groups; and

(D) Solicit referrals from Judges and former Grand Jurors.

(2) All persons who submit an application are to receive a formal questionnaire which must be returned no later than April 15 of that year. This questionnaire will be available to anyone upon request from the Superior Court Secretary's Office.

(Rule 2.31(2) revised effective 1/1/16)

(Rule 2.31 revised effective 1/1/16)

Rule 2.32. Grand Jury Qualifications

The Jury Commissioner will assess the qualifications of each application according to the criteria specified under Part 2, Title 4, Chapter 2, Articles 1 and 2 of the Penal Code, and the referenced sections of the Code of Civil Procedure. The Jury Commissioner shall make such preliminary investigation of the applicants as may be directed by the Grand Jury Selection Committee.

(Rule 2.32 revised effective 1/1/16)

Rule 2.33. Grand Jury Selection Committee

The Grand Jury shall be selected in accordance with the standards and requirements of law. Accordingly, the Presiding Judge will appoint a Grand Jury Selection Committee of five (5) Judges. The selection process will be administered as follows:

(1) The Selection Committee will oversee the process by which sixty (60) applications are selected, making every reasonable effort to ensure proportional representation from supervisorial districts and sociological group representation.

(2) Each of the five Selection Committee Judges will interview twelve (12) applicants over a period of three (3) court days, allotting fifteen (15) minutes to each applicant. On the fourth day, the five Judges will meet, discuss the sixty (60) applicants and prepare a final list of thirty (30) names.

(3) The Selection Committee will present the list of thirty (30) names to the Superior Court Judges before June 1, at which time, the judges will vote whether or not to ratify and confirm the actions of the Grand Jury Selection Committee. Once approved by a majority of judges, the names shall constitute the Grand Jury list which shall be filed with the County Clerk and made a public record.

(Rule 2.33 revised effective 1/1/16)

Rule 2.34. Additional Grand Jury

The Presiding Judge may order and direct the impanelment, at any time, of one additional Grand Juror (see Penal Code Section 904.6).

(Rule 2.34 revised effective 1/1/16)

Rule 2.35. Sealing of Grand Jury Transcript

The filing party must serve all Motions to Seal a Grand Jury Transcript on all parties and the court reporter(s). When an Order is issued by the Court to seal a Grand Jury transcript, in whole or in part, the prevailing party must serve the Order on all parties and the court reporter(s).

(Rule 2.35 revised effective 1/1/06)

(Rule 2.35 revised effective 1/1/15)

Chapter 3. Attorney's Fees and Appointment of Counsel

Rule 2.40. Attorney's Fee Schedule

The following fee schedule is established for all cases where the obligation sued provides for attorney's fees, EXCEPT in Unlawful Detainer actions. This schedule will be used by the Clerk and the Court respectively to fix attorney's fees in default judgments entered pursuant to Code of

Civil Procedure Section 585 or judgment by the Court pursuant to Code of Civil Procedure Section 437(c).

In Unlawful Detainer actions, and Judgments pursuant to Section 437(c), the attorney's fee shall be fixed at the sum of $375.00 or at a fee set pursuant to the within schedule, whichever is greater.

FEE SCHEDULE

MINIMUM AMOUNT		MAXIMUM AMOUNT	FEE
$1.00	TO	$500.00	$150.00
501.00	TO	1,000.00	$150 plus 30% on amount over $500
1,001.00	TO	2,000.00	$300 plus 25% on amount over $1,000
2,001.00	TO	5,000.00	$550 plus 10% on amount over $2,000
5,001.00	TO	10,000.00	$850 plus 6% on amount over $5,000
10,001.00	TO	50,000.00	$1,150 plus 3% on amount over $10,000
50,001.00	TO	100,000.00	$2,350 plus 2% on amount over $50,000
100,001.00 and over			$3,350 plus 1% on amount over $100,000

(Rule 2.40 revised effective 1/1/15)

Rule 2.41. Schedule for Use Entering Default Judgment

When the Clerk is authorized by statute to enter judgment in an action upon a contract providing for an attorney's fee, the foregoing schedule of attorney's fees in default cases shall be used by the Clerk in determining the amount to be included in the judgment, but in no event shall the amount included by the Clerk exceed the amount of attorney's fees requested.

(Rule 2.41 revised effective 1/1/16)

Rule 2.42. Setting Attorney Fees in Contested Case

The judge shall have complete discretion in setting attorney's fees contingent upon all the attendant circumstances.

(Rule 2.42 revised effective 1/1/15)

Rule 2.43. Attorney Fees in Foreclosure Cases

When an attorney's fee is allowed on the foreclosure of a mortgage or trust deed, a reasonable attorney's fee shall be deemed to be that computed as provided in Local Court Rule 2.40, increased by ten (10) percent.

(Rule 2.43 revised effective 1/1/15)

Rule 2.44. Itemization of Extraordinary Services

Every application for compensation for extraordinary services rendered by an attorney in any case mentioned in this rule and every application in any other case, as authorized by law, for allowance, fixing or recovery of attorney's fees, shall be accompanied by an itemized statement of the services rendered.

(Rule 2.44 revised effective 1/1/16)

Chapter 4. Court Reporting Services

Rule 2.50. Notice of Availability of Court Reporting Services

The Court's policy is set forth in the Court's Notice of Availability of Court Reporting Services, which is posted in the Clerk's Office and on the Court's website.

(Rule 2.50 revised effective 1/1/15)

Rule 2.51. Unavailability of Court-Provided Court Reporters and Procurement of Outside Private Reporters

(a) Unavailability of court reporters by case type

Unless otherwise noted in the Court's Notice of Availability, pursuant to California Rules of Court, Rule 2.956, the Court does not provide court reporters for hearings in the following civil case types:

(1) Unlimited and Limited Civil

(2) Family Law

(3) Probate

(b) Procurement of private court reporter

For matters where the court does not provide a court reporter due to unavailability, any party who desires a verbatim record of a court proceeding from which a transcript can later be prepared, may procure the services of a private certified court reporter pro tempore to report any scheduled hearing or trial (see Government Code 70044 and California Rules of Court, Rule 2.956). The Court does not provide referrals to private court reporting service providers and does not have any contractual or employment obligation related to pro tempore reporters hired by the parties for this purpose. It is the party's responsibility to arrange for and pay the outside reporter's fee for attendance at the proceedings but the expense may be recoverable as part of the costs, as provided by law, (See California Rules of Court, Rule 2.956(c)).

(c) Requirement to meet and confer to select court reporter

For contested matters, the parties must meet timely and confer as to the selection of a qualified court reporter and provide a written stipulation, on the court-provided form (see Government Code 70044).

(1) The reporter must be licensed as a Certified Shorthand Reporter in California and comply with all California statutory and rule provisions for reporting court proceedings. The court reporter pro tempore must provide their name, CSR number, business address and phone number and/or email address to the courtroom clerk and all parties present on the day of the hearing in the event of an appeal or if a party wishes to procure a transcript from the reporter (see California Rules of Court, Rule 2.950).

(2) The court reporter pro tempore must execute the court's required written agreement as to the obligations of the court reporter in accepting the reporting assignment.

(3) If court reporters become available and at the court's discretion are provided by the court for any civil hearings (including family law and probate matters), the parties will be required to pay the applicable reporter attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B) in a timely manner.

(Rule 2.51(c) new effective 1/1/13)

(Rule 2.51 revised effective 1/1/16)

Rule 2.52. Requests for Transcripts

Whenever a party requests a court reporter to furnish a transcript of all or a part of a trial or proceedings, the reporter shall immediately inform all other parties of such request and inquire whether any party desires a copy of the transcript.

Parties shall be responsible for all transcript costs listed in Government Code Section 69953.

(Rule 2.52 revised effective 1/1/16)

Chapter 5. Sanctions

Rule 2.60. Sanctions

A violation of any of these rules may result in sanctions and penalties including, but not limited to, dropping a matter from the calendar, vacating a trial date, dismissal for lack of prosecution, imposition of a fine or imposition of costs payable to the Court, actual expenses and counsel fees, witness fees and jury fees arising as a result of such violation payable to opposing counsel.

(Rule 2.60 revised effective 1/1/16)

Chapter 6. Information and Forms

Rule 2.70. Form of Documents Filed with the Court

All documents filed with the Court must comply with California Rules of Court, Rules 2.100 et seq, and 3.1110.

(Rule 2.70 revised effective 1/1/15)

Rule 2.71. Identifying Information on Filed Documents

(a) Every pleading or paper filed by the Clerk of the Court must include the name, address and phone number of the attorney or party on the first page (see California Rules of Court, Rule 2.100).

(b) No substitution of a party appearing in person in place of an attorney shall be filed unless the mailing address and phone number of such party is contained in such substitution.

(Rule 2.71 revised effective 1/1/16)

Chapter 7. Facsimile Transmitted Documents

Rule 2.80. Definition of Facsimile Document

A facsimile document is a document that is produced electronically by facsimile machine (FAX) scanning and transmission or by similar means.

(Rule 2.80 revised effective 1/1/15)

Rule 2.81. Facsimile Document Compliance with California Rules of Court

Facsimile-produced documents submitted for filing with the Court shall comply with California Rules of Court, Rule 2.300, and all Contra Costa Local Rules of Court. All documents filed must be plain paper copies that are permanently legible copies. There is no provision for direct facsimile transmission to the Court or Court Clerk.

(Rule 2.81 revised effective 1/1/15)

Rule 2.82. Signatures

Signatures on facsimile-produced documents shall be treated as original signatures unless a request is timely made to produce or substitute the original document.

(Rule 2.82 revised effective 1/1/15)

Rule 2.83. Request to Produce Original Documents

When a facsimile-produced document is filed or served in an action in the Court, the party against whom the document is filed or served may, at any time, request the filing or production of the original document in the Court. The request to file or produce the original document shall be served upon the party filing or serving the facsimile-produced document, who shall file or produce the original document in the Court within fifteen (15) calendar days thereafter.

In the event that the original document is not filed or produced, the party, on notice to the filer or server of the facsimile-produced document, may petition the Court in which the action is pending to order the filer or server of the facsimile-produced document to file or produce the original document.

(Rule 2.83 revised effective 1/1/16)

Rule 2.84. Incorporation of Exhibits

In the event that a proper facsimile-produced document submitted for filing requires or refers to attached exhibits which, because of the nature of such exhibits cannot be accurately transmitted via facsimile transmission, such documents shall be filed with an insert page for each missing exhibit describing the exhibit and why it is missing. Unless the Court otherwise orders, the missing exhibits shall be mailed or otherwise delivered to the Court, for filing and attachment to the filed document, not later than five (5) court days following facsimile transmission of the document for filing. The date on which the facsimile-produced document is filed determines the filing date of the document and not the date when the exhibits are received and attached to the filed document. Failure to send the missing exhibits to the Court for attachment to the document as required by this paragraph shall be grounds for the Court to strike any such document or exhibit.

(Rule 2.84 revised effective 1/1/15)

Rule 2.85. Requirements for Service of Process

This subdivision applies only to filings with the Court. The complete document must, where required, be served on all parties in accordance with applicable time limits, and a certificate to that effect must accompany the filing.

(Rule 2.85 revised effective 1/1/15)

Rule 2.86. Pilot Project - Limited Facsimile Filings

(a) General rules - authorization of pilot project

To enable the Court to evaluate the feasibility and effectiveness of instituting direct facsimile filing of court documents, a pilot project permitting the limited filing of documents in specified areas will be allowed. Any facsimile transmissions other than as authorized by Rule 2.86 will be rejected and will not be accepted by the Clerk.

(1) A facsimile filing shall be accompanied by a Judicial Council Facsimile Filing Cover Sheet as specified in California Rules of Court, Rule 2.304(b).

(2) Each facsimile document shall contain the phrase "By fax" below the document's title.

(3) A party using facsimile transmission to file a document must utilize a machine that generates a transmission record and maintain that record in case there is an error in the transmission or the Court fails to process the document. In either instance, the filing party may move the Court for an order filing the document nunc pro tunc by including the proof of transmission with the document. The form of this proof shall be as specified in California Rules of Court, Rule 2.304(d).

(b) Special rules applicable to Juvenile Dependency filings

Subject to finalizing satisfactory arrangements with the Department of Social Services, the Court will accept the filing of initial dependency petitions and accompanying documents by way of facsimile transmission. Check the court's website at www.cc-courts.org for the correct facsimile number.

(1) For this Pilot Project, the filing of only initial dependency petitions in juvenile matters will be allowed by facsimile transmission. Any subsequent filings in these juvenile matters shall be made by regular filing process.

(2) Before filing the initial Dependency petition via facsimile, the petitioner shall contact the Clerk of Court Juvenile Department by telephone to inform the appropriate Clerk's Office staff that a juvenile dependency petition is being transmitted via facsimile.

(3) Petitions received by the Clerk's Office by 5:00 p.m. via facsimile transmission will be considered filed as of the day received. Petitions received after 5:00 p.m. will not be considered as filed by the Clerk's office until the next business day following receipt of the facsimile transmission.

(4) In addition to any other required information, the Facsimile Filing cover sheet shall indicate the time, location and department of the scheduled detention hearing in the matter.

(5) Upon receipt, the Clerk's Office shall stamp the petition as filed, and shall transmit by return facsimile to the petitioner a copy of the initial page of the petition reflecting the dated file stamp. The petitioner shall present a copy of that file stamped petition to the Court at the detention hearing.

(6) The original petition shall be delivered to the Clerk of Court Juvenile Department for filing the next business day following the facsimile filing of the petition. The original petition shall be stamped as filed by the Clerk with the date the facsimile petition was received and filed. The facsimile copy of the petition shall be retained in the court file along with the original petition.

(Rule 2.86(b)(6) revised effective 1/1/13)

(Rule 2.86 revised effective 1/1/16)

Chapter 8. Standards of Professional Courtesy

Rule 2.90. Consideration of History of Breaches in Professional Courtesy

The Court acknowledges that the Contra Costa County Bar Association has adopted "Standards of Professional Courtesy," which are incorporated in these Local Court Rules.

In any motion filed pursuant to Code of Civil Procedure Sections 128, 128.7, 177 and 177.5 and various local rules, the Court may take into consideration counsel's history of breaches of these standards in deciding what, if any, sanctions to impose.

(Rule 2.90 revised effective 1/1/15)

Rule 2.91. Standards of Professional Courtesy

(a) Purpose of these standards

Attorneys are most often retained to represent their clients in disputes. The practice of law is largely an adversarial process. Attorneys are ethically bound to zealously represent and advocate their clients' interest. Nonetheless, there exist certain standards of professional courtesy that are observed, and certain duties of professionalism are owed by attorneys to their clients, opposing parties and their counsel, the Courts and other tribunals, and the public as a whole. Members of the Contra Costa County Bar Association have practiced law with a level of professionalism that goes well beyond the requirements of the State Bar mandated Code of Professional Conduct. The following standards of professional courtesy describe the conduct preferred and expected by a majority of attorneys practicing in Contra Costa County in performing their duties of civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence. These standards are not meant to be exhaustive. They should, however, set a tone or guide for conduct not specifically mentioned in these standards.

(b) Professional courtesy standards

These standards have been codified to make the level of professionalism reflected in them the standard for practice within Contra Costa County, with the hope that their dissemination will educate new attorneys and others who may be unfamiliar with the customary local practices. These Standards have received the approval of the Board of Directors of the Contra Costa County Bar Association. They have also been endorsed by the Judges of the Superior Court of Contra Costa County, who expect professional conduct by all attorneys who appear and practice before them. They will be considered by those judges in their rulings pursuant to California Code of Civil Procedure Sections 128, 128.7, 177, and 177.5, as provided for in Local Court Rule 2.90.

All attorneys conducting any practice of law in Contra Costa County are encouraged to comply with the spirit of these standards and not simply blindly adhere to the strict letter of them. The goals stated and inherent herein are equally applicable to all attorneys regardless of area of practice.

(c) Conformity with other statutes or rules

This Code is, of course, not a substitute for the statutes and rules, and no provision of this Code is intended to be a method to extend time limitations of statutes and rules, including fast track time limitations, without appropriate court order.

(Rule 2.91 revised effective 1/1/15)

Rule 2.120. Scheduling

(a) Advance notice of scheduling activities

(1) Attorneys should communicate with opposing counsel before scheduling depositions, hearings, meetings and other proceedings and make reasonable efforts to schedule such meetings, hearings, depositions, and other proceedings by agreement whenever possible, at all times attempting to provide opposing counsel, parties, witnesses and other affected persons, sufficient notice.

(2) Where such advanced efforts at scheduling are not feasible (for example, in an emergency, or in other circumstances compelling more expedited scheduling, or upon agreement of counsel) an attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations that do not prejudice their clients or unduly delay a proceeding.

(b) Sufficient time to complete proceedings

In all cases an attorney should attempt to reserve sufficient time for the completion of the proceeding to permit a complete presentation by counsel for all parties.

(c) Avoid continuances or undue delays in scheduling

An attorney should not engage in delay tactics in scheduling meetings, hearings and discovery. An attorney should not seek extensions or continuances for the purpose of harassment or solely to extend litigation.

(d) Notice of scheduling conflicts

Attorneys should notify opposing counsel, the Court and others affected, of scheduling conflicts as soon as they become apparent and shall cooperate in canceling or rescheduling. An attorney should notify opposing counsel and, if appropriate, the Court or other tribunal, as early as possible of any resolutions between the parties that renders a scheduled hearing, position or meeting unnecessary or otherwise moot.

(e) Requests for time extensions

Consistent with existing law and court orders, attorneys should grant reasonable requests by opposing counsel for extensions of time within which to respond to pleadings, Discovery and other matters when such an extension will not prejudice their client or unduly delay a proceeding.

(f) Disclosure of identity of witnesses

Attorneys should cooperate with opposing counsel during trials and evidentiary hearings by disclosing the identities of all witnesses reasonably expected to be called and the length of time needed to present their entire case, except when a client's material rights would be adversely affected. They should also cooperate with the calling of witnesses out of turn when the circumstances justify it.

(g) Time and manner of service of papers

The timing and manner of service of papers should not be calculated to disadvantage, overwhelm or embarrass the party receiving the papers. An attorney should not serve papers simply to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience the adversary, such as late in the day (after normal business hours), or so close to a court appearance that it inhibits the ability of opposing counsel to prepare for that appearance or to respond to the papers (if permitted by law), or in such other way as would unfairly limit the other party's opportunity to respond to those papers or other matters pending in the action.

(Rule 2.120 revised effective 1/1/16)

Rule 2.121. Discovery

(a) Purpose of discovery

Attorneys should pursue discovery requests that are reasonably related to the matter at issue. Attorneys should not use Discovery for the purpose of harassing, embarrassing or causing the adversary to incur unnecessary expenses, as a means of delaying the timely, efficient and cost effective resolution of a dispute, or to obtain unfair advantage.

(b) Response to requests for discovery

Attorneys should ensure that responses to reasonable discovery requests are timely, organized, complete and consistent with the obvious intent of the request. Attorneys responding to document demands and interrogatories should not do so in an artificial manner designed to assure that answers and responses are not truly responsive or solely to attempt to avoid disclosure.

(c) Discovery questions

Attorneys should avoid repetitive or argumentative questions, questions asked solely for purposes of harassment, or questions which are known to the questioner to be an invasion of the rights of privacy of third parties not present or represented at the deposition.

(d) Conduct of deposition proceedings

Attorneys should bear in mind that depositions are to be taken as if the testimony was being given in court, and they should therefore not engage in any conduct during the deposition that would not be allowed in the presence of a judicial officer. An attorney

should avoid, through objections or otherwise, improper coaching of the deponent or suggesting answers.

(e) Requirement to meet and confer on discovery

Attorneys should meet and confer on Discovery requests in a timely manner and make good faith attempts to actually resolve as many issues as can possibly be resolved before proceeding with motions concerning the discovery. Before filing a motion concerning discovery, or otherwise, an attorney should engage in more than a mere pro forma effort to resolve the issue(s).

(Rule 2.121 revised effective 1/1/15)

Rule 2.122. Conduct Towards Other Attorneys, the Court and Participants

(a) Professional conduct

Attorneys must remember that conflicts with opposing counsel are professional and not personal, that vigorous advocacy is not inconsistent with professional courtesy, and that they should not be influenced by ill feelings or anger between clients in their conduct, attitude, or demeanor toward opposing attorneys.

(b) Service of papers

An attorney should never use the mode, timing or place of serving papers primarily to embarrass a party or witness.

(c) Filing of motions

Motions should be filed sparingly, in good faith and when the issue(s) cannot be otherwise resolved. An attorney should not engage in conduct which forces opposing counsel to file a motion and then not oppose the motion, or provide information called for in the motion only after the motion is filed.

(d) Professional demeanor

Attorneys should refrain from disparaging or denigrating the Court, opposing counsel, parties or witnesses before their clients, the public or the media.

(e) Conduct of clients and witnesses

Attorneys should be, and should impress upon their clients and witnesses, the need to be courteous and respectful and not rude or disruptive with the Court, court personnel, opposing counsel, parties and witnesses.

(f) Instructions to attorneys on witnesses

Attorneys should make an effort to explain to witnesses the purpose of their required attendance at depositions, hearing or trial. They should further attempt to accommodate the schedules of witnesses when setting or resetting their appearance, and promptly notify them of any cancellations. Dealings with nonparty witnesses should always be courteous

and designed to leave them with an appropriately good impression of the legal system. Attorneys should instruct their clients and witnesses that they are not to communicate with the Court on the pending case except with all counsel or parties present in a reported proceeding.

(g) Notification to opposing party regarding ex parte

Where applicable laws or rules permit an ex parte application or communication to the Court, before making such an application or communication, an attorney should make diligent efforts to notify opposing party or opposing counsel known to represent or likely to represent the opposing party, should make reasonable efforts to accommodate the schedule of such attorney or party to permit the opposing party to be represented, and should avoid taking advantage of an opponent's known absence from the office.

(h) Drafting court documents

Attorneys should draft agreements and other documents promptly and so as to fairly reflect the true intent of the parties.

(i) Prohibiting bias

No attorney shall engage in any act of age, gender, sexual orientation, physical or mental impairment, religion, or race bias while engaging in the practice of law in Contra Costa County.

(Rule 2.122 revised effective 1/1/15)

Rule 2.123. Candor to the Court and Opposing Counsel

(a) Accuracy of written and oral statements

Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the Court or to the opposing counsel, and shall not mislead by inaction or silence. Written materials and oral argument to the Court should accurately state current law and fairly represent the party's position without unfairly attacking the opposing counsel or opposing party.

(b) Manner to present new information

If, after all briefing allowed by law or the Court has been submitted, an attorney locates new authority that s/he desires to bring to the Court's attention at a hearing on the matter, a copy of such new authority shall be provided to both the Court and to all opposing counsel in the case at or before the hearing.

(c) Proposed orders

Attorneys should draft proposed orders promptly, and the orders should fairly and adequately represent the ruling of the Court. When proposed orders are submitted to counsel for approval, attorneys should promptly communicate any objections to the party

preparing the proposed order so that good faith discussions can be had concerning the language of the proposed order.

(d) Court rulings

Attorneys should respect and abide by the spirit and letter of all rulings of the Court.

(e) Opposing letters to counsel

An attorney should not draft letters assigning to an opposing party or opposing counsel a position that party or counsel has not taken or to create a "record" of events that have not occurred.

(Rule 2.123 revised effective 1/1/16)

Rule 2.124. Efficient Administration

(a) Avoid unnecessary action

Attorneys should refrain from actions which cause unnecessary expense, or delay the efficient and cost-effective resolution of a dispute.

(b) Stipulate to facts and legal authority

Attorneys should, whenever appropriate, stipulate to all facts and legal authority not reasonably in dispute.

(c) Encourage negotiation and resolution

Attorneys should encourage principled negotiations and efficient resolution of disputes on their merits.

(d) Punctuality and preparedness

Attorneys should be punctual in communications with others, and punctual and prepared for all scheduled appearances.

(e) Consider Alternative Dispute Resolution (ADR)

In every case, and as soon as the case can be reasonably evaluated, an attorney should consider whether the client's interest could be adequately served and the case more expeditiously and economically disposed of by settlement, arbitration, mediation or other form of alternative dispute resolution.

(f) Make legitimate objections during deposition or trial

An attorney in making objections during a deposition, trial or hearing should do so for legitimate and good faith reasons and should not make such objections only for the purpose of making a speech, harassment or delay. All remarks, argument, objections and requests by counsel during trial shall be addressed to the Court rather than directly to adversaries. Objections should be in legal form and without argument, unless directed to make argument by the Court.

(g) Arrange witness appearance to eliminate delay

An attorney shall arrange for the appearance of witnesses during presentation of their case so as to eliminate delay caused by waiting for witnesses who have been placed on call.

APPROVED BY THE BOARD OF DIRECTORS OF THE CONTRA COSTA COUNTY BAR ASSOCIATION JUNE 1993.

(Rules 2.124 revised effective 1/1/16)

Rule 2.150. Committee on Bias

The Superior Court, in cooperation with the Contra County Bar Association, re-establishes a Committee on Bias, and adopts the procedures and stated purpose that are in these Local Rules of Court (see Title 10, Standard 10.20, Standards of Judicial Administration).

(Rule 2.150 new effective 1/1/15)

(a) Informal complaint process defined

The Judges of the Superior Court and the Contra Costa County Bar Association, have agreed upon an informal complaint procedure addressing issues of age, gender, sexual orientation, disability, socioeconomic status, religion, national origin and race bias in the Courts (see Title 10, Standard 10.20, Standards of Judicial Administration).

(b) Intent of procedure

The intent of this procedure is not to discipline, but to educate with the purpose of improving the problem and preserving the integrity and impartiality of the judicial system.

(c) Complaint procedure

(1) Notify Committee on Bias. If a participant (participant includes, but is not limited to counsel, witnesses, parties or jurors) believes a bench officer has engaged in an act of bias or otherwise failed to ensure that proceedings are conducted in a manner that is fair and impartial to all participants, such person may forward a letter addressed to the Committee on Bias, 2300 Clayton Rd, Suite 520, Concord, CA 94520. Anonymous complaints will not be considered. Complaints are limited to behavior or conduct occurring in courtroom proceedings.

(2) Review of Committee on Bias. The Committee on Bias will review the letter. The Committee's focus will be on incidents that do not warrant discipline but that should be corrected. If the Committee believes the letter raises the appearance of bias, the Committee will forward the substance of the letter, without disclosing the identity of the complainant, to the Presiding Judge. The Presiding Judge will meet with the bench officer who is the subject of the letter and take appropriate corrective action.

(3) Conduct of Committee on Bias. In determining whether a complaint raises an appearance of bias, the Committee may conduct its own investigation which may include contacting the complainant for additional information.

(4) Investigation of Committee on Bias. Any investigation conducted shall be undertaken, with the utmost care not to violate the confidentiality of the complainant.

(5) Resolution of Complaint. It is hoped that making the bench officer aware of the complaint will resolve the issue if one exists. If both the bench officer and the complainant wish to confer about the matter, or try to further resolve any outstanding problems, they may do so. However, this would be subject to the agreement of both and to the complainant's decision to waive any confidentiality.

(6) Return of letter to Committee. After the Presiding Judge informs the Committee that the bench officer who is the source of the complaint has been contacted, the letter will be returned to the Committee for destruction. However, for educational purposes, the Committee may maintain data as to the types of complaints received.

(7) No referral of and to Commission on Judicial Performance. Those matters referred in this manner will not be used as a basis for a referral to the Commission on Judicial Performance by the Committee.

(8) Notification to Complainant. With respect to those incidents that, if substantiated, would warrant discipline, the Committee will advise the complainant of the appropriate disciplinary authority.

(d) Committee membership and length of service

(1) Composition of Committee. The Committee on Bias is to be composed of representative members of the court community, including but not limited to, judges, lawyers, court administrators, representatives and individuals from minority, women's and gay and lesbian bar associations and from organizations that represent persons with disabilities.

(2) Number of members on Committee. The Committee on Bias will consist of five members, appointed by the President of the Contra Costa Bar Association. The Presiding Judge can also appoint a judge and/or a court administrator to the committee. However, if the judge appointed to the committee is the subject of the complaint, the judge is precluded from participating in the review of the complaint.

(3) Term of Committee members. Committee members will serve for staggered terms. A quorum will be necessary for meetings and a majority vote of those in attendance will be required before any action can be taken.

(Rule 2.150, revised effective 1/1/16)

Chapter 10. Communication of Concerns

Rule 2.170. Concerns

Concerns regarding court services or personnel, other than those related to a particular court case, must be submitted in writing. Each concern will be considered carefully, and a written response will be issued. Written concerns must be signed, include an address where the court's response can be sent, and addressed to the Court Executive Officer at:

Email: mediainfo@contracosta.courts.ca.gov

Or

Mail: P.O. Box 431, Martinez, CA 94553

(Rule 2.170 new effective 1/1/15)

Title Three. Civil Rules

Chapter 1. Administration of Civil Litigation

Rule 3.1. Applicability

Unless otherwise specified, this rule applies to all civil cases except Juvenile, Probate and Family Law cases, extraordinary writs, Asset Forfeiture cases under Health and Safety Code Section 11470 et seq., and Limited Jurisdiction Collections Cases under provisions of California Rules of Court, Rule 3.740. Special provisions are made for expediting Unlawful Detainer cases (see Rule 3.12).

(Rule 3.1 revised effective 1/1/15)

Rule 3.2. Definitions as Used in Title Three

As used in Title 3:

(1) The term "counsel" includes parties representing themselves.

(2) The term "plaintiff" also includes cross-complainant.

(3) The term "defendant" also includes cross-defendant.

(Rule 3.2 revised effective 1/1/15)

Rule 3.3. Transferred Cases

Unless excluded under Rule 3.8(c), all cases transferred from another jurisdiction are subject to this Rule.

(Rule 3.3 revised effective 1/1/15)

Rule 3.4. Policy

(a) Civil case management

It is the policy of the Superior Court of Contra Costa County to track and manage all cases from the moment the complaint is filed until disposition and to conclude all civil cases as expeditiously as possible within the limits of available funding and staffing.

(Rule 3.4(a) revised effective 1/1/13)

(b) Disposition goals

(1) It is the goal of the Court to conclude 75% of all Unlimited Jurisdiction Civil cases and 90% of Limited Jurisdiction Civil cases filed within 12 months of the filing of the complaint, 85% of all Unlimited Jurisdiction Civil cases and 98% of all Limited Jurisdiction Civil cases filed within 18 months of the filing of the complaint, and 100% of all civil litigation cases within 24 months of the filing of the complaint.

(Rule 3.4(b)(1) revised effective 1/1/13)

(2) It is the policy of the Court that all civil cases, not court-designated as “complex”, are presumed to be appropriate for a disposition goal of 12 months. The Court may modify this disposition goal at any time upon the showing of good cause or insufficient staffing due to lack of funding.

(Rule 3.4(b)(2) revised effective 1/1/13)

(c) Hearings

It is the policy of the Court that unnecessary hearings, which tend to delay the progress of litigation, be avoided. The Court urges counsel to meet and confer on disputed issues before motions are filed.

(Rule 3.4(c) revised effective 1/1/01)

(d) Assignment of Unlimited Jurisdiction Civil cases

All Unlimited Jurisdiction Civil cases subject to this rule will be assigned to one judge for all purposes unless otherwise determined by the Presiding Judge for good cause.

(Rule 3.4(d) revised effective 1/1/13)

(e) Uninsured motorists

The following policy applies to uninsured motorist cases:

(1) Promptly upon learning that an action is to proceed as an uninsured motorist case, plaintiff's counsel shall file a declaration setting forth the information upon which such a determination has been made. The declaration shall include: A statement that coverage exists under an uninsured motorist's insurance policy; the name of the carrier and limits of coverage. It shall also include a statement that counsel believes that the limits of coverage are adequate to compensate for known loss or damage; that plaintiff(s) will promptly pursue such remedy and that it is counsel's

present intention to assign the claim or dismiss the pending action upon receipt of a recovery by settlement or award.

(2) The declaration shall be captioned "Request for Temporary Exemption - Uninsured Motorist Case."

(3) Upon review of the declaration, the Court may designate the action as an uninsured motorist case in which event the time requirements under this Rule will be suspended for up to 270 days from the date the complaint was filed or from such other date the Court, in its discretion, shall fix. The case will be monitored by the setting of a review hearing at the end of the suspension period. If a dismissal has not been filed, plaintiff's counsel must file a further declaration five (5) court days before the review hearing date and provide a status report and, if necessary, a request with supporting justification for additional time to conclude the case.

(Rule 3.4(e) revised effective 1/1/16)

(f) Dismissal of "DOES" upon disposition

It is the policy of the Court that each case be completely disposed. At the time of adjudication of the case, by request for dismissal or request for entry of judgment, all remaining parties including DOES, will be dismissed by the Court unless otherwise specified.

(Rule 3.4(f) revised effective 1/1/16)

(g) Exception order

Nothing in this Rule shall be interpreted to prevent the Court in an individual case from issuing an Exception Order based on a specific finding that the interest of justice requires a modification of the routine procedures as prescribed by this Local Court Rule.

(Rule 3.4(g) revised effective 1/1/13)

(h) Alternative Dispute Resolution (ADR)

It is the policy of the Court to encourage the parties in all cases to consider the use of appropriate alternative dispute resolution options as a means of resolving their disputes without trial. The Court encourages parties who can agree to use ADR before the first Case Management Conference to use the appropriate local court form:

(1) CV-655b – ADR Case Management Stipulation and Order (Unlimited Jurisdiction Civil Cases)

(2) CV-659d – ADR Case Management Stipulation (Limited Jurisdiction Civil Cases)

(Rule 3.4(h) revised effective 1/1/13)

(i) Notice to court upon disposition

It is the policy of the Court that proper notice be given to the Court of the disposition of cases. (Refer to Rule 3.100 for settlements).

(Rule 3.4(i) revised effective 1/1/13)

(Rule 3.4 revised effective 1/1/16)

Rule 3.5. Venue, Filing and Form of Papers

(a) Unlimited and Limited Jurisdiction Civil cases:

All new Unlimited and Limited Jurisdiction Civil cases (excluding Limited Jurisdiction Unlawful Detainer and Small Claims cases), and any subsequent papers shall be filed in Martinez (see California Rules of Court, Rule 2.100 for form of papers.

(Rule 3.5(a) revised effective 1/1/16)

(b) Limited Jurisdiction Civil cases filed before January 1, 2006:

(1) All Limited Jurisdiction Civil cases filed before January 1, 2006, in Richmond or Pittsburg Branch Courts shall remain in the branch court where the complaint was filed and any subsequent papers filed in such matters shall only be filed in the originating branch court.

(2) All Limited Jurisdiction Civil cases filed before January 1, 2006 in Concord or Walnut Creek are transferred to Martinez effective January 1, 2013, and any subsequent papers filed in such matters shall only be filed in Martinez. All hearings that are scheduled to occur in Limited Jurisdiction cases after January 1, 2006, will be held in Martinez.

(Rule 3.5(b) revised effective 1/1/16)

(c) Limited Jurisdiction Unlawful Detainer cases

(1) All Limited Jurisdiction Unlawful Detainer cases, and all subsequent filings in these cases, must be filed in the appropriate court location based upon the location of the property in question with the exception of those that currently fall under the jurisdiction of the Concord/Mt. Diablo and Walnut Creek branch courts.

(2) Effective January 1, 2013, Limited Jurisdiction Unlawful Detainer cases where the property is located in the following cities and adjacent unincorporated areas must be filed in the Martinez Clerk's Office at 725 Court Street, Martinez, CA:

Avon, Alamo, Blackhawk, Camino Tassajara, Canyon, Clayton, Clyde, Concord, Danville, Lafayette, Martinez, Moraga, Orinda, Pacheco, Pleasant Hill, Rheem, Rossmoor, San Ramon, St. Mary's College, Walnut Creek, Ygnacio Valley and adjacent unincorporated areas.

(Rule 3.5(c)(2) revised effective 1/1/13)

(d) Small Claims cases

(1) All Small Claims cases must be filed in one of the following locations. All subsequent filings must be filed in that same location.

(A) The locality where one or more of the defendants resides; or

(B) If the action arises from operation of a business by one or more defendants, the location where such a defendant has his, her, or its principal place of business; or

(C) The locality where a substantial part of the events in question occurred; or

(D) If there is no appropriate locality under any of the preceding provisions, in any locality.

(2) The geographic territory for filing in the appropriate court location effective January 1, 2013 is as follows

(A) **Martinez:** Avon, Alamo, Blackhawk, Camino Tassajara, Canyon, Clayton, Clyde, Concord, Danville, Lafayette, Martinez, Moraga, Orinda, Pacheco, Pleasant Hill, Rheem, Rossmoor, San Ramon, St. Mary's College, Walnut Creek, Ygnacio Valley and adjacent unincorporated areas.

(B) **Pittsburg:** Antioch, Bay Point, Bethel Island, Brentwood, Byron, Discovery Bay, Knightsen, Oakley, Pittsburg and adjacent unincorporated areas.

(C) **Richmond:** Crockett, El Cerrito, El Sobrante, Hercules, Kensington, North Richmond, Pinole, Point Richmond, Port Costa, Richmond, Rodeo, Rollingwood, San Pablo, Tilden Park North and adjacent unincorporated areas.

(Rule 3.5(d)(2) revised effective 1/1/13)

(Rule 3.5 revised effective 1/1/16)

Rule 3.6. Challenge to assigned Judge

In both Unlimited and Limited Jurisdiction Civil cases (which are assigned to one judge for all purposes), a challenge to the assigned judge pursuant to Code of Civil Procedure Section 170.6 must be made in accordance with the time requirements set forth in that section. Upon acceptance of a proper challenge under Code of Civil Procedure Section 170.6, the case will be reassigned.

(Rule 3.6 revised effective 1/1/15)

Rule 3.7. Service of Summons, Complaint, Cross-Complaint, Responsive Pleadings and Default Judgments

(1) Counsel are to be familiar with and follow with particularity the rules set forth in California Rules of Court, Rule 3.110 as to service and filing of pleadings and proofs of service and the notice of default judgments.

(2) Upon failure to serve the complaint and file a proof of service as required, an Order to Show Cause shall issue as to why counsel shall not be sanctioned for failure to comply with California Rules of Court, Rule 3.110.

(3) Responsive papers to the Order to Show Cause must be filed and served no less than five (5) court days in advance of the hearing.

(Rule 3.7 revised effective 7/1/15)

Rule 3.8. Case Management Conference Procedure (Formerly Referred to as a Status Conference)

(a) Filing of complaint

Upon filing a complaint, which includes a completed Civil Case Cover Sheet (Judicial Council Form CM-010), the plaintiff will receive the following from the Clerk or Court support staff:

(1) Summons and Complaint and notification of the assigned department for Superior Court cases;

(2) Notice and date of the First Case Management Conference. (This court-generated notice includes the assigned date, time, and department);

(3) Notice to Defendants (Local Court Form CV-655(d) for Unlimited Civil Jurisdiction cases and Form CV-659(b) for Limited Jurisdiction Civil cases);

(4) A blank Case Management Statement (Judicial Council Form CM-110) and an Alternative Dispute Resolution Information Sheet (Local Court Form CV-655(c) for Unlimited Civil Jurisdiction cases and Form CV-659(e) for Limited Jurisdiction Civil cases);

(5) In Limited Jurisdiction Civil cases only, the Case Questionnaire for Limited Civil Cases (Judicial Council form DISC-010) and a blank Issue Conference Statement (Local Court Form CV-659(c));

(6) Plaintiffs in Unlimited Civil Jurisdiction cases will also receive a ADR Case Management Stipulation and Order (Local Court Form CV-655(b) for Unlimited Jurisdiction Civil cases and plaintiffs in Limited Jurisdiction Civil cases will receive an ADR Case Management Stipulation (Local Court Form CV-659(d)).

Rule 3.8(a) revised effective 1/1/17)

(b) Case questionnaire for Limited Jurisdiction Civil cases

Any cross-complainant naming any new party in a Limited Jurisdiction Civil case will also be served with a blank Case Questionnaire for Limited Civil Cases (Judicial Council Form DISC-010).

(c) Setting the Case Management Conference for transfer-ins

If a case is transferred from another jurisdiction after a responsive pleading has been filed, the First Case Management Conference will be set within forty-five (45) calendar days from the Order of Transfer. If no responsive pleading has been filed, the First Case Management Conference will be set within ninety (90) calendar days from the Order of Transfer. In all other particulars, the plaintiff in a transfer case will receive the same information and items as described above.

(d) Notice of first CMC

At the time of serving the Summons and Complaint (and a cross-complaint upon a new party), the responding party shall be served with the Notice of the First Case Management Conference and an ADR Case Management Stipulation and Order (Local Court Form CV-655(b)) for Unlimited Jurisdiction Civil cases, and the ADR Case Management Stipulation. The responding party in Unlimited Jurisdiction Civil cases and plaintiffs in Limited Jurisdiction Civil cases will receive an ADR Case Management Stipulation (Local Court Form CV-659(d)) for Limited Jurisdiction Civil cases. The responding party in Limited Jurisdiction Civil Cases will also receive a blank Case Questionnaire for Limited Civil Cases (Judicial Council form DISC-010).

(e) File and serve Case Management Statement

Each appearing party shall file and serve the completed Case Management Statement, (Judicial Council Form CM-110), at least fifteen (15) calendar days before the First Case Management Conference as provided by California Rules of Court, Rule 3.725.

Rule 3.8(e) revised effective 7/1/02)

(f) Request for early Case Management Conference

One or more parties to a civil action may request that the assigned department advance the date of the first case management conference in the action, subject to the following:

(Rule 3.8(f) revised effective 1/1/09)

(1) Requests must be in writing, but may be informal, such as in letter format. They should be lodged (rather than filed) with the department assigned the matter.

(2) Such requests must be served upon all parties that have appeared in the action.

(3) The request shall either recite that all parties join in the request or, if not, must provide a brief but clear explanation of the benefits of advancing the conference date.

(4) Any party opposing a request shall lodge and serve an informal statement of opposition, with reasons, within five (5) calendar days of receiving the request.

(5) The Court reserves the discretion to determine whether such an early conference would be beneficial and whether the department's calendar can accommodate the request.

(g) First Case Management Conference

The First Case Management Conference shall be conducted in accordance with California Rules of Court, Rule 3.721. Counsel are required to be thoroughly familiar with and abide by that Rule.

(Rule 3.8(g) revised effective 7/1/02)

(h) Subsequent Case Management Conference

Unless otherwise ordered by the Court, a party need not file a Case Management Statement (Judicial Council Form CM-110) for subsequent conferences unless that party has not previously filed that form. Parties are welcome to file narrative status conference statements with proper material that they believe would be helpful to the Court.

(Rule 3.8(h) revised effective 9/1/04)

(Rule 3.8 revised effective 1/1/17)

Rule 3.9. Telephone Appearances

The Unlimited Jurisdiction Civil departments (fast track departments) generally use the CourtCall® system. If a department does not use CourtCall®, the CourtCall® operator will so advise and the parties wishing to appear by telephone should then contact the department involved for telephone appearance instructions.

The Court reserves the right in any matter to require a personal appearance (see California Rules of Court, Rule 3.670(e)(2)).

(Rule 3.9 revised effective 1/1/16)

Rule 3.10. Sanctions

If the Court finds that any party has not proceeded with due diligence or has otherwise failed to comply with this Rule, sanctions may be imposed.

(Rule 3.10 revised effective 1/1/15)

Rule 3.11. Issue Conference

(a) Time and purpose of Issue Conference

Within fourteen (14) calendar days before the trial date, unless otherwise ordered, an Issue Conference will be held during which all matters necessary to be resolved before

trial will be before the Court. All trial counsel must be present, along with all principals or clients and claims representatives with settlement authority.

(Rule 3.11(a) revised effective 1/1/16)

(b) Motions in limine

All motions in limine must be in writing and are to be filed and served at least ten (10) calendar days before the conference. Motions in limine should be numbered consecutively and if a party files more than five (5) motions an index must be provided. Any objections to motions in limine must be filed and served five (5) calendar days before the conference, with a copy lodged with the chambers of the department to which the case is assigned. Parties should not submit motions in limine upon the following topics as each fast track trial department will issue orders sua sponte as follows:

(Rule 3.11(b) revised effective 1/1/16)

(1) No witness may be called, except with Court permission in exceptional circumstances, unless notice has been given to all parties of the date when the witness will testify. Such notice shall be given no later than at the end of the court day preceding the court day when the witness is to testify.

(2) All witnesses will be excluded from the courtroom, unless otherwise ordered, excepting those for whom an exception exists at law (e.g. parties and corporate representatives).

(3) Evidence of, or reference to, settlement negotiations, mediation, and materials which are privileged under the evidence code or by agreement of the parties shall not be allowed.

(Rule 3.11(b)(3) revised effective 1/1/16)

(4) Evidence of, or reference to, insurance, or the fact that an attorney is employed by, or has been compensated by, an insurance company, shall not be allowed.

(5) Evidence of, or reference to, other claims or actions against any party to the litigation shall not be allowed without permission from the Court.

(6) Evidence of, or reference to, the financial position or wealth, or lack thereof, of any party to the litigation, shall not be allowed without permission from the Court.

(Rule 3.11(b)(6) revised effective 9/1/04)

(c) Issue Conference Statement

Parties must file with the court and serve on all parties an Issue Conference Statement (Local Court Form CV-659(c)) of not more than ten (10) pages at least five (5) court days before the Issue Conference. In Limited Civil Cases only, use of the local Issue Conference Statement form (Local Court Form CV-659(c)) is mandatory. The following shall be included in the Issue Conference Statement and will be considered at the Issue Conference:

(1) A statement of the facts, law and respective contentions of the parties regarding liability, damages (with specific dollar details), nature and extent of injuries, any unusual evidentiary or legal issues anticipated at trial, and all matters of fact believed by any party to be appropriate for stipulation;

(2) A witness list, including only those witnesses that each party actually expects to have testify, with a brief statement of anticipated testimony, and exhibit list;

(3) A trial length estimate and a proposed statement of the case to be read to the jury, and proposed voir dire questions; and

(4) A list (index) of proposed CACI jury instructions, as required by California Rules of Court, 2.1055, and copies of any proposed special instructions [note: copies of CACI instructions should not be submitted with the Issue Conference Statement.

(Rule 3.11(c) revised effective 1/1/17)

(d) Settlement statement

Each party shall lodge with the assigned department, at the time of filing of the Issue Conference Statement, a settlement statement in the form and content described in Local Rule 3.101.

(Rule 3.11(d) revised effective 1/1/08)

(e) Jury questionnaires

(1) If any party intends to request that a specific written questionnaire be submitted to the jury, said party shall, no later than twenty (20) court days before the Issue Conference, serve a proposed questionnaire on the other parties;

(2) Any party objecting to any question or proposing additional questions, shall serve said objections or proposals on all other parties no later than fifteen (15) court days before the Issue Conference;

(3) All parties shall meet and confer to attempt resolution of objections and proposals no later than ten (10) court days before the Issue Conference;

(4) The questionnaire shall be submitted with the Issue Conference Statement with any unresolved questions requiring a ruling by the Court clearly identified;

(5) If the Court approves a questionnaire, it shall be the responsibility of the party submitting a questionnaire to have an adequate number of copies delivered to the office of the Jury Commissioner no later than two (2) court days before the scheduled commencement of trial, and to arrange and pay for prompt copying and distribution of the completed questionnaire to the Court and other parties in the order in which jurors will be called; and

(6) Failure to comply with the requirements of Local Rule 3.11(e)(4) and (5) may result in an order that the case be tried without the use of a written questionnaire.

(Rule 3.11(e) revised effective 1/1/16)

(Rule 3.11 revised effective 1/1/17)

Rule 3.12. Reporting of Court Proceedings in Civil Fast Track Departments

(1) Official court reporters employed by the court are unavailable in the Unlimited/Limited Civil Fast Track Departments effective January 1, 2013, until further notice. Consult the Notice of Availability on the court's website for current status and any changes.

(2) Any party who desires a verbatim record of the proceedings from which a transcript can later be prepared, may procure the services of an outside private certified court reporter pro tempore to report any scheduled hearing or trial (see Government Code 70044 and California Rules of Court, Rule 2.956).

(3) Parties electing to procure the services of an outside reporter must comply with Local Rule 2.51.

(4) Pursuant to California Rules of Court, Rule 2.956(d), if a party arranges and pays for the attendance of a certified shorthand reporter at a hearing in a civil case because of the unavailability of the services of an official court reporter, none of the parties will be charged the reporter's attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(5) If court reporters become available and in the court's discretion are provided by the court for any civil hearings, the parties will be required to pay the applicable reporter attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(6) Parties shall be responsible for all transcript costs pursuant to Government Code Section 69953.

(Rule 3.12(6) revised effective 1/1/13)

(Rule 3.12 revised effective 1/1/16)

Rule 3.13. Unlawful Detainer Cases

(1) Unlawful Detainer cases entitled to expedited handling shall be adjudicated or a memo to set or conditional settlement shall be filed within forty-five (45) calendar days from the filing of the complaint unless the time limit is authorized to be stayed or extended by a judge. The plaintiff shall be issued an OSC re: sanctions or dismissal if the case has not been adjudicated or a memo to set or conditional settlement has not been filed within forty-five (45) calendar days from the filing of the complaint or within any extended time limit authorized by a judge. Responsive papers to the Order to Show Cause must be filed at least five (5) court days in advance of the hearing.

(2) The plaintiff will file a memo to set when the case is ready for trial.

(Rule 3.13 revised effective 1/1/16)

Rule 3.14. Relief Following Breach of a Settlement Agreement in Limited Jurisdiction Cases

(a) Unlawful Detainer cases

A settlement agreement may provide that, in the event of default, the non-defaulting party may seek additional relief from the Court by filing an ex parte application. If it does, then:

(1) An ex parte application filed pursuant to this provision must either:

(A) Contain a Proof of Service showing that the application was served on the defaulting party, or

(B) Include a declaration stating either:

(i) Notice of the filing of the application was given to the defaulting party, specifying how and when that notice was given, or

(ii) Notice should be excused pursuant to California Rules of Court, Rule 3.1204.

(2) Such an application may be heard no sooner than forty-eight (48) hours after the later of:

(A) Filing the application, or

(B) Notice to the allegedly defaulting party unless notice is excused pursuant to California Rules of Court, Rule 3.1204. If notice is given by mail, the time for hearing the ex parte application will be extended by three (3) calendar days.

(3) A statement that the non-defaulting party told the defaulting party that it "would be applying" for further relief is not adequate. The non-defaulting party must give notice that it "has applied" for relief, describing the relief requested and the time at which the relief will be sought.

(4) If the ex parte application is accompanied by a declaration proving that the defaulting party has been given notice of default and does not then object to the granting of the additional relief sought, the ex parte application may be heard before the expiration of the time required by paragraph (a)(2).

(5) If the allegedly defaulting party wishes to contest the application, it must file a written objection, stating the reasons for the objection. Any such objection must be filed within forty-eight (48) hours of the notice given pursuant to paragraph (a)(2).

(6) If objection is made, the Court may consider the ex parte application on the papers submitted or may set the matter for expedited hearing.

(7) If a settlement agreement does not contain a provision such as is described in paragraph (a), then the non-defaulting party seeking additional relief must file a motion to obtain that relief. Applications for Orders Shortening Time will be viewed

with presumptive favor in unlawful detainer cases seeking possession and other cases in which time is of the essence.

(b) Non-Unlawful Detainer cases

(1) A settlement agreement may provide that, in the event of default, the non-defaulting party may seek additional relief from the Court. However, the non-defaulting party will not be granted additional relief without notice to the defaulting party.

(2) The proper form for seeking additional relief is a noticed motion. The parties may agree, in advance, to an Order Shortening Time for the hearing of such a motion, provided that (except in exceptional cases, for good cause shown) the time for noticing the motion shall not be less than ten (10) court days.

(3) If the settlement agreement does not provide for shortened time, as described in paragraph (b)(2), then a party may file an ex parte application to have the motion heard on shortened time. Any such application must comply with the California Rules of Court, Rule 3.1200 and, where applicable, Rule 3.46 of the Local Court Rules.

(4) If, at the time of the default, the defaulting party stipulates in writing to further relief, the Court will entertain an application for entry of an order upon stipulation without need for formal motion. Nothing in this rule shall preclude a party from seeking to enforce the terms of a settlement agreement (as opposed to seeking additional relief for breach) by an appropriate motion pursuant to Code of Civil Procedure Section 664.6 or other controlling authority.

(Rule 3.14(b)(4) revised effective 1/1/05)

(Rule 3.14 revised effective 1/1/15)

Rule 3.15. Complex Litigation Cases

(1) There shall be designated a Complex Civil Litigation Department to which cases covered by California Rules of Court, Rule 3.400 shall be assigned, unless otherwise ordered by the Court.

(2) Counsel for plaintiffs shall use the most current form of civil cover sheet to indicate whether a matter is or is not deemed complex. Other parties may counter-designate at or before the time for the filing of a first appearance (see California Rules of Court, Rule 3.402).

(Rule 3.15(2) revised effective 1/1/16)

(Rule 3.15 revised effective 1/1/16)

Rule 3.16. CEQA Claims

The title of any pleading seeking relief under the California Environmental Quality Act, whether by petition or complaint, shall clearly identify that the matter is a CEQA action. [e.g. "CEQA claim: Complaint for Damages"].

(Rule 3.16 revised effective 1/1/15)

Rule 3.17. Conforming Copies

The Superior Court Clerk will conform a maximum of two copies of any document at the time of filing. Additional copies will be provided by photocopying and the standard Superior Court Clerk fee for copies will be charged.

(Rule 3.17 revised effective 1/1/15)

Chapter 2. Civil Law and Motion

Rule 3.40. Law and Motion Calendar

There shall be a Civil Litigation Division (which includes a Discovery Commissioner when available funding permits) which will handle civil law and motion matters except as follows:

(1) All law and motion matters relating to Family Law shall be heard in the Family Law Departments;

(2) Motions in Unlawful Detainer cases shall be heard in the appropriate court or department scheduled;

(Rule 3.40(2) revised effective 1/1/13)

(3) As provided in Local Rule 7.1, most law and motion regarding probate matters shall be heard in the Probate Department.

(A) Each judge in the Civil Litigation Division shall designate one day of the week for his or her Law and Motion matters.

(B) Each judge in the Civil Litigation Division shall designate the day(s) of the week and time(s) that discovery matters and ex parte applications will be heard in their department.

(Rule 3.40(3)(B) revised effective 1/1/13)

(Rule 3.40 revised effective 1/1/16)

Rule 3.41. Hearing Dates

(1) With the exception of motions brought pursuant to Code of Civil Procedure section 128.7, all other motion hearing dates will be assigned by the Clerk's Office at the time the motion is filed unless otherwise ordered by the Court. Dates cannot be reserved or given over the telephone.

(Rule 3.41(1) revised effective 1/1/16)

(2) No hearing will be set by the Clerk's Office for a Discovery Motion unless no discovery responses have been provided or recommendations from a Discovery Facilitator are attached as the first exhibit.

(Rule 3.41(2) revised effective 1/1/15)

(Rule 3.41 revised effective 1/1/16)

Rule 3.42. Papers to Comply with State Rules

(1) Moving, opposing and reply papers must be filed and served with the Court and parties within the time prescribed by law. The Court will not consider late filed papers unless good cause is shown at the hearing.

(2) All memoranda and other papers filed in support of, and in opposition to, motions shall comply with the requirements of the California Rules of Court.

(3) Despite rule 3.1110 of the California Rules of Court, subdivision (f), a large number of documents filed with the Court include exhibits that are not properly tabbed. The majority of these non-compliant documents are fax-filed through an attorney service. The attorney service prints out the documents and files them without tabbing the exhibits. The purpose of this rule is to discourage such rule violations, which impose a substantial burden on judges and staff.

(A) Every fax-filed document shall be stamped on the first page with the name, address, and telephone number of the attorney service that prepared the document for filing.

(B) Every fax-filed document or set of fax-filed documents shall include, as a separately filed document, a certification by an employee of the attorney service that the document or documents have been reviewed for compliance with rule 3.1110 of the California Rules of Court, subdivision (f), and that all exhibits have been properly tabbed.

(C) If a particular attorney service repeatedly files documents with untabbed or improperly tabbed exhibits, the matter will be referred to the presiding judge for appropriate action.

(D) Counsel of record should take note the Court has and will continue to impose monetary sanctions on attorneys who file documents with untabbed or improperly tabbed exhibits, regardless of whether such documents were fax-filed through an

attorney service, and in some instances will disregard those documents or drop a hearing from calendar based on the rule violation.

(Rule 3.42(3) new effective 1/1/17)

(Rule 3.42 revised effective 1/1/17)

Rule 3.43. Tentative Ruling

(1) The Civil Litigation Division shall operate a tentative ruling system for Unlimited Civil law and motion. The tentative rulings can be obtained beginning at 1:30 p.m. the court day preceding the hearing. Phone numbers and tentative rulings for Martinez are available on the court website www.cc-courts.org. If the website is down, or for some reason cannot be accessed by the litigant or counsel, the number to call, during business hours is (925) 608-1000.

(Rule 3.43(1) revised effective 1/1/17)

(2) The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify what issues are to be argued.

Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter.

(Rule 3.43(2) revised effective1/1/15)

(3) The prevailing party must prepare an order after hearing in accordance with the requirements of California Rules of Court, Rule 3.1312.

(Rule 3.43(3) revised effective 1/1/01)

(Rule 3.43 revised effective 1/1/17)

Rule 3.44. Telephone Appearances for Law and Motion

If the judge hearing a matter determines on an individual case that a personal appearance is necessary (i.e. that a telephone appearance will not be allowed), the tentative ruling will so indicate unless the Court has previously been advised.

(Rule 3.44 revised effective 1/1/16)

Rule 3.45. Reporting of Law and Motion

Law and motion oral arguments are not reported in Civil Fast Track Departments until further notice. Parties may procure the services of an outside reporter as set forth in Local Rule 2.51.

(Rule 3.45 revised effective 1/1/15)

Rule 3.46. Time to Plead or Respond Following Hearing (Subject to Preemption by the California Rules of Court)

(1) If the hearing involved a demurrer, motion to strike, motion to quash service of process, motion for a change of venue, or motion to stay or dismiss for "Forum Non Conveniens," and the demurrer is overruled or the motion is denied; the moving party shall have ten (10) calendar days after notice (see Paragraph 3 below) to file an Answer or further responsive pleading.

(2) If a demurrer is sustained or motion to strike is granted with leave to amend, the party granted leave to amend shall have ten (10) calendar days after notice to amend, and the initial moving party shall have ten (10) calendar days after service of the amendment to file a further responsive pleading.

(3) Parties shall be deemed to have notice of the Court's ruling as of the date of the hearing, or in the case of a matter submitted for decision, as of five (5) calendar days after the date the Clerk mails notice of the Court's ruling.

(4) Except as allowed by statute or California Rules of Court, the parties may not extend the stated times in the absence of an approval by the Court. Such a request must be made before the final day to respond or answer.

(Rule 3.46 revised effective 1/1/16)

Rule 3.47. Civil Ex Parte Orders

Ex Parte applications for Orders to Shorten Time will be considered only when accompanied by the proposed moving papers. Orders to Shorten Time will be filed only when the motion has been previously filed or is simultaneously filed.

(1) Martinez Civil Fast Track ex parte motions, except in emergency situations, will be heard in each department at times designated by the assigned judge. Consult the court's website for designated times. Ex parte motions include applications for restraining orders, writs of mandate and prohibition (see ex parte process for writs of mandate below), other extraordinary writs, and appointment of receivers. Applications for such orders must comply with California Rules of Court, Rule 3.1203 (except temporary restraining orders under Code of Civil Procedure Section 527.6).

(Rule 3.47(1) revised effective 1/1/13)

(A) Ex Parte Applications for Orders to Shorten Time will be considered only when accompanied by the proposed moving papers, unless, in its discretion, the Court otherwise orders. Orders to Shorten Time will be filed and calendared for hearing only when the motion has been previously filed or is simultaneously filed (see signed order for compliance).

(Rule 3.47(1)(A) revised effective 1/1/10)

(B) Status Conference and Briefing Schedules for Writs of Mandate. The following rule applies to all writs of mandate except those in which the Department of Motor

Vehicles is named as respondent. After the Petition is filed in the Clerk's Office and a department is assigned, the filing party shall take a copy of the petition along with a proposed order to the assigned department during ex parte hours. A status conference for the establishment of a hearing date and briefing schedule for writs of mandate will be set by the assigned judge during the designated ex parte hours. The petitioner must comply with California Rules of Court, Rule 3.1203 concerning notice to opposing counsel or unrepresented party of the intent to present an ex parte application to the Court. The petitioning party need not notify the Court before presenting the application to set hearing date and briefing schedule. Once the order is signed and a briefing schedule assigned, the party shall present the order to the clerk's office for filing.

(Rule 3.47(1)(B) revised effective 1/1/16)

(C) A copy of the resulting order concerning the writ is to be delivered to the department in which the writ will be heard as well as to the research attorney's office.

(Rule 3.47(1)(C) revised effective 1/1/06)

(2) Sufficient notice should be given to all parties in the time and manner provided by California Rules of Court, Rule 3.1203.

(3) Ex parte applications will be heard only after each party with papers to present has given them to the Court and other counsel who appear, and after both Court and counsel have had adequate time to review them. Therefore, whenever practicable, moving papers should be served on the affected party or that party's attorney by personal delivery, telecopy (fax), express mail, messenger, or similar means before the hearing.

(Rule 3.47(3) revised effective 1/1/16)

(4) Guardian ad litem. Requests in cases of Unlimited Jurisdiction, for appointment of a Guardian ad litem should normally not seek appointment of a person that has a claim arising from the same event or conduct. The proposed appointee normally should not be a person that has a possible adverse or conflicting interest with that of the minor.

(Rule 3.47(4) revised effective 7/1/08)

(Rule 3.47 revised effective 1/1/16)

Rule 3.48. Original Orders to Show Cause

When an Order to Show Cause has been signed, the original shall be filed immediately in the office of the Court Clerk and service shall be effected by a certified copy, for which no charge shall be made.

(Rule 3.48 revised effective 1/1/15)

Rule 3.49. Continuances

Requests for continuance of Law and Motion matters may be by written motion or stipulation. Moving papers must be filed and submitted by 12:00 noon of the court day before the scheduled hearing.

(Rule 3.49 revised effective 1/1/16)

Rule 3.50. Calendar Matters Heard in Law and Motion Department

All motions to consolidate cases, bifurcate issues of liability or other issues, such as statute of limitations or other special defense, or sever consolidated cases or causes of action for trial may be heard in Law and Motion, or may be reserved for the trial department. Motions to consolidate must be noticed for hearing in the department which is assigned to the lowest numbered case of those cases proposed for consolidation.

(Rule 3.50 revised effective 1/1/15)

Rule 3.51. Name Change Applications

(1) Name change applications are submitted on the Petition for Change of Name (Judicial Council Form NC-100) and Attachment to Petition for Change of Name (Judicial Council Forms NC-110).

(2) The petition must be presented personally by the applicant to the clerk at the Probate window in the civil division's clerk's office and shall be accompanied by the following:

(Rule 3.51(2) revised effective 1/1/16)

(A) A completed Order to Show Cause for Change of Name (Judicial Council Form NC-120) that will be signed by the judge.

(B) Photographic proof of identification (California Driver's License or ID, or similar).

(C) Proof of residency in Contra Costa County (e.g. recent utility bill or tax bill); and

(D) For minors, a birth certificate.

(Rule 3.51 revised effective 1/1/16)

Rule 3.52. Motions

(a) Proof of Service

Unless otherwise ordered, all returns of Proof of Service of Notice of Motions and Orders to Show Cause shall be filed in the office of the Clerk of the Court not less than two (2) calendar days preceding the time set for hearings.

(Rule 3.52(a) revised effective 1/1/16)

(b) Failure to appear

Failure of counsel to appear at the time set in the department to which the matter is assigned, unless excused by the judge, shall be deemed cause for placing such matter off calendar, for proceeding to hear the matter in the absence of counsel, or for assessment of costs and sanctions as the Court in its discretion may determine.

(Rule 3.52(b) revised effective 1/1/00)

(c) Motions after trial

All motions after trial until judgment is final shall be heard before the judge who presided over the trial, unless such judge is absent, unavailable or unable to act, in which case the Presiding Judge shall assign an alternate judge; this includes such matters as motions to reopen, motions for new trial, motions for judgment notwithstanding a verdict and hearings on statements of decision.

(Rule 3.52(c) revised effective 1/1/13)

(d) Papers on file

All supporting affidavits, declarations, memoranda of points and authorities, and similar documents shall be attached to the notice of motion, or order to show cause, or other moving papers, when filed. Failure to comply with this requirement shall be deemed cause for taking the matter off calendar. All responsive and opposing documents shall be filed by respondents at least five (5) court days before the day set for hearing. Failure to comply with this requirement shall be deemed cause for acting on the matter without the consideration of documents not so filed. The application of this rule shall not apply to responsive and opposing documents where the moving party has obtained an order shortening time for hearing. This rule shall not be applicable where other time limits are required or provided by law, as in Code of Civil Procedure Section 659(a).

(Rule 3.52(d) revised effective 1/1/00)

(Rule 3.52 revised effective 1/1/16)

Rule 3.53. Uncontested Calendars

(a) Request for hearing

Applications for Default Prove Up Hearings, Minor's Compromises, Adoptions and other uncontested matters requiring hearing shall be made in writing to the Clerk of the Court not less than five (5) calendar days before the hearing.

(Rule 3.53(a) revised effective 1/1/16)

(b) Completion of file

No hearing will be set on an uncontested matter until all requisite pleadings and documents have been filed and the Clerk has entered the default, unless it is a matter

requiring court entry of default, in which case the Return of Service must be filed before the request for hearing.

(Rule 3.53(b) revised effective 1/1/09)

(Rule 3.53 revised effective 1/1/16)

Rule 3.54. Written Orders

(a) Preparation of order

Whenever a Judge rules upon a motion, order to show cause, or similar matter, and the matter is uncontested, within ten (10) calendar days, a written order shall be prepared, presented to the Judge for signature, and filed. In any contested matter, where opposing counsel appears, a written order shall be prepared and served by the prevailing party and reviewed by the opposing party, in accordance with California Rules of Court, Rule 3.1312. The order shall be prepared whether or not specifically requested by the Court.

(Rule 3.54(a) revised effective 1/1/16)

(b) Judge's signature

Counsel shall not approach the Bench for the purpose of obtaining a Judge's signature, during a hearing or trial; documents requiring a Judge's signature shall be presented during recess or given to the Bailiff while the Judge is on the bench.

(Rule 3.54(b) revised effective 1/1/00)

(c) Subsequent applications for orders

When an application for an order has been made to the Court or a Judge and has been refused in whole or in part, any subsequent application for the same character of relief, although made upon an alleged different state of facts, shall be made before the Judge making the original order in the case, unless the Judge is absent or unable to act, or shall request the Judge of another department to entertain such application; in all such instances, a full disclosure shall be made to such Judge of any and all such prior applications. See Code of Civil Procedure Section 1008.

(Rule 3.54(c) revised effective 1/1/16)

(Rule 3.54 revised effective 1/1/16)

Rule 3.55. Number of Attorneys Examining a Witness

Except by stipulation of opposing counsel or by express permission of the Court, only one lawyer representing the same party may examine or cross-examine a witness.

(Rule 3.55 revised effective 1/1/15)

Chapter 3. Receivers

Rule 3.80. Receivers

Appointment of receivers:

(1) In proper cases for the appointment of a receiver or a commissioner, and the Court determines that the appointment of an independent third party is unnecessary and no active management is necessary, court clerks may be appointed to such a position.

(2) Court clerks may not be appointed as a receiver or commissioner by stipulation of counsel.

(3) Attention is invited to California Rules of Court, 3.1175-3.1184 for provisions relating to appointment of receivers.

(Rule 3.80 revised effective 1/1/16)

Chapter 4. Settlements and Settlement Conferences (Not Applicable To Family Law and Probate Matters)

Rule 3.100. Settlements

Whenever a civil case has settled, counsel shall immediately notify the Court in writing. If a hearing, conference, or trial is imminent, notice must be given orally to the assigned department followed by a confirmation in writing. The writing must specify when all closing papers will be filed with the Court. If a case settles within five (5) calendar days of the trial date, counsel shall have on file a dismissal, stipulated judgment, or conditional settlement or make an appearance at the time and place designated for trial to place the settlement terms on the record. If a case settles before that time, counsel shall:

(1) Immediately give written notice to the Court, and;

(2) File a request for dismissal, stipulated judgment, or conditional settlement within forty-five (45) calendar days of the written notice of settlement.

If a request for dismissal, stipulated judgment, or conditional settlement is not filed within forty-five (45) calendar days, an Order to Show Cause shall issue as to why sanctions should not be imposed. Responsive papers to the Order to Show Cause must be filed five (5) court days in advance of the hearing. See California Rules of Court, Rule 3.1385.

(Rule 3.100(2) revised effective 1/1/16)

(Rule 3.100 revised effective 1/1/16)

Rule 3.101. Settlement Conferences

On the Court's own motion, all cases, other than short causes, may be calendared for mandatory settlement conferences, upon written or oral notice to all parties involved. At this conference, all parties shall:

(1) Have endorsed by the Clerk of the Court and served on all parties five (5) court days before the conference, a written statement of the facts, law and respective contentions of the parties to prove or disprove the right of recovery, items and amount of special damages, nature and extent of injuries incurred and claimed residuals documented by medical report when possible, any wage loss claim showing methods of computation, and any claim for future medical expenses and earnings loss;

(2) Have in attendance all principals or clients. Claims representatives shall be in attendance, unless excused in writing, by the Presiding Judge before the Settlement Conference;

(3) Be prepared to make a bona fide offer of settlement; and

(4) Participate in good faith in the settlement conference. Failure by any such person or entity to file the required written statements, to prepare for, appear at, or participate in a settlement conference, unless good cause is shown for any such failure, may be considered as an unlawful interference with the proceedings of the court and the Court may impose appropriate sanctions including, but not limited to, costs, actual expenses and counsel fees; and further, the Court may vacate the trial date, or order the case to proceed to trial on the date assigned.

(Rule 3.101(4) revised effective 1/1/08)

(Rule 3.101 revised effective 1/1/16)

Rule 3.102. Special Needs Trusts

Proposed Orders for the placing of the proceeds of a court judgment or settlement into a special needs trust must provide a place for the Court to assign a date in the Probate Department for the first annual review of the operation of the trust. A review date will be assigned in all cases of the approval of such a trust.

(Rule 3.102 revised effective 1/1/15)

Rule 3.103. Special Bench Bar Settlement Conferences (BBSC)

Specialized BBSC settlement proceedings may be held at such times as are designated by the Presiding Judge.

(Rule 3.103 revised effective 1/1/15)

Chapter 5. ADR (Not Applicable to Family Law Matters and Probate Matters)

Rule 3.200. Alternative Dispute Resolution Programs

(a) Availability of Alternative Dispute Resolution (ADR) programs

Judges in the Contra Costa County Superior Court encourage parties involved in lawsuits to use ADR to resolve their disputes without trial. The Court offers several ADR programs

in general civil and probate cases. The Court also provides mediation services in juvenile dependency and child custody and visitation cases and collaborates with community ADR providers to offer mediation in small claims, guardianship, civil harassment, and unlawful detainer cases.

(b) Application of these rules

These rules apply to all court–administered ADR programs except Child Custody Recommending Counseling (mediation) sessions available from family court services (which is governed separately by the California Family Code, related rules of court, and case law), community mediation services (provided in some small claims, civil harassment, guardianship, juvenile dependency, and unlawful detainer cases), and assignment of temporary judges to hear regular court calendars.

(c) Duty to meet and confer

In the event parties to a civil action agree to use ADR before their first Case Management Conference, they are encouraged to use the appropriate local court form:

(1) CV-655b – Stipulation and Order to Attend ADR and Delay First Case Management Conference 90 Days (Unlimited Jurisdiction Civil Cases)

(2) CV-659d – Stipulation to Attend ADR and Delay First Case Management Conference 90 Days (Limited Jurisdiction Civil Cases)

(d) Voluntary participation

Participation in any of the Court's ADR programs is strongly encouraged and voluntary unless otherwise provided by law, Judge or Local Rule. Parties may choose an ADR option on the Case Management Form (Judicial Council Form CM-110), or by filing one of two local court forms included in the plaintiff's packet:

(1) (For Limited Jurisdiction cases) - a Stipulation to Attend ADR and Delay First Case Management Conference 90 Days (Local Court Form CV-659d), or

(2) (For Unlimited Jurisdiction cases) – a Stipulation and Order to Attend ADR and Delay First Case Management Conference 90 Days (Local Court Form CV-655b).

Parties may also agree (stipulate) orally or in writing to use ADR at any time.

(e) Opening an ADR case

To open a civil or probate ADR case, parties must contact the ADR Programs office. Once a case is opened, the parties will receive a list of panel members with expertise in their type of case. The parties must make their own decision about whether a panel member has the needed expertise, and can help the parties to complete ADR before the Court deadline. All parties must agree on the panel member who will handle the ADR portion of their court case. Parties with child custody and visitation, guardianship, juvenile dependency, small claims, civil harassment and unlawful detainer cases will get separate instructions from the judge assigned to hear their case.

(f) Standard ADR case management timelines

Unless the judge makes different arrangements to accommodate circumstances in individual cases, parties can expect that they must choose their mediator, arbitrator, or neutral case evaluator within fourteen (14) calendar days of the matter being referred to ADR. The Court and ADR department will tell the parties how long they have to finish ADR.

ADR sessions may be scheduled at the parties' and panel members' convenience, as long as they meet the court–ordered ADR completion deadlines.

(g) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case, as well as to change between most ADR processes only if:

(1) All parties notify both the Judicial and ADR Department as soon as is practicable of their intent to change processes,

(2) All parties and the ADR panel member ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(h) Changing or abandoning ADR

Some ADR processes are confidential (private) and others are not. Once the Court has made an ADR order, the parties must have permission from the judge to change the ADR process, or to cancel ADR altogether.

(i) ADR panel member requirements

All ADR panel members must meet the training, education, and experience requirements for the mediation, arbitration, neutral case evaluation, and settlement mentor panels. People interested in serving on the Court's ADR panel must complete and update their panel member information as changes occur. If selected to serve on a particular case, panel members must complete and submit all forms and follow all of the Court's Ethical and Practice Standards listed in section seven of these rules.

(j) Complaints

ADR program participants are encouraged to discuss any concerns they have about the ADR process or a panel member's conduct with the panel member first. Consistent with California Rules of Court, Rule 3.865, the Court will address party complaints as follows:

(1) The party must make a written complaint to the ADR program director. If the ADR program director cannot resolve the complaint informally,

(2) The written complaint will be forwarded to the Supervising Civil Judge. The panel member must answer the complaint in writing, and a copy of that answer will be given to the person or people making the complaint. If the complaint remains unresolved,

(3) The Supervising Civil Judge and ADR program director will convene a review panel to consider the complaint. If the Supervising Judge finds the complaint to be valid, he or she may reprimand the panel member, suspend the panel member until he or she has completed additional training, or remove the panel member from one or all of the Court's ADR program panels.

(k) Service of ADR member

Service as an ADR panel member, and the appearance of a panel member's name on panel lists is at the sole discretion of the Supervising Civil Judge and/or his or her designee. Panel members' services can be terminated without cause, reason, or notice at any time. The Court is under no obligation to use any panel member's services now or in the future.

(l) Panel member evaluation

The Court will periodically evaluate each panel member's performance. In the event performance issues are identified, the Court may:

(1) Contact the panel member informally or formally to address and resolve any identified issues;

(2) Suggest or require the panel member attend additional training, or establish a mentoring relationship with an experienced practitioner;

(3) Issue a formal or information reprimand, suspend the panel member, or remove him or her from the panel.

(Rule 3.200 revised effective 1/1/16)

Rule 3.201. Mediation

(a) Mediation

Mediation allows people to focus on the issues at the heart of their dispute. Mediation conferences are informal. Most mediators start out talking with all the parties together. Later, the mediator may meet with each party separately. Mediators often ask each party to list the issues in dispute, and to offer their ideas for settlement. People often discuss and exchange documents or other information before or during mediation, but do not present evidence as they would in court. Mediators have different ways of handling the mediation process. For example, some mediators are more evaluative and are willing to tell the parties what they think a case is worth or how they think the case might turn out if it went to trial. Other mediators are more facilitative and tend to focus on helping the parties to negotiate and reach agreements of their own design. Parties are free to decide which mediation style they prefer. No matter what approach a mediator takes, he or she is not the decision maker. Agreements can only be reached if all the mediating parties accept the proposed solution.

(b) Mediator selection

All mediating parties must agree on a mediator and complete a Selection of ADR Panel Member (Local Court Form ADR-201) within fourteen (14) calendar days of the matter being referred to Mediation, unless the judge sets a different selection deadline. Parties must forward the Selection form to the ADR Programs office. If the parties cannot agree on a mediator, the Court or ADR department may appoint one. Once a mediator has been chosen, the ADR Programs office will then file and serve a Notice of Assignment on all parties and the Mediator.

(c) Mediator qualifications

Although most of the Court's mediators are also attorneys, some panel members are professionals and experts from other fields such as: accounting, business, construction, finance, psychology, and real estate.

(1) Mediators appointed to the panel after January 1, 2006 must:

(A) Have completed an initial 40-hour comprehensive mediation training program that encompasses commonly recognized mediation principles and practices including: confidentiality, voluntary participation, communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner;

(B) Have mediated five (5) cases or co-mediated at least ten (10) cases. Each mediation counted for this purpose must have lasted two or more hours; and,

(C) Be familiar with ethical standards as adopted by state and national professional organizations, and with the Uniform Mediation Act.

(2) Alternative qualifications:

A person who does not meet all of the requirements of (c)(1)(a) and (c)(1)(b) may still qualify to be a mediator for the Court if he or she provides the Court ADR Committee or its designee with satisfactory evidence of sufficient alternative education, training, skills and experience. Acceptance of alternative qualifications is at the discretion of the Court ADR Committee and/or its designee. The Court is under no obligation to accept alternative qualifications.

(3) All mediation panel members must:

(A) Attend at least four (4) hours of continuing education or training related to the practice of mediation every three years. At least 2 hour(s) of that education or training must address ethics, fairness, and bias issues in the mediation context. At least 1 hour of that education or training must address practice and ethical issues that arise when parties are not represented by an attorney.

(B) Certify that they meet the requirements of this rule every three years following their appointment as a mediator to the Court ADR panel.

(C) Agree to abide by the ethical principles established by California Rules of Court, Rules 3.850 et seq. and comply with the competence standards established by California Rules of Court, Rule 3.856.

(d) Mediation fees

The Court's mediation panel members shall not charge fees for the first 30 minutes of case scheduling and preparation time, or for the first two hours of mediation conference time. If more time is needed, the parties must pay that mediator's hourly fee for the time used. Parties who have had their court filing fees waived, (cancelled), may ask the ADR Programs Department to contact the mediator and find out if that party's mediation fees may also be waived (cancelled). Parties are encouraged to have a written agreement with the panel member regarding fees and the management of their ADR case.

(e) Attendance at mediation

Unless excused by the assigned judge before mediation starts, all trial lawyers, principals, clients, claims representatives, and other appropriate decision–makers must attend mediation in person. Telephone standby is not allowed unless approved by the assigned judge before mediation starts.

(f) Confidentiality

Court–connected mediations are confidential (private) per California Evidence Code Sections 1115–1128. The mediator cannot be called to testify in court about what happened or what was said in mediation. Except as otherwise provided by law or these rules, court staff, the mediator, all parties, all attorneys, and any other people facilitating or participating in the mediation process must treat all written and oral communications made in or during mediation, as confidential. The only exceptions to confidentiality in mediation are:

(1) The law or any other mandate requires the information to be reported; or

(2) The ADR panel member thinks there might be a danger of serious physical harm either to a party or to another person.

(g) Mediation statements

Parties must prepare and give information about their case to the mediator and other parties at least five (5) court days before the mediation hearing. Parties may use the Mediation Statement (Local Court Form ADR-304), or write this information on their own paper. This form is available online at www.cc-courts.org/adrforms. Mediation statements must not be longer than five (5) pages and must contain the following information:

(1) The name and title (or relationship to the case) of all people who will attend mediation;

(2) A list of people connected with other parties who, if present at mediation, might improve the chances of settlement;

(3) A brief statement of the important issues, and the party's views on liability and damages;

(4) A list of legal or factual issues that, if narrowed or resolved early, would promote settlement;

(5) A brief description of the history and status of any settlement negotiations; and,

(6) Copies of any court or other documents that will help the mediator understand the issues in dispute.

(h) Mediator's report

The mediator must forward a copy of the completed Mediator's Report (Local Court Form ADR-305) to the ADR Programs office, counsel, and all self-represented parties. This form is available online at www.cc-courts.org/adrforms.

(i) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case as well as to change between most ADR processes only if:

(1) All parties notify both the judicial and ADR Department as soon as is practicable of their intent to change processes, and

(2) The parties and the ADR panel member must ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(Rule 3.201 revised effective 1/1/16)

Rule 3.202. Judicial Arbitration

(a) Judicial Arbitration

Judicial Arbitration is less formal than a court hearing. It allows the parties under oath, to present their case, offer witness testimony, and get a decision. California Code of Civil Procedure Section 1141.10 et seq., allows the Court to require all cases where the amount in dispute is $50,000 or less to be submitted either to judicial arbitration or to mediation if the judge finds it to be appropriate in a particular case. Cases may also go to judicial arbitration if the person who made the complaint agrees to limit his or her recovery to $50,000, or if the parties all agree to use arbitration. The award (arbitrator's decision) must be filed with the Court within ten (10) calendar days of the last hearing. If either party disagrees with the arbitration award, he or she may ask the Court to review the case by filing a request for a new court hearing (called a Trial De Novo). The arbitration award becomes a court order unless one of the parties file for a Trial De Novo within sixty (60) calendar days or another time limit set by the judge.

(b) Arbitrator selection

All parties must agree on an arbitrator and complete a Selection of ADR Panel Member (Local Court Form ADR-201) fourteen (14) calendar days of the matter being referred to Arbitration, unless the judge sets a different selection deadline. Parties must forward this form to the ADR Programs office. If the parties cannot agree on an arbitrator, the assigned judge may appoint one. The ADR Programs office will then file and serve on all parties and the Arbitrator a "Notice of Assignment".

(c) Arbitrator qualifications

Arbitrators must be licensed California attorneys and have an oath of office on file with the ADR Programs office unless the parties jointly agree by stipulation to appoint an arbitrator with other qualifications.

(d) Arbitration fees

Under California Code of Civil Procedure Section 1141.18, arbitrators in judicial arbitration cases are paid $150 per case or $150 per day if the arbitration takes more than one day. All of the arbitrators on the Court's panel have agreed either to donate their services, or to be paid by the parties at the rate described in this section.

(e) Attendance at arbitration

As long as all trial attorneys, parties, and other people needed to present the case and answer the arbitrator's questions are included, the parties may choose who will attend arbitration.

(f) Arbitration statements

Parties must prepare and give information about their case to the judicial arbitrator and other parties at least five (5) court days before the arbitration hearing. Parties may use the Arbitration Statement (Local Court Form ADR-404) or write this information on their own paper. This form is available online at www.cc-courts.org/adrforms. This information must not be longer than five (5) pages and must include:

(1) The name and title (or relationship to the case) of all people who will attend arbitration;

(2) A brief statement of the legal and factual issues in the case, and the party's views on liability and damages; and,

(3) Copies of any documents that will help the arbitrator understand the issues in dispute.

(g) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case, as well as to convert most ADR processes only if:

(1) All parties notify both the Judicial and ADR Department as soon as is practicable of their intent to change processes, and

(2) The parties and the ADR panel member ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(Rule 3.202 revised effective 1/1/16)

Rule 3.203. Settlement Mentors

(a) Settlement Mentor conferences

The assigned judge may refer, or the parties may ask for a conference with a settlement mentor either on the morning of trial, or earlier in the case. These informal conferences usually last about two hours. These processes are not the same as mediation, and are **not confidential** per Evidence Code Sections 1115-1128. Parties meet with an attorney who has significant litigation experience with similar cases (called a settlement mentor) to review the issues, analyze the case, and consider settlement recommendations. The parties do not present evidence, and witnesses are not called. Although information may be shared with the settlement mentor and not shared with the other party, **any information given to the settlement mentor may be shared with the judge**. When appropriate, the settlement mentor may involve the judge in the settlement discussions.

(b) Selection of Settlement Mentors

Settlement mentors are assigned by the ADR Programs Department based on their stated areas of expertise, and in consultation with the assigned judge.

(c) Settlement Mentor qualifications

Settlement mentors are attorneys who have background experience in the issues involved in the case.

(d) Settlement Mentor fees

Settlement mentors may not charge any fees for their services unless the parties agree to continue settlement discussions with the settlement mentor at his/her usual fee.

(Rule 3.203(d) revised effective 1/1/17)

(e) Attendance at the Settlement Mentor conference

All trial attorneys, principals, clients, claims representatives, and other decision makers must attend the settlement mentor conference. Telephone standby is not allowed unless approved by the assigned judge before the conference begins.

(f) Confidentiality

Although information given during the settlement mentor conference may be shared with the judge, everyone attending, (including court staff, the settlement mentor, all parties and

all attorneys), must treat all written and oral communications made in or during the settlement conference as confidential.

When the judge will not be trier of fact, the mentor may report to the judge the settlement positions of the parties to help the parties reach an agreement.

(g) Blending, changing, or converting ADR processes

Although the Court allows parties to engage in more than one ADR process over the life of their case, they may not convert settlement mentor conferences into any other ADR process unless they have first asked for and received permission from the Judge scheduled to hear that case.

(Rule 3.203 revised effective 1/1/17)

Rule 3.204. Neutral Case Evaluation

(a) Neutral Case Evaluation

This program allows litigants and their lawyers to meet with an experienced trial attorney to get an independent opinion about their case, and about likely outcomes if their case were to go to trial (to the extent this is possible in a jury trial system). Evaluators can also help the parties develop a cost–effective plan for exchanging information (or managing discovery) and handling their cases. While commercial, business, real estate, personal injury, and contract matters often benefit from this program; any case might gain from this process if there are only two or three parties, and if there are more than just legal questions to resolve. Because this program does not involve negotiation or other settlement discussions, some parties use the evaluator's recommendations to negotiate their own agreement. Others choose another ADR program (such as mediation or arbitration) to settle their cases.

(b) Selection and assignment of Neutral Case Evaluators

All parties must agree on an evaluator and complete a Selection of ADR Panel Member (Local Court Form ADR-201) within fourteen (14) calendar days of the matter being referred to Neutral Case Evaluation, unless the judge sets a different selection deadline. Parties must forward this form to the ADR Programs office. If the parties cannot agree on an evaluator, the assigned judge may appoint one. The ADR Programs office will then file and serve a Notice of Assignment on all parties and the evaluator.

(c) Neutral Case Evaluator qualifications

Evaluators are attorneys who have significant litigation experience and background in the issues involved in the case.

(d) Neutral Case Evaluation fees

The Court's neutral case evaluators shall not charge fees for the first 30 minutes of case scheduling and preparation time, or for the first two hours of evaluation conference time. If more time is needed, the parties must pay that evaluator's hourly fee for the time used.

Parties who have had their court filing fees cancelled, (waived), may ask whether the neutral case evaluator is willing to waive that party's fees. Parties are encouraged to have a written agreement with the panel member regarding fees and the management of their ADR case.

(e) Attendance at the Neutral Case Evaluation Conference

All trial lawyers, principals, clients, claims representatives, and other decision–makers shall attend the evaluation conference. Telephone standby is not permitted unless approved in advance by the assigned judge.

(f) Admissibility of Neutral Case Evaluation findings

Neutral case evaluation is not confidential unless the parties and evaluator agree otherwise, and sign an agreement to that effect.

(g) Neutral Case Evaluation statements

Parties must prepare and give information about their case to the neutral case evaluator and other parties at least five (5) court days before the evaluation hearing. Parties may use the Neutral Case Evaluator Statement (Local Court Form ADR-504) or write this information on their own paper. This form is available online at www.cc-courts.org/adrforms. This information must not be longer than five (5) pages and must include:

(1) The name and title (or relationship to the case) of all people who will attend the neutral case evaluation conference;

(2) A brief statement of the important issues in the case, and the party's views on liability and damages;

(3) The legal or factual issues to be resolved; and,

(4) Copies of any court or other documents that will help the evaluator understand the issues in dispute.

(h) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case, as well as to convert most ADR processes only if:

(1) All parties notify both the judicial and ADR Department as soon as is practicable of their intent to change processes, and

(2) The parties and the ADR panel member ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(Rule 3.204 revised effective 1/1/16)

Rule 3.205. Temporary Judge Trial - Civil Division

Applicable to Civil Cases

(not including juvenile or family law cases)

(a) Temporary Judge trials

Some parties with civil cases want to choose when their case will be tried, and so will agree to have the Court appoint a temporary judge to hear their case. (This is permitted by Article 6, Section 21 of the State Constitution and Rule 2.831 of the California Rules of Court). Except for appeals in small claims cases (may also be heard by temporary judges), or court appearances where a temporary judge has been appointed to call a particular calendar, these trials are held at a time and location that is convenient for the parties and the temporary judge. Temporary judges have nearly the same authority as a superior court judge. Except for small claims appeal cases or times when the Court appoints a temporary judge to call a particular calendar, parties choose the temporary judge from a list maintained by the ADR Programs office. Temporary judge trials are handled in the same way as other civil trials, except that the trial may not take more than five (5) court days, there is no option for a jury trial, and the temporary judge might not have assistance from a court clerk or other support staff. The parties must provide their own court reporter. The parties in a temporary judge trial can appeal the temporary judge's decision in the same way as following a trial by an assigned sitting judge. Whenever possible, each party must also:

(1) Pre–mark all exhibits; and

(2) Give the temporary judge an exhibit list, witness list, and opening statement.

(b) Qualification of Temporary Judges

Consistent with California Rules of Court, Rules 2.810 et seq., all attorneys who act as temporary judges must have been active members of the State Bar for a minimum of ten (10) years, must be active members of the State Bar at the time of appointment, must meet the initial and ongoing training requirements established by California Rules of Court, 2.812 – 15 and established court policy, and must not be the subject of any pending State Bar disciplinary proceeding. Further, all attorneys who act as temporary judges must certify that he or she has not pled guilty or no contest to a felony, or has not been convicted of a felony that has not been reversed. Retired judges need not be active members of the bar as long as they are in compliance with all requirements of the assigned judge's rules and obligations as established by the Judicial Council of California. Retired commissioners must be active members in good standing with the State Bar of California, but are exempt from the requirement to have been active with the State Bar and free of any State Bar Discipline for ten (10) years before their service as a temporary judge.

(Rule 3.205 revised effective 1/1/16)

Rule 3.206. Ethical and Practice Standards for ADR Panel Members

(a) General responsibilities

People serving on the Court's ADR Panel must be familiar with and follow all state or federal laws, California Rules of Court, Local Court Rules, and relevant professional or ADR–specific standards of practice. Further, panel members have a duty to the parties, the Court and themselves to be honest and diligent, to act in good faith, and to not advance their own interests at the parties' expense.

ADR panel members must be reasonably available to schedule ADR conferences, and must make an effort to expedite the ADR process.

(b) Neutrality

ADR panel members must be neutral and act fairly in dealing with the parties. In these rules, neutrality is defined as "freedom from favoritism or bias by appearance, word, or action, and a commitment to serve all parties as opposed to a single party." Further, the mediator may not have a personal interest in the case, and cannot show bias toward individuals and institutions involved in the dispute.

(c) Conflict of interest – definition

Conflicts of interest include (but are not limited to) personal or professional relationships with a party such as: legal representation by the panel member or his or her law firm; representation in business, real property, tax preparation, or other transactions; and, service as a consultant, advisor, therapist, or other expert. All parties should ask panel members whether there would be a conflict of interest if he or she accepted the case. All panel members must disclose any personal or professional relationships that might create a conflict of interest before accepting a case assignment. If there is an actual or perceived conflict of interest, the parties may jointly decide to continue working with that panel member, or contact the ADR Programs office to choose another panel member.

(d) Conflict of interest – duty to disclose

Per California Rules of Court, Rule 3.855, panel members have an ongoing duty to disclose actual or potential conflicts of interest. Panel members must disclose personal or professional relationships with a party including (but not limited to): legal representation by the panel member or his or her law firm; representation in business, real property, tax preparation, or other transactions; and, service as a consultant, advisor, therapist, or other expert. If there is an actual or perceived conflict of interest, the parties may jointly decide to keep working with that panel member, or contact the ADR Programs office to choose another panel member.

(e) Solicitation by panel members

Panel members must accurately state their qualifications, and must not make misleading claims about any ADR process, its costs and benefits, or its outcome. Panel members must not ask for or accept business from an ADR participant (either as a neutral,

consultant, or representative in any other professional capacity) while that ADR proceeding is pending.

(f) Confidentiality

Except as otherwise provided, panel members must treat all written and oral communications made in or during an ADR process as confidential to the extent provided by the California Evidence Code and relevant case law.

(g) Role of the panel member in settlement

Panel members should help the parties to discuss the issues in dispute, and to carefully consider any proposed settlement options. Further, the panel member must try to identify and limit inappropriate pressures to settle the case. In order to protect the neutrality of his or her role, the panel member may find it advisable, for example, to encourage parties to seek independent advice from legal or other professionals.

(h) Unrepresented interests

Panel members must consider the possibility that people not attending an ADR conference may be affected by the results. The panel member has a duty to encourage the parties to fully consider such interests, when, in his or her judgment, it is appropriate to do so.

(i) Informed consent

Panel members have an ongoing duty to ensure that all parties understand the process and procedures associated with their ADR case. Further, the panel member must make every effort to ensure that the parties understand the panel member's role, and the limits to that role, in managing the ADR process, getting expert advice, and making decisions. Panel members should always have written agreements with the parties in a particular case regarding hourly fees and the management of the ADR case.

(j) Knowledge of ADR process

A panel member must only accept responsibility for delivering ADR services when reasonably certain that he or she has sufficient knowledge, training, or other expertise to administer that process appropriately, and in a way that helps the parties to participate effectively.

(k) Pro bono contributions and fees for service

Panel members must follow the Court's policies regarding ADR services that will be provided at no cost to the parties, and ADR services that may be compensated at the panel member's normal rate. Panel members must prepare billing or invoice statements to the parties that clearly state the purpose for all fees, and reflect the required pro bono service contribution. Specifically:

(1) Panel members will provide their services at no cost to the parties or the Court when serving as a settlement mentor or as a temporary judge.

(2) Panel members will limit their fees for judicial arbitration to $150 per day or per case, and will look to the parties for payment of these fees.

(3) Panel members will provide the first thirty minutes of case preparation and scheduling, and the first two hours of mediation and neutral case evaluation conference time at no charge. If the parties request additional time, or additional time is required to provide the requested mediation or evaluation services, the panel member may, with the parties' agreement, charge their normal rates for actual time spent.

(l) Advance deposits for Mediation or Neutral Case Evaluation services

Mediators and evaluators may require the parties to pay a deposit against anticipated mediation or evaluation fees. If the panel member requests a deposit against anticipated fees, he or she may only charge the parties for actual time spent or services provided, and refund any balance due. Mediators and evaluators may not require parties to pay a non-refundable fee for a "minimum" number of mediation or evaluation hours.

(m) Complete and return all ADR forms

Panel members must complete and return, as appropriate, all local and state forms as directed by the Court or the ADR Programs office.

(Rule 3.206 revised effective 1/1/16)

Chapter 6. Discovery Motions and the Discovery Facilitator Program

Rule 3.300. Discovery Facilitator program

In an attempt to avoid protracted, costly and unnecessary discovery disputes, Civil and Probate Departments listed on the Court's website require parties to participate in the Discovery Facilitator Program ("Program") before filing all motions in Court to compel discovery, except as set forth below, or unless the Court specifically orders otherwise. This includes motions pursuant to CCP Section 1987.1.

Cases exempt from the Discovery Facilitator program

The following discovery disputes are exempt from the Program:

(a) Cases in which there has been no response to discovery requests. Motions to compel under Code of Civil Procedure, Sections 2030.290(b) or 2031.300(b) shall be filed directly with the Court. The moving party should include, "Exempt from Discovery Facilitator Program" on the Notice of Motion.

(b) Cases in which trial is less than sixty (60) days away.

(c) Motions necessitated solely by a third party's refusal to comply with a subpoena.

(d) Those disputes specifically exempted by the trial judge.

(Rule 3.300 revised effective 1/1/15)

Rule 3.301. Discovery Motions and the Discovery Facilitator Program

(a) Mandatory referral to Discovery Facilitator program

(1) Unless exempt as set forth above, any party wishing to file a Discovery Motion, must first serve a Request for Assignment of Discovery Facilitator (Local Court Form ADR-610) by fax or email on the Martinez Civil Clerk's Office of the Contra Costa County Superior Court ("Martinez Civil Clerk's Office"), Fax 925-608-2109; email: ADRdiscoveryfacilitator@contracosta.courts.ca.gov

A copy of the Request for Assignment of Discovery Facilitator shall also be served on all parties to the action.

The Request for Assignment of Discovery Facilitator (Local Court Form ADR-610) shall provide the name and the fax number and email address of the party who intends to file the Discovery Motion, of all other parties against whom the motion will be filed, and of all other parties in the action.

(2) The Request for Assignment of Discovery Facilitator (Local Court Form ADR-610) must be served on or before the last date for filing the Discovery Motion. Service of the Request for Assignment of Discovery Facilitator shall be deemed the proper filing of a Discovery Motion for purposes of the rule requiring that Discovery Motions must be filed within forty-five (45) days of service of the discovery responses.

(3) Discovery Facilitators are experienced attorneys who are volunteering their time to assist the Court in resolving these disputes. There is no cost for participation in the Program. The Court does not expect any Discovery Facilitator to spend more than 4 hours on a case. If the Discovery Facilitator estimates that a case may take more than 4 hours, he or she may decline the case by sending a completed "Notice of Termination of Appointment of Discovery Facilitator" (Local Court Form ADR-615) stating that the matter is expected to take longer than 4 hours to the Martinez Civil Clerk's Office.

(4) Cases that are exempt from the Discovery Facilitator program pursuant to Local Rule 3.301(a)(3) will be set for OSC or a Discovery Conference within sixty (60) days. The Court will preview the issues with the parties, give guidance on alternatives, encourage meaningful "meet and confer" sessions and discussion of the need to appoint a Discovery Referee. The Court may set a date for hearing on a Discovery motion, or impose issue or monetary sanctions, as appropriate.

(Rule 3.301(a) revised effective 1/1/17)

(b) Discovery Facilitators

(1) The Martinez Civil Clerk's Office shall maintain a list of Discovery Facilitators. Cases shall be assigned to Discovery Facilitators in the order in which they appear on the list.

(2) Before notifying the parties of the assignment of a Discovery Facilitator, the Martinez Civil Clerk's Office shall contact the proposed Discovery Facilitator to confirm availability and willingness to serve.

(3) Within three (3) calendar days of being contacted, the proposed Discovery Facilitator shall perform a conflict of interest check. A Discovery Facilitator shall decline the assignment if he or she knows of facts that would serve as grounds for disqualification under CCP § 170.1 if the Discovery Facilitator were a Judicial Officer. The Discovery Facilitator shall also inform the Martinez Civil Clerk's Office of any disclosures he or she deems appropriate to be forwarded to the parties.

(4) Discovery Facilitators shall have the following minimum requirements: 10 years of experience in Civil or Probate Litigation.

(c) Assignment of Discovery Facilitator

(1) The Martinez Civil Clerk's Office shall serve a Notice of Assignment of Discovery Facilitator (Local Court Form ADR-612) within ten (10) calendar days of receipt of a Request for Assignment of Discovery Facilitator.

(2) Rejection of Assigned Discovery Facilitator.

(A) Parties to the proposed motion shall have ten (10) calendar days after service of the Notice of Assignment to serve on the Martinez Civil Clerk's Office and the parties in the action a Rejection of Assigned Discovery Facilitator (Local Court Form ADR-617). If the Discovery Facilitator is rejected, a second Discovery Facilitator will be appointed. Objections to the second, or succeeding, Discovery Facilitators may only be made by ex parte application to the Court setting forth good cause for the objection. Failure to set forth good cause, may result in the imposition of monetary sanctions.

(B) If no Rejection of Assigned Discovery Facilitator is served within ten (10) calendar days of service of the original Notice of Assignment of Discovery Facilitator, the Notice of Assignment of Discovery Facilitator is confirmed.

(d) Hearing of discovery dispute

(1) The Discovery Facilitator shall hold a hearing on the discovery dispute no later than thirty (30) days after confirmation of the assignment of the Discovery Facilitator. Parties may stipulate in writing to extend the 30 day deadline or it may be extended by the Facilitator for good cause that supersedes the policy of the Program for expedited resolution.

(2) One of the purposes of this Discovery Facilitator program is to narrow the number of discovery disputes, should a hearing ever be required before a judicial officer. Another purpose is to allow for informal resolution of discovery disputes at a lower cost to the parties than they would otherwise incur. Therefore, the format of briefing done for a hearing before a Discovery Facilitator should be brief, practical, and informal. Within these guidelines, the Discovery Facilitator has the discretion to determine the format of briefing required or whether any briefing will be required, and the schedule for service of such briefing. The Discovery Facilitator shall also have discretion to determine the structure of the hearing, including appearances by telephone or video.

(3) If the Discovery Facilitator determines that the hearing cannot be scheduled or completed within thirty (30) days of the date of confirmation of the assignment of the Discovery Facilitator because of conduct of one of the parties, the Discovery Facilitator shall issue a Finding of Non-Compliance, specifying the party and/or attorney responsible. In the event a formal Discovery Motion is subsequently filed, the moving party shall attach a copy of the Finding of Noncompliance to its papers as an exhibit and may submit a brief, factual, non-argumentative recitation of the facts regarding the non-compliance. The policy of the court will be to award monetary sanctions against the party responsible for the Discovery Facilitator's inability to schedule or complete the hearing within thirty (30) days, regardless of the outcome on the merits of the motion. In the case of represented parties, the monetary sanction shall be assessed against the attorney and/or the party.

(4) The Discovery Facilitator program is not a mediation program. The Discovery Facilitators are not mediators, and the proceedings under this Program are not subject to mediation confidentiality rules. While the Facilitator may encourage compromises in discussion at or before the hearing in order to narrow or settle disputes, Discovery Facilitators should not simply try to produce a compromise at any cost. In making his or her recommendations, the Discovery Facilitator will give an opinion on the merits of the dispute in a manner that he or she believes is consistent with applicable law.

(5) If the discovery dispute is completely resolved at or before the hearing, the parties will confirm the terms of the resolution in writing, and the appointment of the Discovery Facilitator will terminate automatically, unless the Discovery Facilitator and the parties agree that the Facilitator will continue to serve.

(6) If the discovery dispute is not completely resolved at the hearing, the Discovery Facilitator shall, within ten (10) days of the completion of the hearing, serve a document on the parties entitled “Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator” (Local Court Form ADR-616). The Recommendation may be on the merits of the motion, may be a recommendation that the matter be referred to the assigned judge for decision, may be that the parties are ordered to meet and confer and to provide a report to the Court of the results of such meeting and the matters that remain in dispute, or that a formal Discovery Referee be appointed. The Discovery Facilitator may

require the substantially prevailing party to do the initial draft of the recommendations. If so, this initial draft shall not be required to be sent to the opposing party for approval as to form, but rather will be sent directly to the Discovery Facilitator.

(7) If service of the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator does not resolve the dispute, the moving party shall have thirty (30) days from the service of the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator to file with the clerk of the court and serve on the parties a formal Discovery Motion. Those moving papers shall include, as the first exhibit, a declaration that the parties have completed the Discovery Facilitator Program and shall attach the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator as part of the exhibit.

(8) If for any reason the Discovery Facilitator fails to serve the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator, the moving party shall have forty (40) days from the completion of the discovery hearing to file formal Discovery Motion papers regarding the discovery dispute, which papers shall include, as the first exhibit, a declaration regarding the failure of the Facilitator to serve the Notice.

(9) The court will consider the Recommendations of the Discovery Facilitator in deciding the merits of the motion. The purpose of this Discovery Facilitator program is to facilitate discovery and the resolution of discovery disputes without, or with minimal, court supervision, given current budgetary restraints on the court.

The policy of the court will be to award monetary sanctions in favor of any party who substantially prevails on a Discovery Motion that is subject to the Discovery Facilitator program.

(e) Urgent discovery motions

(1) A party may present an ex parte application to the Court to shorten all time frames set forth in this Rule, or to exempt the dispute from the Program, upon a showing of good cause.

(f) Compensation of Discovery Facilitators

(1) Recognizing the importance of the principle of maintaining access to justice, and the fact that there is only a nominal fee for filing a Discovery Motion to be heard before a judicial officer, Discovery Facilitators shall serve without any monetary compensation. The parties to the discovery dispute are counseled to bear in mind that the Discovery Facilitators are donating their time and grant them the courtesy and respect the parties would grant to a judicial officer, and minimize the paperwork that they serve on the Discovery Facilitators.

(2) If the parties choose to use the services of the Discovery Facilitator after completion of the assignment, compensation shall be pursuant to agreement of the Facilitator and the parties, which agreement should be confirmed in writing.

(3) The policy of the Program is that a Discovery Facilitator will handle only one Assignment per case without compensation. If there is more than one Request for Assignment of Discovery Facilitator in a case, the parties may use the Facilitator for the second Assignment if an agreement is reached for compensation of the Facilitator. Otherwise, the second Request for Assignment of Discovery Facilitator will be assigned to a different Discovery Facilitator.

(g) Forms used in Discovery Facilitator program

Request for Assignment of Discovery Facilitator
Local Court Form (ADR-610)

Notice of Assignment of Discovery Facilitator
(Local Court Form ADR-612)

Finding of Non-Compliance
Local Court Form (ADR-614)

Notice of Termination of Appointment of Discovery Facilitator
Local Court Form (ADR-615)

Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator
Local Court Form (ADR-616)

Rejection of Assigned Discovery Facilitator
Local Court Form (ADR-617)

Notice to Deponent and Deposition Officer of Assignment to Discovery Facilitator Program and Stay of Records Production Date
Local Court Form (ADR-618)

(Rule 3.301 revised effective 1/1/17)

Title Four. Criminal Rules

Division I. Criminal

Chapter 1. Criminal Department

Rule 4.1. Motions

(a) Motions procedures

(1) Length

(A) A memorandum of points and authorities filed in support of or opposition to a motion and produced on a computer must not exceed 4,200 words, including footnotes. Such a memorandum must include a certificate by submitting counsel or an unrepresented party stating the number of words in the memorandum. The person certifying may rely on the word count of the program used to prepare the memorandum.

(B) A memorandum of points and authorities prepared on a typewriter must not exceed 15 pages.

(C) The limitations above do not include the caption of the case, the signature block, the word count certification, or any exhibits.

(D) On application, a judge may authorize filing of a longer memorandum. Except as otherwise ordered, any memorandum submitted in violation of this rule will not be considered.

(2) Consequences for Failure to Comply with Motions rules.

(A) The failure to comply with the rules governing motions may result in the imposition of monetary sanctions.

(B) If any motion subject to this rule is not made or heard within the time limits and pursuant to the requirements of this rule, the failure to do so shall constitute a waiver of the right to make the motion. The Court, for good cause shown, may grant relief from the waiver.

(C) The failure to file any response within the time limits and pursuant to this rule shall constitute a waiver of the right to make a response, but the Court, for good cause shown, may grant relief from the waiver.

(b) Pre-trial motions.

(1) The following motions shall be filed and heard before trial:

(A) Demurrer to the complaint, indictment or information where the Court authorizes filing after the entry of plea or where a demurrer is filed before entry of plea;

(B) Motion to dismiss complaint, indictment or information (e.g. Penal Code Section 995 or non-statutory motions to dismiss);

(C) Motion under Penal Code Section 1538.5 and other motions to suppress evidence or for return of property unlawfully seized;

(D) Motion for discovery, including discovery relating to informants claimed to be material witnesses;

(E) Motion to compel lineup;

(F) Motion to sever or consolidate cases, counts or defendants, if the parties stipulate that the ruling shall be binding on the trial department;

(G) Any speedy trial motion where grounds exist at the time set herein for notice;

(H) Motion to challenge the jury selection system;

(I) Motion to reinstate complaint;

(J) Motion to strike or attack the constitutional validity of prior convictions, enhancements or probation;

(K) Motion to dismiss or for other relief for vindictive prosecution or outrageous government conduct;

(L) Motion to recuse;

(M) Faretta motion;

(N) Motion to appoint advisory counsel;

(O) Motion to appoint second counsel in capital case;

(P) Motion to disclose surveillance action; and

(Q) Any other motion that does not require for its resolution a ruling on admissibility of evidence at trial or is not otherwise a common law in limine trial motion.

(c) Time and place for notice and hearing of pre-trial motions, and rules for filing and service.

(1) Unless otherwise ordered, all motions and proofs of service shall be filed and served in accordance with the time limitations set forth in California Rules of Court, Rule 4.111 and Penal Code Section 1538.5, and shall be set for hearing in the Criminal Department of the appropriate court.

(2) The Court, for good cause or upon the stipulation of the parties with court approval, may permit motions to be heard at the time of trial.

(3) All pleadings filed in connection with Pre-Trial motions shall be filed in the courthouse where the case is pending at the time the motion is filed. All pleadings shall be served on opposing counsel in his or her regularly assigned office by the most expeditious means available. If the identity of opposing counsel is not known when the pleading is filed, the following service rules shall apply: (1) if the case is being handled by a special unit, the pleading shall be served on the office of the special unit assigned to the case; (2) in all other cases, the pleading shall be served on the office of the opposing party closest to the courthouse in which the case is pending.

(4) In felony cases, any party filing a pleading in connection with a substantive Pre-Trial motion shall simultaneously serve the Court's Research Attorneys. Pleadings and exhibits in connection with felony motions shall be served on the Research Attorneys by email at the following address: ratts@contracosta.courts.ca.gov.

(5) If a felony motion is to be continued or dropped from calendar, counsel for the moving party shall promptly notify the Court's Research Attorneys by email and the Research Attorneys will notify the Judge. If the party opposing a motion is unable to file pleadings at least five (5) court days before the time scheduled for the hearing as required by California Rules of Court, Rule 4.111, or as otherwise required by law, counsel shall notify the Court's Research Attorneys by email.

(6) All papers shall contain in the upper right-hand corner of the first page, the filing party's estimate of the overall time required for the hearing of the matter, date and department number of the hearing, and a request for a removal order if a defendant or necessary witness is in custody outside the Contra Costa County Jail.

(d) General procedures for pre-trial motions:

(1) A failure of the moving party to appear when the matter is called may, in the Court's discretion, cause the matter to be ordered off calendar. In the event of an unavoidable schedule conflict, the attorney with the conflict can avoid having the matter dropped by calling the Court and also notifying opposing counsel before the scheduled hearing and reporting the conflict.

(2) A motion that has been duly filed may be dropped from calendar up to forty-eight (48) hours before the appearance date by notifying opposing counsel and the Court. Within forty-eight (48) hours of the date set for hearing, the moving party shall appear unless excused by the Court.

(3) No matters will be continued, even by stipulation of the parties, except with the approval of the Court for good cause shown. Compliance with Penal Code Section 1050 is required unless excused by the Court.

(4) Motions and opposition to such motions shall specifically set forth any evidence, theories of law and authorities relied on in support or opposition to said motions. Checklist or "boilerplate" motions will not be considered and may, in the discretion of the court, cause the matter to be dropped from the calendar.

(e) Motions to be heard by the trial judge.

Except as otherwise ordered, motions not enumerated above as Pre-Trial motions shall be heard by the Trial Judge. Counsel in cases pre-assigned to a trial department shall submit to the Trial Judge all such motions within three (3) court days before the date set for trial.

(f) Ex parte applications.

(1) All ex parte applications for orders shortening or extending time shall be presented in the Criminal Department to which the motion has or will be assigned, with at least twenty-four (24) hours' notice to the opposing party or counsel. Such applications shall include a written or oral supporting declaration, stating whether that party has been contacted and has agreed to the requested order or why the ex parte order should be issued.

(2) Except by order of the Court, upon a showing of good cause, all ex parte applications seeking to set a matter on shortened time shall provide for moving papers to be filed and personally served at least five (5) calendar days and for opposing papers to be filed and served at least two (2) calendar days before the hearing date. All papers, including opposition and reply papers, filed in motions brought on an order shortening time, shall be accompanied by a copy of the proposed order.

(3) Any request for relief from operation of these rules shall be made to the Court, with a showing of good cause, before the papers are filed.

(g) Motion to withdraw as counsel

An attorney who is appointed or retained to represent a client in a criminal proceeding shall not withdraw from such representation except by filing a substitution of attorney bearing the written consent of the defendant or upon a timely motion and order of the court.

(Rule 4.1 revised effective 1/1/16)

Rule 4.2. Discovery.

Any party asserting a work product or other privilege exception pursuant to Penal Code Section 1054.6 or asserting a discovery exception based upon a showing of good cause pursuant to Penal Code Section 1054.7 shall proceed by noticed motion which shall be heard before the first readiness conference.

(Rule 4.2 revised effective 1/1/16)

Rule 4.3. Applications on Behalf of Inmates.

(a) Application to the Sheriff

Except as otherwise stated in this rule, applications by or on behalf of inmates confined in the county jail, for temporary release from custody, for medical, family emergency, education, employment, and related purposes (i.e. requests for "passes") shall be made to the Sheriff and not to the Court.

(b) Application to the judge of the felony calendar

The following applications shall be made to the judge of the Felony Calendar Department: those made pursuant to Sections 4011, 4011.6 and 4011.8 of the Penal Code.

(c) The Court's power to determine condition of confinement

Nothing in this rule shall affect the Court's power and duty to make proper determinations and orders with respect to allegedly unlawful conditions of confinement in the county jail in a justiciable controversy properly before the Court in connection with a proper petition for writ of habeas corpus, application for modification of probation, or other similar pleading.

(Rule 4.3 revised effective 1/1/15)

Rule 4.4. Violations of Probation.

(a) Notification by Probation Officer

In all cases involving persons on probation, the Probation Officer shall promptly notify the Criminal Calendar Department responsible for monitoring that probationer of every violation of law (other than minor traffic offenses) that the Probation Officer reasonably believes the probationer has committed.

(b) Where probation violations are heard

Probation violation hearings in felony cases shall be held in the Criminal Department that presides over the felony probation calendar. Probation violation hearings in misdemeanor cases that originally arose in the Richmond and Pittsburg branch courts shall be held in the branch court in which the underlying case arose, in a department designated by that branch court's Supervising Judge. Probation violation hearings of misdemeanor cases that originally arose in the Walnut Creek or Concord/Mt. Diablo branch courts shall be held in Martinez in a department designated by the Presiding Judge.

(Rule 4.4 revised effective 1/1/15)

Rule 4.5. Disposition of Cases Other than by Trial or Hearing.

The disposition of cases other than by trial or hearing may be discussed only with the judge to whom the Pre-Trial, readiness conference, or probation revocation matter, has been assigned.

(Rule 4.5 revised effective 1/1/15)

Rule 4.6. Relief from Forfeiture of Bail in Misdemeanor and Felony Cases.

(a) Bench warrants upon forfeiture of bail

(1) When a bailed defendant fails to appear, unless personal appearance has been excused under Penal Code Section 977, or unless the Court grants a continuance under Penal Code Section 1305.1, bail shall immediately be forfeited and a bench warrant shall be issued. The bench warrant shall require bail in an amount not less than the amount of the forfeited bond, and not less than the minimum amount required for entry into automated warrant index systems. Each warrant shall contain a notice to the following effect: “Do Not Cite Release -- Bail in Forfeiture”.

(2) If counsel appears for a bailed defendant whose personal appearance is desired by the Court, and asserts that the defendant’s personal appearance is excused under Penal Code Section 977, the Court shall order the defendant to personally appear at a specific date, time and place, pursuant to Penal Code Section 978.5(a)(1). If the defendant does not then appear, bail forfeiture and bench warrant shall be ordered.

(3) If counsel or the defendant provides the Court with sufficient grounds for a finding that the non-appearance may be excused under Penal Code Section 1305.1, the Court shall enter in the record any such finding and may order a reasonable continuance without immediate forfeiture of bail.

(b) Setting aside forfeiture upon appearance of defendant

(1) An order of bail forfeiture shall be vacated on the Court‘s motion if the defendant personally appears before the end of the 180-day period defined in Penal Code Section 1305. Appearance may be by means of arrest on the bench warrant, “voluntary” or “add-on” appearance, surrender by the bail agent, or other means (e.g., a dismissal of the case).

(2) If the defendant appears on a new or separate matter and the defendant or bail agent advised the Court of the forfeited bond, the Court may, in its discretion, address the bail forfeiture issue on the case in which a bench warrant remains outstanding. The Court does not assume responsibility for identifying a defendant’s pending cases involving forfeiture or initiating service of warrants.

(3) Relief from bail forfeiture without the personal appearance of the defendant will be considered only upon a timely written motion by the bail agent or surety, stating the specific grounds upon which relief is sought, with not less than ten (10) calendar days’ notice to both the District Attorney and the County Counsel. A motion for exoneration of forfeited bail will be treated as a motion for a tolling of the 180-day period if the grounds asserted are those of temporary disability, as described in Penal Code Section 1305(e). Repetitive, groundless or otherwise frivolous motions may result in the imposition of sanctions.

(4) When the People request dismissal of a case in which bail is in forfeiture, the Court may, on its own motion, waive the defendant's personal appearance and may order forfeiture relief and bail exoneration.

(c) Reinstatement and continuance of bail

After Notice of Forfeiture has been mailed by the clerk, a defendant may be continued on a reinstated bond only with the consent of the bail agent. Consent to reinstatement and continuation of a forfeited bond may be given through personal appearance by the bail agent or in writing, or to a member of the court's staff by telephone. The Clerk's Minute Order shall identify the person giving consent to continuation of the bond, and the method of communicating it.

(d) Exoneration of bail after forfeiture

When an order of bail forfeiture has been vacated on a bond that is not to be continued, the Court may, on its own motion and in its discretion, order bail exoneration without the necessity of a motion or appearance by the bail agent.

(e) Cost assessment as condition of forfeiture relief

(1) Unless the Court orders otherwise, in its discretion in the interests of justice, any order setting aside a bail bond forfeiture shall be conditioned on the timely payment by the bail agent or surety of an assessment of costs. Written notice of the cost assessment shall be mailed by the clerk to the parties to whom the Notice of Forfeiture was sent, as required by Penal Code Section 1305.2.

(2) For bail posted after the effective date of this Rule, the following levels of cost assessment shall be "just terms" under Penal Code Section 1306(b): When the defendant's appearance is a result of arrest on the bench warrant issued upon bail forfeiture, the assessment is $100.00 per bond; when the defendant's appearance is not a result of bench warrant arrest, the assessment is $75.00 per bond.

(3) The Court may, in its discretion, order larger assessments, following notice, in cases where criminal justice agencies have incurred extraordinary expenses in returning a defendant to court jurisdiction.

(4) The Court may, in its discretion, waive imposition of assessments in cases in which the defendant appears and shows the Court that the defendant was, at the time of the order of forfeiture, either in custody in this county or personally appearing in another court.

(5) The Court may, in its discretion, waive the imposition of cost assessments on a case-by-case basis in the interest of justice.

(e) Cost assessment as condition of forfeiture relief

(1) Unless the Court orders otherwise, in its discretion in the interests of justice, any order setting aside a bail bond forfeiture shall be conditioned on the timely payment by the bail agent or surety of an assessment of costs. Written notice of the cost

assessment shall be mailed by the clerk to the parties to whom the Notice of Forfeiture was sent, as required by Penal Code Section 1305.2.

(2) For bail posted after the effective date of this Rule, the following levels of cost assessment shall be "just terms" under Penal Code Section 1306(b): When the defendant's appearance is a result of arrest on the bench warrant issued upon bail forfeiture, the assessment is $100.00 per bond; when the defendant's appearance is not a result of bench warrant arrest, the assessment is $75.00 per bond.

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(4) The Court may, in its discretion, waive imposition of assessments in cases in which the defendant appears and shows the Court that the defendant was, at the time of the order of forfeiture, either in custody in this county or personally appearing in another court.

(5) The Court may, in its discretion, waive the imposition of cost assessments on a case-by-case basis in the interest of justice.

(Rule 4.6 revised effective 1/1/16)

Rule 4.7. Submitting Sensitive Exhibits.

All controlled substances, guns, money, valuables, and other sensitive exhibits shall be packaged and stored separately from other exhibits. Sharp objects such as knives, needles and glass shall be specially wrapped and labeled for the handler's protection. (For instance, a syringe shall be packaged by the police agency in a plastic tube). Any party submitting such items, and anyone arranging transfer of such items, shall notify the exhibits clerk or the courtroom clerk of these objects and about any dangers associated with them.

(Rule 4.7 revised effective 1/1/15)

Division 2. Infractions

Chapter 1. Infraction Rules

Rule 4.40. Filing.

The Clerk's Office of the Contra Costa County Superior Court, Traffic Division shall be responsible for processing all adult and juvenile traffic infractions and non-traffic infractions. No misdemeanors shall be filed in the Traffic Division in the Pittsburg, Richmond, and Walnut Creek courthouses.

(Rule 4.40 revised effective 1/1/15)

Rule 4.41. Court Sessions.

Regular court sessions for citations and complaints filed in the Traffic Division for both adult and juvenile matters shall be scheduled as required by the Presiding Judge and published by the Court Executive Officer.

(Rule 4.41 revised effective 1/1/15)

Rule 4.42. Arraignments.

Except for offenses mandating a court appearance, a defendant may waive his/her right to be arraigned on the violation and enter a plea of not guilty at the court counter. The Clerk will assign a trial date within the statutory time requirements of Penal Code §1382, unless the defendant waives that right on the form provided by the Clerk.

(Rule 4.42 revised effective 1/1/15)

Rule 4.43. Continuances.

Except for continuance of a trial date, on or before the date set or required in any matter, the Clerk shall have the authority to grant the defendant one extension of not more than thirty (30) calendar days.

(Rule 4.43 revised effective 1/1/15)

Rule 4.44. Trial Continuances.

When a case has been set for a contested court trial, each side shall be entitled to one continuance of the trial date provided the request is received by the Traffic Division not fewer than twenty (20) calendar days before the assigned date of trial. This request must be received in writing.

(Rule 4.44 revised effective 1/1/16)

Rule 4.45. Juvenile Traffic Infraction Matters.

All juvenile traffic citation matters will be required for a mandatory appearance pursuant to W&I Code 853.6 and 853.6(a). These citation will not be subject to civil assessment pursuant to Penal Code § 1214.1.

(Rule 4.45 revised effective 1/1/15)

Chapter 2. Adjudication of Infraction Matters

Rule 4.60. Trial by Declaration for Traffic Infractions.

(a) Trial by Declaration in traffic infractions

The Court adopts the trial by declaration process defined in Vehicle Code § 40902.

(b) Failure to appear or untimely request for action

Additionally, pursuant to Vehicle Code § 40903, any person who fails to appear as provided by law may be deemed to have elected to have a trial by written declaration upon any alleged infraction, as charged by the citing officer, involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the vehicle code. If there is no timely request for action and the fines and fees are not paid by the due date, the case will proceed to civil assessment pursuant to Penal Code § 1214.1. Additionally, the Department of Motor Vehicles (DMV) may be notified of the failure to appear pursuant to Vehicle Code § 40509.5(b), which can result in a suspension of the defendant's driver's license pursuant to Vehicle Code § 13365(a)(2) until all obligations to the Court are satisfied.

(c) Adjudication pursuant to CVC 40500

In eligible cases the Court will conduct the trial by declaration and it will be adjudicated on the basis of the notice to appear issued pursuant to Vehicle Code § 40500. Once adjudicated, the suspension of the defendant's license will be lifted by the Court to DMV.

(d) Disposition with guilty finding or untimely request for a trial de novo

If there is a guilty finding, the conviction shall be reported to the DMV and the defendant notified of the disposition of the case, the amount of imposed fines, and fees, and the defendant's right to request a trial de novo within a specified period of time. If there is no timely request for a trial de novo and the fines and fees are not paid by the due date, the case will proceed to civil assessment pursuant to Penal Code § 1214.1. Additionally, the DMV will be notified of the failure to pay pursuant to Vehicle Code § 40509.5(b), which can result in a suspension of the defendant's driver's license pursuant to Vehicle Code § 13365(a)(2) until all obligations to the Court are satisfied.

(Rule 4.60 revised effective 1/1/15)

Rule 4.61. Clerks' Authority in Infraction Cases.

For cases that have not been transferred to court collections, deputy clerks are granted the authority to take the following actions at the request of defendants charged with infraction violations:

(1) Accept not guilty plea and schedule court trial.

(2) Accept the posting and forfeiting of bail on infraction cases.

(3) Set trial de novo (must post full bail with cash or certified funds only).

(4) Accept cash, check, credit payment, certified fund if case is in court control.

(5) Accept cash payment if case is with AllianceOne of at least 10 percent of the total bail amount for each infraction violation of the vehicle code.

(6) Accept not guilty plea forms and set cases for hearing (also see Local Rule 4.80, below).

(7) Schedule same day arraignment calendar.

(8) Accept proof of correction for correctable violations with a $25 proof fee.

(9) Give one time 30 traffic school extension.

(10) Give one time 30 day first appearance extension.

(11) Issue subpoenas for case that have a court trial set.

(Rule 4.61 revised effective 1/1/15)

Rule 4.62. Prohibited Requests in Traffic Matters.

The Court will not grant, or authorize deputy clerks to grant, any of the following requests from defendants or their counsel:

(1) For the scheduling of a court arraignment or trial after the finding defined in Vehicle Code § 40902.

(2) Reset of court trial that is not within twenty (20) calendar days before the hearing date.

(3) Reduction in bail, fines and fees, or community service work hours.

(4) Remand to county jail in lieu of payment of bail or fines and fees.

(5) To grant subsequent extension, following an initial 30-day extension, of time to pay or to provide proof of completion of community service work or traffic violator school or to provide proof of correction of correctable offense(s).

(6) To grant community service work following defendant's failure to appear for a contested traffic trial, where the case has been sentenced in absentia.

(7) To grant community services for civil assessments.

(8) To grant out of state community service work.

(Rule 4.62 revised effective 1/1/16)

Rule 4.63. Civil Assessments in Traffic Matters.

(a) Imposition of Civil Assessment

A Civil Assessment in the statutorily accepted amount is imposed against anyone who does not appear (Failure To Appear - FTA) in court and/or pay a court-ordered fine by the due date (Failure To Pay - FTP). The Civil Assessment is added to and is separate from, any fine and fees connected with your case. You must pay the Civil Assessment even if you are not found guilty on the traffic citation.

(b) Procedure to request removal of Civil Assessment

Complete the Defendant's Request and Declaration to Vacate Civil Assessment form (Local Court Form TR-121) which can be found at www.cc-courts.org/forms. Provide a written explanation of the reason you did not appear in court and did not pay and attach

supporting documentation. If you do not attach documentation, your application will not be processed and all documentation will be returned.

(Rule 4.63 revised effective 1/1/16)

Rule 4.64. Appeals.

(a) The process for filing an appeal in an Infraction case

An appeal is taken by filing with the Clerk in the Traffic Division a written notice of appeal signed by appellant or appellant's attorney. The notice shall be filed within thirty (30) calendar days of pronouncement of judgment or mailing by the clerk of the Notice of Judgment. Any Notice received after the expiration of the time prescribed shall be marked by the Clerk "received (date) but not filed," and the Clerk shall advise the party seeking to file the notice that it was received but not filed because the period for filing had elapsed.

(b) The record on appeal for Infraction cases

The Appellate Division elects to authorize the use of the original court file in lieu of a clerk's transcript as the record on appeal, pursuant to California Rules of Court, Rules 8.910(a)(1)(B) and 8.914.

(c) Authorization to use official electronic recording where available in Infraction cases

The Appellate Division elects to authorize the use of an official electronic recording, where available, as the record of the oral proceeding instead of obtaining a corrected statement on appeal from the judicial officer who presided over the proceeding before the Appellate Division, pursuant to California Rules of Court, Rule 8.916(d)(6)(A).

(Rule 4.64 revised effective 1/1/16)

Chapter 3. Collections Program for Traffic Infraction Cases

Rule 4.80. Enhanced Court Collections Program.

(a) Collection fee when defendant pleads guilty before Failure to Appear

If the Defendant would like to plead guilty to the citation during the sixty (60) calendar days before the scheduled court hearing, the defendant will be referred to AllianceOne. The defendant must pay a $30 non-refundable administration fee, and must pay imposed fines and fees within sixty (60) days. Should the defendant require longer than sixty (60) days to pay, they must pay an additional $20 non-refundable accounts receivable fee.

(b) Collection efforts for delinquent cases

At the time the Court determines that a defendant is delinquent in making payments for fines, fees, penalty assessments and surcharges, the Court will deem the case delinquent. Upon such determination, AllianceOne will contact the defendant to determine how the

unpaid court-ordered debt will be paid. The Court will utilize all available collection methods to resolve these unpaid debts, including skip tracing, referral to the Franchise Tax Board Court Ordered Debt Program for possible wage garnishment, and levy of personal property.

(Rule 4.80 revised effective 1/1/16)

Rule 4.81. Application of Overpayment.

Whenever the Court receives an overpayment for an infraction case and the Court determines that the defendant is delinquent on another felony, misdemeanor or infraction case, the Court will apply the overpayment to that case.

(Rule 4.81 revised effective 1/1/15)

Title Five. Family and Juvenile Rules

Division 1. Family Law Matters

Chapter 1. Family Law Department

Rule 5.0. Definitions and Self-Represented Litigants

(a) Definitions

(1) California Rules of Court (Family Rules) may be referred to as “CRC’s”.

(2) Local Rules shall be referred to as “Local Rule”.

(3) Department of Child Support Services shall be referred to as “DCSS”.

(4) Family Court Services shall be referred to as “FCS”.

(5) Income and Expense Declaration (Judicial Council Form FL-150) may be referred to as “I&E”.

(b) Self-represented litigants

Attorneys and self-represented litigants (also known as pro per litigants) shall comply with all applicable statutes in addition to these local family law rules and the California Rules of Court. Where these rules refer to Superior Court forms, the equivalent Judicial Council forms shall also be accepted.

Self-represented litigants shall be treated in the same manner as if represented by counsel and shall be held to the same standards. All references to counsel in these rules apply equally to self-represented litigants.

(Rule 5.0 revised effective 1/1/15)

Rule 5.1. Assignment of Departments and Matters

(a) Assignment of departments

(1) The Court designates four or more full-time departments and additional part-time departments (as resources allow) to serve as the Family Law Division of the Court. The Presiding Judge shall make the assignment of departments to the Family Law Division and the designation of one of the judges as the Supervising Judge of the division.

(Rule 5.1(a)(1) revised effective 1/1/14)

(2) One of the designated departments will operate under the authority of AB 1058 (Stat. 1996, ch. 957). This department will hear all issues described in Family Code Section 14700, whether or not the action was initially filed by the Department of Child Support Services (DCSS). Absent stipulation or other court order providing that this department will also hear any other issues arising in such case (whether or not filed by DCSS) such other issues will be heard in the department to which such action would be assigned if DCSS were not involved in the case.

(3) The remaining departments will hear all matters filed pursuant to the California Family Code under a direct calendar system. Cases will be assigned to departments, utilizing a plan of assignment which the Supervising Judge of the Family Law Division devises from time to time. These case assignments are deemed "all-purpose" assignments under Code of Civil Procedure Section 170.6(a)(2).

All matters shall be initially calendared in the appropriate department based on the "all purpose" assignment. Except in the case of a matter that has shortened time, the initial hearing date shall be assigned by the Clerk's Office at the time the matter is filed.

(Rule 5.1(a)(3) revised effective 1/1/15)

(4) When there is more than one case filed with respect to a given family, the bench officer hearing a matter in one of those cases may order the cases consolidated or coordinated.

(Rule 5.1(a)(4) revised effective 1/1/17)

(5) Applications for Temporary Restraining Orders and for Restraining Orders After Hearing filed pursuant to the Domestic Violence Prevention Act (Family Code Division 10) may be heard in departments located in designated branch courts. Applications for Temporary Restraining Orders and for Restraining Orders After Hearing shall be filed as set forth in Local Rule 5.2.

(Rule 5.1(a)(5) revised effective 1/1/17)

(6) All Custody Order-Juvenile-Final Judgment-Visitation Order-Juvenile" (Judicial Council Form JV-200/JV-205) containing custody and visitation orders, shall be filed in existing family law cases or, if no case exists, a new file will be opened. If

a new file is opened and either parent files a Request for Order to modify custody or visitation, the initial moving party shall be designated the Petitioner and the responding party shall be designated the Respondent thereafter. If the "Custody Order-Juvenile-Final Judgment/Visitation Order-Juvenile" of the Juvenile Court contains an order described in Local Rule 5.66, then any Request for Order to modify custody or visitation filed within one year of the Juvenile Court's "Custody Order-Juvenile-Final Judgment/Visitation Order-Juvenile" shall be heard as provided in Local Rule 5.65(c).

(Rule 5.1(a)(6) revised effective 1/1/17)

(b) Assignment of matters

(1) The following matters shall be heard in the Family Law Division:

(A) All matters filed under the Family Code except (unless assigned by the Presiding Judge) those actions filed under:

i. Family Code Division 11

ii. Family Code Division 12, Parts 4, 5, and 6, and

iii. Division 13

(B) All other matters assigned by the Presiding Judge.

(C) All other matters which are properly brought before a Family Law bench officer pursuant to an order of the Court.

(Rule 5.1(b) revised effective 1/1/00)

(c) Collaborative law

(1) Collaborative Law Defined

(A) The Court recognizes the unique nature of family law disputes and the fact that family law issues are best resolved by the parties reaching an agreement or agreements over critical matters including child custody, support and property, without engaging in the traditional adversarial litigation process. The Contra Costa County Superior Court strongly supports the use of the collaborative law process as well as other alternate dispute resolution tools for the purpose of developing both short-term and long-term agreements that meet the best interests of the entire family, particularly the children.

(2) Standards of Collaborative Law Cases

(A) No case will be entitled to a designation as a "collaborative law" case unless the parties have signed and filed a collaborative law stipulation.

(B) When a case is designated as a "collaborative law" case, the Court shall vacate all matters previously set on the Court's calendar and shall set the

matter for a Case Management Conference no later than one year from the date of the designation.

(C) The term "Collaborative Law Case" is to be included in the caption of any document filed with the Court from and after the filing of the collaborative law stipulation and order.

(D) As to any case designated as a collaborative law case:

(i) The Court will consider collaborative law counsel to be advisory and not attorneys of record.

(ii) The Court will not impose discovery deadlines or enter scheduling orders.

(E) The designation of a case as a collaborative law case is voluntary and requires the agreement of all parties. The collaborative law case designation will be removed by stipulation or upon the filing and service of a termination election as provided in the collaborative law stipulation and order. The filing by any party of a Request for Case Management, Request for Order, or other pleading requiring judicial adjudication shall automatically terminate the collaborative law case designation and a Case Management Conference will be set.

(Rule 5.1(c)(2)(E) revised effective 1/1/17)

(F) Collaborative law cases are governed by the Family Code, the California Rules of Court and other applicable California law.

(Rule 5.1 revised effective 1/1/17)

Rule 5.2. Obtaining Temporary Restraining Orders /Ex Parte Orders

(a) Application

Requests for Temporary Restraining Orders, Ex Parte Orders, and Emergency Orders shall be presented to the family law Legal Technician's Unit. The Legal Technician's Unit will assign the matter utilizing a plan of assignment as determined by the Supervising Judge of the Family Law Division.

With the exception of applications for restraining orders filed under the Domestic Violence Prevention Act (DVPA), all applications must be submitted with the appropriate fee or fee waiver, and the original and two (2) copies of the application. The Court will file all applications submitted (including applications pertaining to domestic violence) whether or not temporary orders are issued.

Applications for a Domestic Violence Restraining Order and Responses to an Application for a Domestic Violence Restraining Order may be saved and submitted electronically by completing the questionnaire found on the Court's website. When submitting an electronic Application or Response, parties shall comply with California Rule of Court 2.257

regarding statements under penalty of perjury and shall print and sign a copy of their Application or Response prior to submitting this document to the Court. Parties shall bring the original, signed, Application or Response with all attachments to the first hearing on the case, at which time they shall produce it for inspection by the Court and all parties upon request.

(Rule 5.2(a) revised effective 1/1/17)

(b) Notice

Except as provided in Family Code Section 6300, unless notice of the application for an ex parte order (including an application for an order shortening time) or a Temporary Restraining Order would result in great or irreparable injury to the applicant before the matter can be heard on notice, the other party must be given the notice required by the California Rules of Court. Parties and attorneys shall use the Declaration Re Notice Upon Ex Parte Application for Orders (Local Form FamLaw-107).

(Rule 5.2(b) revised effective 1/1/17)

(c) Requirements

Applications for ex parte orders must comply with California Rules of Court (Family Law Rules).

(Rule 5.2(c) revised effective 1/1/13)

(d) Minor applicants

If the applicant for Temporary Restraining Orders is a minor under 12 years of age an application for appointment of Guardian Ad Litem and order appointing a Guardian Ad Litem shall accompany the application.

(Rule 5.2(d) revised effective 1/1/14)

(Rule 5.2 revised effective 1/1/17)

Rule 5.3. Orders Shortening Time (OST)

All applications for Orders Shortening Time (OST) for service or for hearing shall be presented as ex parte applications to the family law Legal Technician's Unit. The Legal Technician's Unit will assign the matter utilizing a plan of assignment which the Supervising Judge of the Family Law Division will determine.

All ex parte applications for an OST shall be submitted in compliance with the application and notice requirements for ex parte applications as set forth in Local Court Rule 5.2. Before submitting an application for an OST, the applicant shall contact the opposing counsel or party and request a list of dates counsel or party is unavailable and include that information with his/her own unavailability on the declaration of notice.

(Rule 5.3 revised effective 1/1/17)

Rule 5.4. Hearings

(a) Duty to meet and confer

Except in cases involving domestic violence, and consistent with the California Rules of Court, **BEFORE** the hearing relating to a Request for Order (Judicial Council Form FL-300), parties shall meet to discuss the issues in the case and make a good faith attempt to settle all issues;. and to exchange all relevant documents and information.

(Rule 5.4(a) revised effective 1/1/17)

(b) Initial hearing

When an initial hearing is set pursuant to a Request for Order or other pleading seeking relief, the initial hearing shall be set on the assigned judicial officer's short cause calendar. The clerk shall provide the date and time for all initial hearings. All matters set on a short cause calendar are limited to 20 minutes of hearing time.

(Rule 5.4(b) revised effective 1/1/17)

(c) Transfer of a matter in which a hearing will exceed 20 minutes

If, at any time after a Request for Order is filed, the Court determines that the hearing in the matter will exceed 20 minutes in length, the matter may be continued to another court date which is designed to accommodate long-cause hearings, trials and settlement conferences.

(Rule 5.4(c) revised effective 1/1/15)

(d) Continuances

(1) All requests for continuances shall be in writing, except as may be authorized by the bench officer hearing the case.

(2) Each written request for a continuance must be accompanied by payment of the applicable fee or a fee waiver.

(Rule 5.4(d)(2) revised effective 1/1/17)

(3) A request for a continuance shall be made by ex parte application or by stipulation and shall not be granted unless specifically authorized by the judicial officer to whom the case is assigned or (in that bench officer's absence) by the Supervising Judge. Any such stipulation must be signed by counsel for both sides or, if either side is unrepresented, by that party. Any request or stipulation to continue must contain facts showing good cause for the continuance.

(Rule 5.4(d)(3) revised effective 1/1/15)

(e) Pleadings

(1) All pleadings in family law matters shall be in the form prescribed in the California Rules of Court.

(2) A fully completed, current Income and Expense Declaration (I&E) (or Simplified Financial Statement, when appropriate) shall be filed and served with moving and responsive papers in all hearings involving requests for support, attorney's fees, costs, or other financial relief. (Not required if there is an I&E that is no more than ninety (90) calendar days old on file, unless there have been significant changes).

(Rule 5.4(e)(2) revised effective 1/1/16)

(3) On a Request for Order to modify a prior order, the moving party shall attach a copy of the prior order to the moving papers.

(Rule 5.4(e)(3) revised effective 1/1/16)

(4) Moving and responsive pleadings shall be timely filed and served in compliance with the provisions of Code of Civil Procedure Section 1005.

(Rule 5.4(e)(4) revised effective 1/1/15)

(5) Pursuant to Family Code Section 217, a party seeking to present live testimony from all witnesses other than the parties must file and serve all parties with their witness list with a brief description of the anticipated testimony. This list shall be filed and served no less than fourteen (14) calendar days before hearing.

(Rule 5.4(e)(5) revised effective 1/1/16)

(f) Motions to be relieved as counsel

Motions to be relieved as counsel must be made in conformity with California Rules of Court, Rule 3.1362 using Judicial Council Forms MC-051, MC-052 and MC-053.

(Rule 5.4(f) revised effective 1/1/00)

(g) Interpreter services

The Court provides interpreters to help non-English speaking parties in family law court proceedings. To ask for an interpreter in your case, consult the Court's website regarding Court Interpreters at www.cc-courts.org/interpreter or ask the clerk. A hearing may be delayed or continued to a different date if an interpreter was not requested in advance of the hearing and no interpreter is available at the time of the hearing.

(Rule 5.4(g) new effective 1/1/17)

(Rule 5.4 revised effective 1/1/17)

Rule 5.5. Procedures to Complete Dissolution/Legal Separation

(a) Default or uncontested proceeding

Follow the checklist set forth by the Judicial Council in the Judgment Checklist – Dissolution/Legal Separation (Judicial Council Form FL-182) to complete the steps and pleadings necessary to submit your Judgment.

(b) Contested proceeding

Once a Response has been filed and both parties have served their Preliminary Declarations of Disclosure and filed a Declaration re: Service of Declaration of Disclosure (Judicial Council Form FL-141), either party may file and serve a Request for Case Management Conference (Local Court Form FamLaw-112) with the Court to set the matter for a Case Management Conference. The Request for Case Management Conference will not be accepted for filing until all parties have served their Preliminary Declarations of Disclosure and filed Declaration re: Service of Declaration of Disclosure, or obtained a court order waiving this requirement per Family Code Section 2107. The Court may also set a Case Management Conference at its own discretion.

(Rule 5.5(b) revised effective 1/1/17)

(c) Self-represented parties

Self-represented parties who need assistance in determining the next steps in their cases, including getting custody orders, support orders, finishing their divorce or other some other action, can speak with the Family Law Facilitators during help desk hours.

(Rule 5.5 revised effective 1/1/17)

Rule 5.6. Case Management Conference / Family Centered Case Resolution Conference (FCCRC)

(a) Case Management Conference statement

No less than seven (7) calendar days before the date set for the Case Management Conference (CMC) each party shall file and serve a Case Management Conference Statement (Local Court Form FamLaw-113).

(Rule 5.6(a) revised effective 1/1/16)

(b) Attendance at conference

Parties shall be present at the Case Management Conference or Family Centered Case Resolution Conference (FCCRC) unless represented by counsel, in which case, counsel shall appear. Appearance may be in person or by CourtCall® if timely arranged. The parties or the attorneys shall be fully prepared to discuss identification of disputed issues, the timetable for disposition of the case by settlement or trial, and be sufficiently familiar with the facts of the case so that the Court may make necessary orders.

(Rule 5.6(b) revised effective 1/1/16)

(c) Orders at Case Management Conference/FCCRC

The parties must address, if applicable, and the Court may take appropriate action with respect to, the following:

(1) Whether any matters (e.g., the bankruptcy of a party, pending criminal matters impacting issues in the case, or custody orders from another jurisdiction) may affect the Court's jurisdiction or processing of the case.

(2) Whether discovery has been completed and, if not, the date by which it will be completed.

(3) What discovery issues are anticipated.

(4) Whether the case should be bifurcated or a hearing should be set for a motion to bifurcate.

(5) A date or dates by which Final Declarations of Disclosure are to be exchanged and the Declaration of Service of Declaration of Disclosure and Income and Expense Declarations filed.

(6) The utility of referring the parties to Family Court Services (FCS) in cases in which custody or visitation (or both) is at issue and no evaluation or private mediation is pending.

(7) The need for selection and compensation of joint experts by stipulation or motion.

(8) The need for, selection, and compensation of a Special Master by stipulation or appointment pursuant to Code of Civil Procedure Sections 638 and 639.

(9) The need for an order for attorney fees and costs by stipulation or motion.

(10) A date for Mandatory Settlement Conference (MSC).

(11) Whether to set a Recommendation Conference in cases involving child custody and visitation in cases that have a child custody evaluation pending.

(12) If a trial date has not been previously set, the date by which the case will be ready for trial. Each side must have available at the conference all necessary information as to unavailable dates as to the parties, their attorneys, and any retained experts.

(13) The estimated length of trial.

(14) Setting a trial date.

(15) Any other matters that should be considered by the Court or addressed in its case management order.

(16) Whether to set a further Case Management Conference.

(17) Whether to tailor or modify the requirements of Local Rule 5.7(b) as it relates to the case.

(18) The stipulation of the parties and consent of the Court to place the matter in further case management pursuant to Family Code Sections 2450 and 2451.

(Rule 5.6(c) revised effective 1/1/17)

(Rule 5.6 revised effective 1/1/17)

Rule 5.7. Mandatory Settlement Conference

(a) Calendaring and attendance

The Court may require the parties to participate in a Mandatory Settlement Conference before a long cause matter or trial is set or heard. Absent a written court order allowing a party to appear by telephone, both parties and their counsel of record must personally attend the Mandatory Settlement Conference. Failure to comply may result in monetary sanctions, issues sanctions, or both. A Mandatory Settlement Conference may be continued by the Court for good cause, either sua sponte or upon a timely, properly noticed motion.

(Rule 5.7(a) revised effective 1/1/16)

(b) Mandatory Settlement Conference requirements

Unless excused by the trial court, the parties shall comply with the following requirements.

(1) No later than fourteen (14) calendar days before the Mandatory Settlement Conference, the parties shall:

(A) Exchange good faith settlement demands.

(B) Exchange Final Declarations of Disclosure (if not already done).

(2) No later than seven (7) calendar days before the Mandatory Settlement conference, the parties shall:

(A) File with the Court a Declaration re: Service of Final Declarations of Disclosure, or alternatively, file a stipulation to waive service of final declarations of disclosure.

(Rule 5.7(b)(2)(A) revised effective 1/1/16)

(B) If support or attorney's fees and costs or other financial relief is at issue, the parties shall exchange and file updated I&E. (Not required if there is an I&E that is no more than ninety (90) calendar days old on file, unless there have been significant changes).

(Rule 5.7(b)(2)(B) revised effective 1/1/16)

(C) File a Joint Statement of Contested Issues describing all issues that remain in dispute. That statement must include, where it is an issue, a proposal regarding the division of property and debts. If late or missing payments are claimed, a calculation spreadsheet shall also be attached. If the parties are unable to agree upon a Joint Statement of Contested Issues, then each party must file and serve a Separate Statement of Contested Issue which includes all of the information contained in a Joint Statement of Contested Issues.

(Rule 5.7(b)(2)(C) revised effective 1/1/16)

(D) File a Mandatory Settlement Conference Statement or other such filings as may be required by the Court.

(Rule 5.7(b)(2)(D) revised effective 1/1/15)

(3) If both parties fail to comply with this Order, then the trial date may be vacated. If only one party fails to comply and the other does, the Court may impose sanctions at the Mandatory Settlement Conference, including but not limited to issue sanctions and monetary sanctions.

(Rule 5.7(b)(3) revised effective 1/1/14)

(c) Trial judge as settlement judge

The Mandatory Settlement Conference will be conducted by the trial judge. If any party objects to that, written objections must be filed no later than thirty (30) calendar days before the Mandatory Settlement Conference so the Court can attempt to make alternate arrangements.

(Rule 5.7(c) revised effective 1/1/16)

(d) Meet and confer requirement

Counsel and any unrepresented party shall meet and confer either in person or by phone at least five (5) calendar days before the day of the Mandatory Settlement Conference to resolve as many issues as possible and to specify those matters to be litigated.

(Rule 5.7(d) revised effective 1/1/16)

(Rule 5.7 revised effective 1/1/16)

Rule 5.8. Recommendation Conference

(a) Purpose and attendance

The purpose of the Recommendation Conference is to receive the report of a custody evaluator and attempt to resolve custody and visitation issues without trial. Absent a written Court Order allowing a party to appear by telephone, both parties and their counsel of record must personally attend the Recommendation Conference and be prepared to discuss the recommendations of the Evaluator. Failure to comply may result in monetary sanctions, issues sanctions, or both. If the parties are unable to resolve custody and visitation issues without trial, the Court may, at the Recommendation Conference, make interim orders pending trial.

(Rule 5.8(a) revised effective 1/1/17)

(b) Timing

Recommendation Conferences are set based on the expectation that the evaluation will be prepared and submitted to the parties and counsel at least ten (10) calendar days before the Recommendation Conference. Should the Evaluator determine that it will not be possible to prepare his/her report by that time, said Evaluator shall forthwith notify both

counsel, and provide to counsel a date by which the Evaluator expects the report will be done. Counsel shall notify the Court promptly, either in writing or by telephone conference call. Based on the Evaluator's notice of inability to conclude the report timely, the Court will re-set the date of the Recommendation Conference.

(Rule 5.8(b) revised effective 1/1/16)

(Rule 5.8 revised effective 1/1/17)

Rule 5.9. Trials

(a) Long cause matters

These rules apply to any trial set on the long cause trial calendar and, as determined by the Court, to any long cause hearings.

(Rule 5.9(a) revised effective 1/1/13)

(b) Trial setting

(1) Matters will generally be set for trial at a Case Management Conference/Family-Centered Case Resolution Conference, a hearing on a Request for Order, at a Settlement Conference, or at a Recommendation Conference.

(Rule 5.9(b)(1) revised effective 1/1/15)

(2) If no hearings are scheduled, a party may initiate the trial setting process by filing a Request for Case Management Conference (Local Court Form FamLaw-112). The Request for Case Management Conference may only be filed after a response has been filed, and will not be accepted for filing until all parties have served their Preliminary Declarations of Disclosure and filed the Declaration Re Service of Declaration of Disclosure, or obtained a court order waiving this requirement per Family Code Section 2107. The filing of the Request for Case Management Conference will result in the setting of a Case Management Conference/Family-Centered Case Resolution Conference.

(Rule 5.9(b)(2) revised effective 1/1/17)

(c) Continuances

Trials may only be continued by the trial judge. Any motion for a continuance must be made in a timely manner, and for good cause.

(Rule 5.9(c) revised effective 1/1/15)

(d) Case Management Order / Family Centered Case Resolution Conference Order

The Court may issue, and amend from time to time, an appropriate Case Management/Family-Centered Case Resolution Conference Order to regulate pre-trial and trial proceedings and to set forth a schedule for the submission of papers such as briefs, documents, forms, and exhibits.

(Rule 5.9(d) revised effective 1/1/14)

(e) Evidence Code section 730 experts

(1) The Court encourages mutually agreed upon experts, especially for such issues as custody evaluations, business valuations, business cash flows (when relevant to support), real estate valuations, stock option calculations and tax consequences. In the absence of a mutually agreed upon expert, the Court may appoint its own expert under Evidence Code Section 730.

(2) If one or more written reports are issued by such an expert, copies of all such reports shall be transmitted to each counsel or unrepresented party no later than thirty (30) calendar days before trial.

(3) If either counsel or an unrepresented party demands the right to cross-examine the 730 expert at trial, that party shall be responsible for arranging for the attendance of the expert at trial. Said arrangements shall be made no later than five (5) calendar days after being served with a copy of the report or forty-five (45) calendar days before trial, whichever event occurs later. If there is no written report of the expert (the Court encourages the use of reports at trial), the party offering the expert shall be responsible for making the witness available.

(Rule 5.9(e) revised effective 1/1/16)

(f) Reporter's fees

(1) There are currently no court reporters employed by the Court in Family Law Departments. Consult the "Court Reporters: Notice of Availability on the Court's website for the current status and any changes. There will be no official record of the proceedings unless a party who desires an official record makes arrangements for a private certified court reporter as set forth in Local Rule 2.51.

(2) Any party who desires an official record or transcript of the proceedings, may hire a private certified court reporter to report any scheduled hearing or trial pursuant to Government Code 70044 and California Rules of Court, Rule 2.956.

(3) Parties electing to hire a private certified court reporter must comply with Local Rule 2.51.

(4) Pursuant to California Rules of Court, Rule 2.956(d), if a party arranges and pays for the attendance of private certified court reporter at a hearing in a civil case because of the unavailability of the services of an official court reporter, none of the parties will be charged the court reporter's attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(5) In the event court reporters become available and at the court's discretion are provided by the court for any family law hearings, the party will be required to pay the applicable reporting attendance fees pursuant to Government Code Sections 68086(a)(1)(A) or (B).

(6) Parties shall be responsible for all transcript costs pursuant to Government Code Section 69953.

(Rule 5.9(f) revised effective 1/1/16)

(Rule 5.9 revised effective 1/1/17)

Rule 5.10. Preparation and Presentation of Orders

(a) Proposed orders entered at hearing

The Court may consider signing, at the time of hearing, proposed orders attached to the moving or responsive papers or those orders prepared by either party in court immediately following the hearing. Parties are therefore encouraged to submit proposed orders with their moving or responsive papers.

(Rule 5.10(a) revised effective 1/1/15)

(b) Orders submitted after hearing

All orders after hearing shall be submitted in compliance with California Rules of Court, Rule 5.125. If a court reporter was present at the hearing, and the parties require a transcript of the proceedings to resolve disputes over the form of order, the judge is to be advised that the transcript has been ordered and the expected date of availability of the transcript. Failure to submit Orders After Hearing in accordance with California Rules of Court, Rule 5.125 may result in the imposition of sanctions.

(Rule 5.10(b) revised effective 1/1/16)

(c) Stipulations

All agreements, stipulations, or agreed upon orders, reached before hearing shall be in writing, signed by all parties and counsel (where applicable) and submitted to the Court for signature before the hearing on the matter begins. Stipulations shall not be recited in open court, except at the discretion of the bench officer.

(Rule 5.10(c) revised effective 1/1/17)

(d) Submission of earning assignment orders

A copy of the judgment or order for child, partner, spousal or family support must be submitted with any proposed earning assignment order.

(Rule 5.10(d) new effective 1/1/17)

(Rule 5.10 revised effective 1/1/17)

Rule 5.11. Judgments

(a) Judgment requirements

Pursuant to California Rules of Court, Rules 5.401(c) and 5.411(b), Judgments must include all matters subject to the court's jurisdiction for which a party seeks adjudication,

or an explicit reservation of jurisdiction over any matter not proposed for disposition at that time.

(b) Use of judgment checklist form

For Dissolution of Marriage and Legal Separation cases, parties are directed to use, Judgment Checklist-Dissolution/Legal Separation (Judicial Council Form FL-182). For Parentage cases, parties may refer to the Paternity Judgment checklist (Local Court Form FamLaw-013b).

(Rule 5.11(b) revised effective 1/1/17)

(c) Notarized signatures of self-represented parties to judgment

If the parties submit a signed default Judgment ("default with Agreement"), the signature of the defaulting party must be notarized.

(d) Approval of Department of Child Support Services (DCSS)

DCSS must approve the child support provisions of the Judgment if DCSS is providing services in the case.

(Rule 5.11(d) revised effective 1/1/17)

(e) Relief Requested in True Default

In a True Default, relief may not exceed that requested in the operative Petition.

(Rule 5.11 revised effective 1/1/17)

Rule 5.12. Confidentiality

(a) Placement of confidential documents

Certain documents are required to be kept confidential. They shall be placed in the confidential portion of the court file and may not be disclosed to anyone except in accordance with law. (See for example Local Rule 5.58).

(Rule 5.12(a) revised effective 1/1/17)

(b) Substance abuse assessment reports

Substance abuse assessment reports shall be placed in the confidential portion of the court file.

(Rule 5.12(b) revised effective 1/1/15)

(c) Confidentiality of social security number

If any document filed with the Court or offered as evidence contains a social security number, that number must be redacted by the party offering the document before it is filed with the Court or marked as an exhibit.

(Rule 5.12(c) revised effective 1/1/16)

(Rule 5.12 revised effective 1/1/17)

Rule 5.13. Family Law Facilitator

(a) Facilitator services pursuant to Family Code Section 10004-10005

In addition to other services and duties, the Family Law Facilitator must comply with the requirements of state law and perform the services set out in Family Code Section 10005, consistent with funding restrictions and priorities for service that are periodically set by the Court.

(Rule 5.13(a) revised effective 1/1/15)

(b) Additional duties

If the foregoing has been accomplished, the Family Law Facilitator may also:

(1) Assist the Court with research and any other responsibilities which will enable the Court to be responsive to the litigants' needs; and

(2) Develop programs, assist with, work in conjunction with and/or coordinate with the a State or Local Bar Association and community outreach through day and evening programs, videotapes, and other innovative means that will assist unrepresented and financially-limited litigants in gaining meaningful access to family court. These programs may specifically include, but not be limited to, providing information concerning under-utilized legislation, such as expedited child support orders, and pre-existing court-sponsored programs such as Family Court Services, supervised visitation and appointment of attorneys for children.

(Rule 5.13(b) revised effective 1/1/16)

(Rule 5.13 revised effective 1/1/16)

Rule 5.14. Temporary Spousal or Partner Support

(a) Discretionary guideline

The Court will use the formula contained in the Local Rules of the Superior Court of Alameda County (Alameda Superior Court, Local Rule 5.70) as its discretionary guideline for temporary spousal support or partner support in marital and domestic partnership dissolution cases.

(Rule 5.14(a) revised effective 1/1/17)

(b) Adjustment for tax consequences

In domestic partnership cases, the Court will adjust the formula to account for tax treatment under state and federal laws if necessary.

(Rule 5.14(b) revised effective 1/1/15)

(Rule 5.14 revised effective 1/1/17)

Rule 5.15. Presence of Children in Courtroom

(1) Unless a child whose custody or visitation is at issue has been given court permission to address the court or testify per Family Code Section 3042, that child shall not be present in the assigned courtroom while the matter is being heard, unless the judicial officer has specifically given permission for the child to be present.

(2) Parents disputing custody/visitation shall participate in child custody recommending counseling services or private recommending mediation before a decision by the court as to whether or not a child will address the court.

(Rule 5.15 new effective 1/1/16)

Rule 5.16. Child Custody Recommending Counseling (Formerly "Mediation")

(a) Good faith effort to reach agreement

Except in those cases where domestic violence or other restraining orders have been issued or are pending hearing, all parties shall make a good faith effort to arrive at an agreement regarding child custody and visitation before contacting FCS to schedule appointments and before the court hearing.

(Rule 5.16(a) revised effective 1/1/16)

(b) Conduct of orientation

All parties with disagreements regarding custody and visitation must complete orientation as well as child custody recommending counseling (hereafter "Custody Counseling") at FCS. Parties are to complete the online Family Court Services orientation class at www.cc-courts.org/onlineorientation (English) or www.cc-courts.org/orientacionenlinea (Spanish) at least five (5) days prior to their custody counseling appointment. The purpose of orientation is to provide the parties with information about the Court process, with knowledge of collaborative parenting plan development, child rearing in multiple homes, the impacts of domestic violence and children's developmental needs as related to post-separation parenting arrangements. If it is necessary for a party to complete orientation in a language other than English or Spanish, the party may call the Family Court Services office to make alternate arrangements.

(Rule 5.16(b) revised effective 1/1/17)

(c) Custody Counseling (formerly "Mediation")

(1) Upon the filing of the Request for Order, or before a trial which will litigate a custody/visitation dispute, the parties shall complete the online orientation program located on the court's website and shall arrange for a Custody Counseling appointment with Family Court Services. Sanctions and/or fees may be imposed for failure to arrange for, or appear at, those appointments and for failure to complete the online orientation.

(2) If parties have participated in a custody counseling appointment within the previous six months, Family Court Services will direct the parties to first attend their court hearing to review the requested modifications to the current court ordered parenting plan before a custody counseling appointment will be scheduled. In their discretion, Judges may direct Family Court Services to not schedule custody counseling appointments if parties have completed counseling within twelve (12) months prior to a court hearing.

(3) If a party is requesting a "move-away" order, the moving party is strongly encouraged to specifically state that request in the moving papers. Family Court Services' ability to address a "move-away" request in custody counseling may be significantly limited unless a request for a "move-away" order is specifically stated in a party's moving papers.

(4) If the custody or visitation hearing is scheduled before the Counseling appointment, and the case does not involve current domestic violence, criminal or other protective order, the parties may agree to request a continuance of the hearing by completing and filing a "Stipulation and Order re: Continuance of Court Hearing to a Date After the Custody Counseling Appointment" (Local Form FamLaw-230). No fee is due with the filing of this form.

(Rule 5.16(c) revised effective 1/1/17)

(d) Agreements

If the parties reach a complete agreement regarding custody and visitation before scheduling a custody counseling appointment, they do not need to contact FCS. If they are self-represented, they may obtain assistance at the Help Desk in the Spinetta Family Law Building to prepare a stipulation, so a court hearing can be avoided. If the parties reach a complete agreement regarding custody and visitation after they have scheduled their Custody Counseling appointment, both parties must contact FCS to cancel existing appointments at least 24 hours in advance. Sanctions and/or fees may be imposed on any party that fails to contact FCS at least 24 hours before the scheduled appointment.

(Rule 5.16(d) revised effective 1/1/17)

(e) Communication in Custody Counseling

All Custody Counseling proceedings shall be held in private, and all communications from the parties to the child custody recommending counselor (hereafter "Custody Counselor") shall be deemed official information within the meaning of Evidence Code Section 1040. The Custody Counselor may exclude attorneys from the Custody Counseling proceeding in the sole discretion of the Custody Counselor.

(Rule 5.16(e) revised effective 1/1/16)

(f) Ex parte communication with Family Court Services Custody Counselors

All communication between Family Court Services Custody Counselors and the parties/attorneys must be by telephone conference or in writing, with copies sent to the

other party/attorney, even where the Custody Counselor initiates the communication. If the communication is in writing, the party submitting the writing must send it to the parties/attorneys simultaneously and by the same method (i.e., fax, mail or email). Email and faxes must also be copied to all parties/attorneys. In urgent circumstances or when the Custody Counselor is unable to set up a telephone conference with the parties/attorneys and there is insufficient time to correspond in writing with both parties/attorneys, the Custody Counselor may initiate contact with one party/attorney for the purpose of clarifying information or obtaining additional information for a status report. The Custody Counselor will disclose such ex parte communication to the other party/attorney if this occurs. Questions regarding scheduling or other procedural matters may be discussed with the Family Court Services clerical staff.

(Rule 5.16(f) revised effective 1/1/12)

(g) Custody Counseling complaint process

Within ten (10) calendar days from the date of the Custody Counseling session, a party may file a written complaint, in the form of a declaration signed under penalty of perjury, specifying alleged misconduct of a Custody Counselor. A copy of the declaration shall be served on the other party and a proof of service shall be filed. The party shall also provide a copy of the declaration to the Manager of Family Court Services. The other party may file a written response. A copy of the response shall be served on the other party and a proof of service shall be filed before the next hearing date. The responding party shall also provide a copy of the written response to the Manager of Family Court Services, who shall investigate the complaint and respond in writing to the complainant and the responding party.

(Rule 5.16(g) revised effective 1/1/16)

(h) Custody Counselors as witnesses

In lieu of a subpoena and appropriate fee as described in California Government Code Section 68097.2, should a party wish to compel the appearance of a Family Court Services (FCS) Custody Counselor as a witness at a custody/visitation trial, the party can notify FCS in writing no less than five (5) court days before the hearing date including the morning or afternoon appearance time. A non-refundable check in the appropriate amount as described in California Government Code Section 68097.2 must accompany the written request for the Custody Counselor's appearance.

(Rule 5.16(h) revised effective 1/1/16)

(i) Return Custody Counseling

(1) Parties who return to FCS for a review or follow-up Custody Counseling may be charged a fee for such return services in the amount of $250.

(2) Where parties attend Custody Counseling, reach an agreement, subsequently rescind the agreement, and then wish to return or are ordered to return to Custody Counseling, Family Court Services may charge a fee as set forth in subsection (1) above.

(Rule 5.16(i) revised effective 1/1/17)

(j) Family Court Services reports and recommendations

(1) Where the parties do not reach an agreement during Custody Counseling, the Custody Counselor shall prepare a written Status Report that includes the Custody Counselor's recommendations. The report shall be submitted to the parties and to the Family Law department hearing the matter. The department shall file the report in a confidential portion of the Court file. Pursuant to the standing Order of the Presiding Judge of this Court, use of this document shall be limited to the pending litigation and no person who has access to the document shall disseminate or disclose its contents to any person not entitled to access, nor shall the parties attach such document to any pleading in this or any other litigation or proceeding. Substantial sanctions shall be imposed upon any party who violates this order, whether intentionally, by mistake or by accident.

(2) Persons entitled to access the report and the information contained in the report are limited to the parties, their attorneys, federal or state law enforcement, judicial officers, necessary court employees, and minor's counsel, except upon order of the Court.

(Rule 5.16(j) revised effective 1/1/16)

(Rule 5.16 revised effective 1/1/17)

Rule 5.17. Child Custody Evaluations

(a) Court ordered evaluations

All evaluators appointed by the Court to conduct child custody and visitation evaluations, whether by stipulation or otherwise, shall be appointed under Evidence Code Section 730.

(Rule 5.17(a) revised effective 1/1/16)

(b) Evaluator selection

Where the parties are unable to agree on an evaluator to conduct the custody evaluation, the Court shall select an evaluator for the parties in a manner as determined by the Court. If the Evaluator appointed by the Court does not accept the appointment, the parties or their attorneys must contact the Department and request the appointment of a different evaluator.

FCS will maintain a list of private child custody evaluators who have represented that they meet the training and education requirements of California Rules of Court, Rules 5.225 and 5.230. This list will be kept in a binder for public viewing in the department of the Supervising Family Law Judge and at FCS.

(Rule 5.17(b) revised effective 1/1/15)

(c) Custody evaluation requirements

An Order Appointing Child Custody Evaluator (Judicial Council Form FL-327) shall be filed and given to the Evaluator before the evaluation begins. The Evaluator must file a

Declaration of Private Child Custody Evaluator Regarding Qualifications (Judicial Council Form FL-326). Each party and each party's counsel shall follow the procedures set forth in the Order Appointing Child Custody Evaluator. The Evaluator shall comply with the requirements of California Rules of Court, Rule 5.220.

(Rule 5.17(c) new effective 1/1/15)

(d) Scope of the evaluation

When appropriate, in the interest of saving the parties' time, expense and stress, the evaluation may be limited in scope (focused evaluation) to the question or questions that the Court requires answered.

(Rule 5.17(d) revised effective 1/1/01)

(e) Challenge of the evaluator

No peremptory challenge of evaluators shall be allowed. Parties may raise objections to a specific evaluator during the selection process. Parties may object to the conclusions of the report when the report is submitted to the Court, and may bring other appropriate expert testimony to object to the conclusions. (California Rules of Court, Rule 5.220(d)(1))

(Rule 5.17(e) revised effective 1/1/16)

(f) Withdrawal from a case

A private evaluator has the right to withdraw from a case upon a showing of good cause to the trial court making the appointment.

(Rule 5.17(f) new effective 1/1/15)

(g) Information from children

The Court relies on the judgment of its experts in making decisions about when, how often, and under what circumstances children are interviewed. The expert shall be able to justify the strategy used in any particular case. Children will be informed that the information provided by the child will not be confidential before beginning the interview. (California Rules of Court, Rule 5.220(d)(2).)

(Rule 5.17(g) revised effective 1/1/17)

(h) Impartial expert

The court-appointed evaluator shall be impartial. Evaluators should include interviews of both parents or guardians. Exceptions to this may include geographically separated parents. In such instances, attorneys, parties and the expert are expected to make reasonable accommodation to assure that the expert has received adequate information about all parents, guardians, or parties.

(Rule 5.17(h) revised effective 1/1/01)

(i) Grievance procedure

If a party alleges that an unprofessional or inappropriate act has occurred on the part of the Evaluator during the course of the evaluation, he or she may discuss the complaint with the Evaluator directly in order to handle misunderstandings.

Complaints or grievances concerning the Evaluator will not be considered by the Court until after the evaluation is completed, at the Recommendation Conference. All such complaints and grievances must be submitted to the bench officer hearing the matter no later than fifteen (15) calendar days before the Recommendation Conference, with copies to the Evaluator and all other parties. The Evaluator shall submit a written response to all issues raised in the written complaint to the bench officer hearing the matter no later than two (2) calendar days before the Recommendation Conference, with copies to all parties. The bench officer will address the complaint at the time of the Recommendation Conference. If the party submitting the complaint objects to the bench officer's resolution of the complaint, the complaint or grievance shall become an issue at trial.

(Rule 5.17(i) revised effective 1/1/16)

(j) Expectation of settlement

The parties and the attorneys should make a good faith attempt to settle the custody and visitation disputes before the Recommendation Conference and any subsequent trial. Settlement efforts may include joint meet and confer conferences between the parties and counsel unless potential harm exists from this process.

(Rule 5.17(j) revised effective 1/1/16)

(k) Continuing effort

The Court may ask the Evaluator to continue to be available to the family to help resolve problems with any order made following the Evaluator's recommendations.

(Rule 5.17(k) revised effective 1/1/16)

(l) Payment of the evaluation

The Court will order payment of the Evaluator at the time of the appointment. The Evaluator may not withhold a report from the Court because of the parties' failure to pay. Either party or the appointed custody evaluator may file a Request for Order regarding unpaid custody evaluator fee(s).

(Rule 5.17(l) revised effective 1/1/15)

(m) Evaluation report

(1) The Evaluator shall prepare and submit both an evaluation report and recommendations to the parties, counsel, and the court. The Department hearing the matter shall secure the evaluation report in a confidential portion of the Court file. Pursuant to the standing Order of the Presiding Judge of this Court, use of this document shall be limited to the pending litigation and no person who has access to the document shall disseminate or disclose its contents to any person

not entitled to access, nor shall the parties attach such document to any pleading in this or any other litigation or proceeding. Substantial sanctions shall be imposed upon any party who violates this order, whether intentionally, by mistake or inadvertence.

(2) Persons entitled to access the report and**/or** the information contained in the report are limited to the parties, their attorneys, federal or state law enforcement, judicial officers, necessary court employees, and minor's counsel, except upon order of the Court.

(Rule 5.17(m) revised effective 1/1/16)

(n) Ex parte communication with evaluator

No party or attorney for a party shall initiate one-sided contact with the Evaluator, either orally or in writing before the first appointment of the initiating party except for the purpose of setting up that first appointment. Parties may initiate one-sided contact with the Evaluator after the first appointment of the party initiating the contact. The Evaluator may contact either (or both) party at any time. Attorneys may initiate contact after the first appointment of a party only by conference call or in writing copied to the other party. Contact may be made to arrange appointments without the necessity of a conference call.

(Rule 5.17(n) revised effective 1/1/16)

(Rule 5.17 revised effective 1/1/17)

Rule 5.18. Court Communication for Domestic Violence and Child Custody Orders (Adopted Pursuant to California Rules of Court, Rule 5.445)

(a) Communication between the Criminal, Family, Juvenile and Probate Courts

(1) Before requesting a Criminal Protective Order involving a defendant and a victim or witness who have a relationship as defined in Family Code Section 6211, the District Attorney shall make reasonable efforts to determine whether there are any children of the relationship, whether there are any Family, Juvenile, or Probate Court orders for custody/visitation for those children, and whether there are any existing protective/restraining orders involving the defendant, the protected person, and/or the children. The District Attorney shall advise the Criminal Court of the existence of any such orders at the time the proposed Criminal Protective Order is submitted for approval and signature.

(2) The Family, Juvenile or Probate Court setting terms of custody or visitation shall make reasonable efforts to determine whether any person requesting custody or visitation is subject to a Criminal Protective Order, including inquiring of the parties whether there are any existing protective/restraining orders involving that person, another person seeking custody or visitation, and/or the children.

(3) When the Criminal Court issues a Criminal Protective Order protecting a victim or witness who has children with the defendant, the Criminal Court shall consider

whether peaceful contact with the protected person should be allowed for the purpose of allowing defendant to have visitation with the children.

(4) If any person named in a Criminal Protective Order is also before the Family, Juvenile, or Probate Court in proceedings concerning custody or visitation, a court-employed Child Custody Recommending Counselor or Court Investigator serving the Family, Juvenile or Probate Court shall have access to and review the Criminal Court file, as permitted by applicable law. Confidential information reviewed under this rule remains confidential and shall not be further released except as provided by law or court order.

(Rule 5.18(a) revised effective 1/1/17)

(b) Modification of Criminal Protective Orders

(1) A party seeking to modify a Criminal Protective Order may calendar the matter for hearing before the Criminal Court, after giving notice to the District Attorney. If the defendant and the protected person do not have any minor children in common, the motion shall be heard by the Criminal Court before which the matter is then pending.

(2) If a party seeking to modify a Criminal Protective Order also is before the Family, Juvenile or Probate Court with the protected person in proceedings concerning custody or visitation, the motion to modify the Criminal Protective Order shall be noticed and heard on the Domestic Violence Friday morning calendar in Martinez. The party seeking to modify the Criminal Protective Order must give notice of the hearing to the Family, Juvenile, or Probate Court, and to all counsel and parties in both the criminal action and the Family, Juvenile, or Probate matter.

(3) The Family, Juvenile, or Probate Court may, on its own motion or at the request of a defendant, protected person or other interested party, calendar a hearing before the Criminal Court, on the Domestic Violence Friday morning calendar, for a motion to modify a Criminal Protective Order. Notice of the hearing shall be given to all counsel and parties in both the criminal action and the Family, Juvenile, or Probate matter.

(4) When the Family, Juvenile, or Probate Court calendars a hearing on a motion to modify a Criminal Protective Order, or receives notice that a party with a pending Family, Juvenile, or Probate matter involving minor children seeks to modify a Criminal Protective Order, the Court shall provide the Criminal Court with copies of existing or proposed Orders relating to protection, custody and/or visitation in the pending Family, Juvenile, or Probate matter.

(Rule 5.18(b) revised effective 1/1/16)

(Rule 5.18 revised effective 1/1/17)

Division 2 – Juvenile Matters

Chapter 1. Juvenile Department

Rule 5.50. Adoption, Construction and Amendment of Rules

(a) Citation of Juvenile Rules

These rules for the Juvenile Court may be cited as the "Local Rules for the Juvenile Court of Contra Costa County."

(b) Supplemental authority of local Juvenile Rules

These Local Rules shall be supplementary to and subject to state statutes and any rules adopted by the Judicial Council of the State of California. These rules shall be construed and applied so as not to conflict with such statutes or with the rules adopted by the Judicial Council.

(c) Effective date of Juvenile local court rules

These rules shall, on the date they become effective, supersede rules until adopted by the Superior Court as they relate to the Juvenile Court.

(Rule 5.50 revised effective 1/1/15)

Rule 5.51. Juvenile Judge

(a) Judicial assignments

The Supervising Judge of the Juvenile Court shall be assisted by such judges and subordinate judicial officers (including commissioners, and temporary judges) as may be provided from time to time by the Superior Court. The subordinate judicial officers and temporary judges shall perform their duties under the direction of the Supervising Judge of the Juvenile Court.

(Rule 5.51(a) revised effective 1/1/16)

(b) Juvenile hearings

The business of the Juvenile Court shall be conducted at the Martinez Courthouse and Juvenile Hall, and may be conducted at Pittsburg and Richmond Courthouses, and at such other facilities of Contra Costa County, and at such times as the Juvenile Court Supervising Judge or Presiding Judge may direct. The Juvenile Court Supervising Judge shall be responsible for the distribution of court business.

(Rule 5.51(b) revised effective 1/1/13)

(c) Types of Juvenile hearings

The Juvenile Court Supervising Judge and assigned judges shall conduct fitness hearings, rehearings and other matters which he or she by order, deem appropriate. Matters to be heard by a Juvenile Court Judge shall be calendared directly by that judge's department.

(Rule 5.51(c) revised effective 1/1/16)

(d) Juvenile bench recusal

If the only Juvenile Court judge available is removed from hearing a matter because of a challenge or otherwise, then the matter shall be referred by the Supervising Juvenile Judge to the Presiding Judge of the Superior Court.

(Rule 5.51(d) revised effective 7/1/05)

(e) Assignment of Juvenile hearings

The Juvenile Court judges shall maintain separate calendars of all matters to be heard by them, which shall be published. When a case is assigned to a Juvenile Court Judge, it is assigned to that judge for all purposes.

(Rule 5.51(e) revised effective 1/1/13)

(f) Juvenile pre-hearing conference

Pre-hearing conferences shall be conducted as determined by the Juvenile Court judges. Where such conference is held, attendance is mandatory as to all persons ordered to attend. At such conferences, counsel shall be familiar with the case, shall be prepared to enter into stipulations binding their clients, and shall be prepared to discuss the facts so as to clarify and simplify issues.

(Rule 5.51(f) revised effective 1/1/13)

(g) Juvenile policy and procedure

The Juvenile Court Supervising Judge, in directing the judicial business of the Juvenile Court, may issue memoranda of policy and procedure to all parties involved in the Juvenile Court process, which shall be binding, subject to the authority of the Executive Committee and the Judges of the Superior Court of Contra Costa County.

(Rule 5.51(g) revised effective 1/1/16)

(Rule 5.51 revised effective 1/1/16)

Rule 5.52. Juvenile Court Commissioner

(a) Appointment of Juvenile Court Commissioner

Pursuant to Government Code Section 70142.11, the Judges of the Superior Court, by majority vote, may, as resources allow, appoint a Juvenile Court Commissioner. Any commissioner so appointed shall have been admitted to practice law in California for not

less than ten (10) years, shall hold office at the pleasure of the Supervising Judge of the Juvenile Court, and shall not engage in the practice of law.

(b) Authority of Juvenile Court Commissioner

The Juvenile Court Commissioner shall perform the duties and shall have the powers prescribed by Code of Civil Procedure Section 259, and the duties and powers of a juvenile court referee as specified in Welfare and Institutions Code Section 247.

(c) Juvenile court assignments as temporary judge

Unless otherwise expressly specified, the Juvenile Commissioner, without further order of the Court, shall act as a temporary judge with respect to any and all juvenile actions, causes, or proceedings and whether regularly or specially assigned to the Juvenile Commissioner or to the Department in which the Juvenile Commissioner is sitting. Such duties and powers include, but are not limited to, conducting the trial, contest or hearing assigned actions, causes or proceedings, whether or not contested.

(d) Juvenile subordinate judicial officers

Subordinate judicial officers (including commissioners and temporary judges) shall serve pursuant to the provisions of law. Subject to order of the Juvenile Court Supervising Judge, the subordinate judicial officers shall hear all matters which the law and their calendars permit them to hear.

(Rule 5.52(d) revised effective 7/1/05)

(e) Juvenile stipulation to Commissioner

Subordinate judicial officers shall hear their cases as commissioners and be identified as commissioners to all parties. Any party not objecting to the commissioner hearing the matter is deemed to have stipulated to such commissioner hearing the matter as a temporary judge.

(Rule 5.52(e) revised effective 1/1/16)

(f) Stipulation requirements for temporary judge

When an attorney is sitting as a court-appointed temporary judge and hears a contested matter, the parties whose stipulation should be obtained are: the attorney for petitioner, the attorney(s) for the minor(s), and in applicable cases brought under Welfare and Institutions Code Section 300, the attorney for the parent, guardian or de facto parent.

(Rule 5.52(f) revised effective 1/1/08)

(g) Vacation approval for subordinate judicial officers

A subordinate judicial officer's vacation time and other time away from his or her calendar shall be approved in advance by the Juvenile Court Supervising Judge. When a Juvenile subordinate judicial officer is absent, his or her calendar may be heard by:

(1) Court-appointed Temporary Judge

(2) The Juvenile Court Supervising Judge

(3) A Juvenile Court Judge or subordinate judicial officer as reassigned by the Juvenile Court Supervising Judge.

(Rule 5.52(g) revised effective 7/1/05)

(Rule 5.52 revised effective 1/1/16)

Rule 5.53. Motions

(a) Presentation of motions

Except as provided by law, all motions shall be in writing, shall be heard before the attachment of jeopardy and shall be heard five (5) or more court days after notice unless the Court orders otherwise. The moving party shall clear the hearing date with the clerk of the juvenile court before filing any such motion.

(Rule 5.53(a) revised effective 1/1/16)

(b) Motion to continue the jurisdiction hearings

A motion to continue the jurisdiction hearing in any proceeding shall be made and heard no less than two (2) court days before the jurisdiction hearing, after service of notice on the opposing party at least five (5) court days before the jurisdiction hearing. Said motion shall be in writing unless all parties to the action, with the concurrence of the Court before whom the hearing is to be held, waive the requirement of written notice. The Court, however, may continue a jurisdiction hearing on motion of any party at the proceeding for good cause without the requirements of this subdivision being fulfilled. Untimely last minute continuances, without good cause, may be subject to sanctions.

(Rule 5.53(b) revised effective 1/1/16)

(Rule 5.53 revised effective 1/1/16)

Rule 5.54. Appointment of Juvenile Court Appointed Counsel

Juvenile Court judges shall be responsible for the appointment of counsel for children or minors in matters subject to the jurisdiction of the Juvenile Court. With few exceptions, appointments for minors in Welfare and Institutions Code Section 300 dependency cases are referred to the contracted dependency counsel program. Appointments for minors in Welfare and Institutions Code Section 602 delinquency cases are referred to the Public Defender's Office.

(Rule 5.54 revised effective 1/1/16)

Rule 5.55. Minute order

Minute orders in juvenile proceedings

(1) A minute order shall be prepared by the clerk of the Juvenile Court at the conclusion of each court proceeding. Recommendations adopted by the Court may be attached and incorporated into the minute order by reference.

(2) All parties to the action are entitled to receive a copy of the minute order upon completion of that session of the judicial proceeding.

(3) Any party to the proceeding may waive receipt of the minute order.

(Rule 5.55 revised effective 1/1/15)

Rule 5.56. Juvenile Detention hearings

In Welfare and Institutions Code Section 602 delinquency cases, the Probation Department shall study and report to the Juvenile Court Judge and in Welfare and Institutions Code Section 300 dependency cases, the Department of Human Services shall study and report to the Juvenile Court Judge as to detention of a minor. The report shall set forth specific facts which pertain to the factors regarding detention under the California Rules of Court and shall recommend whether or not the minor should be detained. The Judge shall make findings as required by the California Rules of Court as to the question of detention.

(Rule 5.56 revised effective 1/1/16)

Rule 5.57. Public Hearings

(a) Closed Juvenile hearings

Unless provided otherwise by law, Juvenile Court proceedings shall be closed to the public; provided, however, that the Juvenile Court judge may admit such persons as he or she deems have a direct and legitimate interest in the particular case or the work of the Court.

(Rule 5.57(a) revised effective 1/1/13)

(b) Discretionary public hearings in Juvenile Delinquency case

The Juvenile Court judge shall permit the public, including news media representatives, to be present at juvenile court delinquency proceedings, pursuant to Welfare and Institutions Code Section 676, et seq., unless the Judge determines that in the interest of justice and in the welfare of the minor, the proceedings should be closed.

(Rule 5.57(b) revised effective 1/1/13)

(Rule 5.57 revised effective 1/1/15)

Rule 5.58. Release of Information

(a) Discovery of Juvenile records.

Except as indicated within this rule, in all cases in which a person or agency seeks access to Juvenile Court Records, including records maintained by the Juvenile Court Clerk, the Probation Department, or the Department of Human Services, the person or agency shall file a Petition for Disclosure (Judicial Council Form JV-570) with the Judge of the Juvenile Court. The Petition shall set forth with specificity the material sought and the relevance of

the materials to the underlying action. The Petition shall be supported by a declaration notice to all necessary parties, and if necessary, a Memorandum of Points and Authorities.

In all cases in which a person or agency seeks records held by law enforcement, including police reports regarding children who are the subject of Juvenile Court proceedings, the person or agency shall file a request pursuant to the Police Report Request Form (Judicial Council Form JV-575).

This section does not apply to those persons and agencies designated by Welfare and Institutions Code Section 827(a).

(b) Records access by Court Appointed Special Advocate (CASA)

For the purposes of implementing the Court Appointed Special Advocate (CASA) Program, volunteers serving in the program are considered court personnel as that term is used in Welfare and Institutions Code Section 827. They shall have access to Probation Department and Department of Family and Children's Services files in order to carry out their responsibilities as court appointed advocates.

(Rule 5.58(b) revised effective 1/1/16)

(Rule 5.58 revised effective 1/1/16)

Rule 5.59. Inter-Agency Exchange of Information

(a) Juvenile information access and exchange

The disclosure of information concerning children and their parents by staff associated with Family Court Services, the Probation Department Juvenile Division, the Department of Human Services, Case Management Council, Adult Probation Department and Probate Court Investigator's office is generally prohibited by law. Nevertheless, a limited exchange of information about children or parents between these agencies in certain circumstances will serve the best interest of the child who is before the Court. The Court hereby finds that the best interest of children and victims appearing in court and the public interest in avoiding duplication of effort by the courts and by the investigative agencies serving the juvenile and family courts, and the value of having relevant information gathered by a court agency outweighs the confidentiality interest reflected in Penal Code Sections 11167 and 11167.5 and Welfare and Institutions Code Sections 827 and 10850 et seq., and therefore, good cause exists for the following rule:

In the following types of cases before the Court:

(1) Juvenile Delinquency

(2) Custody Disputes

(3) Juvenile Dependency

(4) Probate investigation (Conservatorship and Guardianship)

(5) Criminal

The representatives of the above listed agencies who are investigating or supervising cases involving children should disclose information to each other, including the exchange of records, reports and other documentation in their files regarding minors within the jurisdiction of the family, probate or juvenile courts or subject to proceedings therein.

(Rule 5.59(a) revised effective 1/1/16)

(b) Application to release information

The Juvenile Court judge will entertain other applications for release of information on a case-by-case basis.

(c) Juvenile inter-agency sharing of information

All county agencies and agencies contracting with the county as to the treatment of juveniles are authorized to share information with each other as to juveniles within the jurisdiction of the Juvenile Court.

(Rule 5.59 revised effective 1/1/16)

Rule 5.60. Timeliness

Attorneys for parties are required to adhere to the statutory timeliness for all hearings as provided in the Welfare and Institutions Codes and California Rules of Court. (See Welfare and Institutions Code Sections: 213.5, 252, 253, 315, 321, 322, 324, 334, 352, 353, 354, 358, 359, 361.2, 361.3, 361.5, 364, 366, 366.21, 366.22, 366.26, 366.3, 367 & 387; California Rules of Court, Rules 5.542, 5.550, 5.612, 5.605, 5.664, 5.666, 5.668, 5.678, 5.680, 5.686, 5.690, 5.695, 5.710, 5.715, 5.720, 5.740).

(Rule 5.60 revised effective 1/1/15)

Rule 5.61. Experience, Training, Education

Effective July 1, 1996, all appointed attorneys appearing in juvenile dependency proceedings shall be familiar with and comply with the minimum standards of competence set forth in California Rules of Court, Rule 5.660 and any applicable Welfare and Institutions Code Sections.

(Rule 5.61 revised effective 1/1/15)

Rule 5.62. Screening for Competency

(a) Minimum competency standards for court-appointed attorneys

All court-appointed attorneys appearing in juvenile dependency proceedings must meet the minimum standards of competence set forth in these rules.

(b) Standards of education and training

(1) Each court-appointed attorney appearing in a dependency matter before the Juvenile Court shall complete the following minimum training and educational requirements: The attorney shall have either: (1) participated in at least eight (8)

hours of training or education in juvenile dependency law, or (2) have sufficient recent experience in dependency procedure. (California Rules of Court, Rule 5.660).

(2) Each court-appointed attorney who practices before the juvenile dependency court shall complete within every three (3) year period, at least eight (8) hours of continuing education related to dependency proceedings. Evidence of completion of the required number of hours of training or education shall be retained by the attorney and may include a copy of a certificate of attendance issued by a California MCLE provider or a certificate of attendance issued by a professional organization which provides training and/or education for its members, whether or not it is a MCLE provider. Attendance at a court-sponsored or approved program will also fulfill this requirement.

(c) Standards of representation

All court-appointed attorneys appearing in dependency proceedings shall meet the following minimum standards of representation:

(1) Attorneys are expected to meet regularly with clients, including clients who are children, to contact social workers and other professionals associated with the client's case, to work with other counsel and the Court to resolve disputed aspects of a case without hearing, and to adhere to the mandated time lines.

(2) If the client is a child, the attorney or the attorney's agent shall have contact with the client before each hearing. The attorney or attorney's agent shall interview all children four (4) years of age or older in person, if possible. Whenever possible, the child shall be interviewed or seen at the child's placement. The attorney or attorney's agent should also interview the child's caretaker, particularly when the child is under four (4) years of age.

(3) If the client is not the child, the attorney or the attorney's agent shall interview the client at least once before the jurisdictional hearing unless that client is unavailable. Afterward, the attorney or the attorney's agent shall contact the client at least once before every hearing unless the client is unavailable.

(Rule 5.62(c) revised effective 1/1/16)

(Rule 5.62 revised effective 1/1/16)

Rule 5.63. Mediation

(a) Mediation of contested jurisdictional hearings

Absent objection by any party or attorney and with court approval and each jurisdictional matter set for contested hearing, with the exception of cases filed under Welfare and Institutions Code Sections 300(d) or (e), should be scheduled for mediation before contested hearing.

(Rule 5.63(a) revised effective 1/1/16)

(b) Mediation of post-jurisdictional contested hearings

At the request of any party or the Court, and with consent of all parties, all post jurisdictional matters set for contested hearing may be referred to mediation.

(Rule 5.63 revised effective 1/1/16)

Rule 5.64. Reciprocal Discovery

By Order of the Supervising Judge, the discovery provisions and rules of California Rules of Court, Rule 5.546 pertaining to juvenile delinquency matters are equally applicable and reciprocal to the prosecution and defense. (Robert S., 9 Cal. App 4th 1417)

(Rule 5.64 revised effective 1/1/15)

Rule 5.65. Disclosure of Victim or Witness Contact Information

(a) Disclosure of victim or witness contact information

All attorneys participating in juvenile delinquency proceedings shall comply fully with the limitations on disclosing victim or witness contact information prescribed by California Penal Code Section 1054.2. (See Robert S. v. Superior Court (1992) 9 Cal.App.4th 1417, 1422). Attorneys may disclose victim or witness contact information, including but not limited to, addresses and telephone numbers, only in accordance with Penal Code Section 1054.2. Attorneys shall not disclose victim or witness contact information to a child who is the subject of a juvenile delinquency proceeding, or to the child's parent or guardian, unless specifically permitted to do so by the Court after a hearing and a showing of good cause. The same concerns for victim or witness safety that prompted the enactment of Penal Code Section 1054.2 applies with equal force in juvenile delinquency proceedings. (Cf., City of San Jose v. Superior Court (1993) 5 Cal.4th 47, 54).

(b) Redaction of victim or witness contact information by district attorney

The District Attorney shall fully redact all victim or witness contact information before providing police, arrest, and crime reports directly to a child, parent, or guardian, and shall simultaneously give notice that this information is being redacted. (See, California Rules of Court, Rule 5.546, subdivisions (b), (g), and (h). The District Attorney shall provide unredacted copies of such reports to the attorney for a child, parent, or guardian, and the receiving defense attorney may use such reports in a manner consistent with Penal Code Section 1054.2(a). However, the receiving defense attorney shall fully redact all victim or witness contact information before providing police, arrest, and crime reports to the attorney's clients. In situations where the child, parent or guardian is not represented by an attorney, the Court shall issue a protective order consistent with Penal Code Section 1054.2, subdivision (b).

(c) Final order determining custody – modifications in new case filings

Pursuant to California Rules of Court, Rule 5.700 and Welfare and Institutions Code Section 302(d), the Court will enter appropriate custody and visitation orders at the time

the Juvenile Court terminates jurisdiction in a dependency case. To ensure there is in fact a significant change of circumstances to warrant modification of that order, when issuing the "Custody Order-Juvenile-Final Judgment-Visitation Order-Juvenile" (Judicial Council Form JV-200/JV-205), the Court may order that any application, order to show cause or motion to change custody or visitation filed within one year of the "Custody Order-Juvenile-Final Judgment/Visitation Order-Juvenile," is to be assigned and determined by a juvenile bench officer. In such cases the juvenile bench officer shall sit as a family law bench officer when hearing such an application, order to show cause or motion, and the matter shall be heard pursuant to the provisions of the Family Code.

(Rule 5.65 revised effective 1/1/15)

Rule 5.66. Notice Regarding Change in Placement for Dependents of the Court

In order to ensure that proper notice is received by attorneys of any change in a child's placement after the jurisdiction hearing:

(1) In non-emergency situations, Children and Family Services shall give notice to the child's counsel by close of the next business day following a decision to change a child's placement, including a change in address for respite, or a 7-day caretaker notice. In no event in non-emergency situations, shall the child be moved from placement without first providing child's counsel a reasonable opportunity to put the matter on the court calendar for court review.

(2) In non-emergency situations, Children and Family Services shall give at least ten (10) calendar days' notice before separating siblings placed together.

(3) Prior to removal of a child from one county to another, Children and Family Services shall give at least fourteen (14) calendar days' notice to all counsel, unless emergency circumstances prevent such notice. In such emergency circumstances, notice shall be given as soon as practicable but no later than close of the next business day.

(4) Within 48 hours of receipt of information that a child is absent without leave ("AWOL"), Children and Family Services shall notify all counsel.

(5) Within 48 hours of receipt of information that a child is or was recently hospitalized for medical treatment, including psychiatric hospitalizations, Children and Family Services shall notify all counsel and must provide the child's counsel the name and location of the hospital.

(6) Notice by Children and Family Services relating to the above changes in placement must be given in writing, which includes by facsimile or email. Notice to the child's counsel shall include the child's address, telephone number and name of the caregiver.

(Rule 5.66 revised effective 1/1/16)

Rule 5.67. Parental Visitation

(1) Visitation/Contact Before Detention Hearing

Immediately after a child is taken into temporary custody, the social worker shall ensure that the child has regular supervised contact with his or her parent pursuant to W&I Code 308 unless the social worker has a reasonable belief that contact with the parent would be detrimental to the child. Detriment may include cases of physical or sexual abuse or coercion by a parent of the child relating to the reporting of abuse or neglect. In such cases, the Court shall address the issue of contact at the initial/detention hearing.

(2) Visitation/Contact After Detention Hearing

The determination of the right to visitation and contact, the length of any visitation or contact, whether any visitation or other forms of contact will be supervised (and by whom) and the frequency of visitation and contact must be made by the Court. The implementation and administration of the Court's order may be delegated to the social worker. These tasks may include time, place and manner of visitation. The Court may also delegate the discretion to the social worker to increase the frequency and duration of the visits and to permit unsupervised visits (sometimes with the explicit condition that minor's counsel be given notice before such visits).

(Rule 5.67 revised effective 1/1/16)

Rule 5.68. Notice to Caregiver

The social worker shall ensure that notice is provided to the current caregivers of a dependent child, including foster parents, relative caregivers, preadoptive parents, or nonrelative extended family members of all status review and permanency review hearings as required under W&I Code 293. The social worker shall also provide the caregiver, at least thirty (30) calendar days before such hearings, with a Caregiver Information Form (Judicial Council Form JV-290) and instructions on how to complete and file the Instructions to Complete the Caregiver Information Form (Judicial Council Form JV-290-INFO) with the court.

(Rule 5.68 revised effective 1/1/16)

Rule 5.69. Notice to Minor's Counsel Regarding Subpoenas

In the event that a social worker receives a subpoena or notice of a subpoena of a minor subject to a dependency action, the social worker shall provide immediate notice to minor's counsel in the dependency action. This notice shall be given at least five (5) business days before the date of the appearance of the minor child or within 48 hours of the social worker's receipt of information of the subpoena, whichever occurs later. The social worker is to provide minor's counsel with a copy of the subpoena in the possession of the social worker.

(Rule 5.69 revised effective 1/1/16)

Rule 5.70. Probation Reports Reporting Confirmed Information on AIDS and AIDS-Related Diseases

Medically verified information that a juvenile or a defendant has AIDS, or AIDS-related diseases or is HIV positive, when reported to the Court, shall be reported in a confidential memorandum, attached only to the Court's copy of the Probation Report. These memoranda will remain confidential, and will be kept permanently sealed.

(Rule 5.70 revised effective 1/1/16)

Rule 5.71. Court Appointed Special Advocates Program Guidelines

Pursuant to Welfare and Institutions Code Section 100, the program guidelines established by the Judicial Council for Court Appointed Special Advocate Programs is hereby adopted, and incorporated herein.

(Rule 5.71 revised effective 1/1/16)

Title Six. Reserved.

Title Seven. Probate Rules

Chapter 1. General Provisions

Rule 7.1. Probate Matters

Matters governed by the Probate Code, except compromises for minors and incompetents arising from matters not governed by the Probate Code, shall be set for hearing in the department(s) designated by the Presiding Judge. These departments will be known collectively as the Probate Division. The Probate Division will manage contested matters that require an evidentiary hearing until resolved or ready for trial, and will then set the trial date and department. For information about Contra Costa Probate Court Calendars, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.1 revised effective 1/1/16)

Rule 7.2. Judicial Commitments

Probate matters also include all matters arising under the Lanterman-Petris-Short Act and any other judicial commitments, except Mentally Disordered Sex Offenders, and shall be heard in the Probate Division at time and date as established.

(Rule 7.2 revised effective 1/1/15)

Rule 7.3. Trust Fund Withdrawals

An application for an order authorizing withdrawals of funds on deposit for the benefit of a minor shall be made by completing a form provided by the clerk of the Court for this purpose. The

application shall be signed under penalty of perjury and shall set forth the status of the account, the purpose for which the funds are to be withdrawn, the need for the withdrawal, and the reasons why the parents or parent are unable to provide the needed funds. If the funds are held in a probate guardianship, or are blocked by other order of the probate court, the application for release of funds shall be submitted to the Probate Division. If the funds are blocked by order of another department, and there is no probate guardianship of the estate, the application shall be submitted to the Presiding Judge.

(Rule 7.3 revised effective 1/1/15)

Rule 7.4. Probate Rules

All petitions, motions, and orders to show cause regarding probate matters shall be set in the Probate Division. Also see Local Rule 3.41.

(Rule 7.4 revised effective 1/1/15)

Rule 7.5. Reporting of Court Reporting in Probate

(a) Unavailability of court reporters in Probate matters

Official court reporters employed by the court are unavailable in the Probate Division effective January 1, 2013 and until further notice. Consult the Notice of Availability on the court's website for current status and any changes.

(b) Procurement of private court reporters

Any party who desires a verbatim record of the proceedings from which a transcript can later be prepared may procure the services of an outside private certified court reporter pro tempore to report any scheduled hearing or trial (see California Rules of Court, Rule 2.956).

(c) Procurement process for court reporter services

Parties electing to procure the services of an outside reporter must comply with Local Rule 2.51

(d) Fee not charged for unavailable court reporter

Pursuant to California Rules of Court, Rule 2.956(d), if a party arranges and pays for the attendance of a certified shorthand reporter at a hearing in a probate case because of the unavailability of the services of an official court reporter, none of the parties will be charged the reporter's attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(e) Attendance fee

If court reporters become available and in the court's discretion are provided by the court for any civil hearings, the parties will be required to pay the applicable reporter attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(f) Transcript costs

Parties shall be responsible for all transcript costs pursuant to Government Code Section 69953.

(Rule 7.5 revised effective 1/1/16)

Chapter 2. Probate Court Proceedings

Rule 7.50. Probate Calendar

(a) Appropriate placement on Probate calendar

Probate calendars are arranged to facilitate efficient and effective resolution of matters before the Court. For information about probate calendars go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.50(a) revised effective 1/1/16)

(b) Calendar Procedures

Parties may request, but are not guaranteed, any particular date for calendaring their matter. For information about probate calendaring, go to the Probate Guidelines section at www.cc-courts.org. Parties who want exceptions to application of the calendar procedures as determined by the clerk may request the Probate Examiners make accommodations to the calendaring procedure—and may make verified application to the Probate Division.

(Rule 7.50(b) revised effective 1/1/16)

(Rule 7.50 revised effective 1/1/16)

Rule 7.51. Contested Matters

(a) Scheduling issue conference

The Probate Division will manage probate matters until they are ready for trial and will then schedule the matter for an issue conference as otherwise described in Local Rule 3.11. Also see Local Rule 7.1.

(b) Alternative Dispute Resolution programs for Probate matters

It is the policy of the Court to encourage the parties in all cases to consider the use of appropriate alternative dispute resolution options as a means of resolving their disputes

without trial. The court finds that it is in the best interests of all parties that they participate in alternatives to traditional litigation, such as arbitration, mediation, neutral evaluation, and voluntary settlement conferences. Therefore, the court may refer cases to an appropriate form of alternative dispute resolution (ADR) before they are set for trial, unless there is good cause to dispense with an alternative dispute resolution process. (See Title 3, Chapter 5).

(Rule 7.51(b) revised effective 1/1/17)

(c) Rules for alternative dispute resolution processes other than judicial arbitration

(1) Selection of provider. The parties may choose any ADR provider they wish, whether or not that provider is on the list described in the following section of these rules.

(2) Good faith participation is required. All parties to an alternative dispute resolution process must participate in the process in good faith.

(3) Personal appearance required. In conducting a session, the ADR provider should require the attendance of persons with full authority to resolve the dispute. The provider should only permit telephone appearances if good cause to waive personal appearance was shown in a timely manner prior to the session.

(4) Cost of the alternative dispute resolution process. Unless the ADR provider's fees and expenses have been ordered by the court, the parties and the provider must agree on the fees and expenses. The fees and expenses of the provider will be borne by the parties equally, unless they agree otherwise.

(Rule 7.51(c) new effective 1/1/17)

(d) Alternative dispute resolution provider list

The court maintains a panel list of alternative dispute resolution providers to assist parties and counsel in obtaining access to experienced and affordable alternative dispute resolution services. The panel list includes providers in the areas of mediation, neutral case evaluation, private arbitration, and judicial arbitration. The panel list, including names, qualifications, services provided and fees charged, will be posted on the court's website and will be available in the office of the ADR program administrator.

(Rule 7.51(d) new effective 1/1/17)

(Rule 7.51 revised effective 1/1/17)

Rule 7.52. Appearances

(a) Appearances in uncontested matters

Appearances at the first hearing in uncontested matters are not normally required. Unless otherwise ordered, appearances are required in the following matters:

(1) If a person has been cited or ordered to appear at a hearing, appearances by both the party and the party's attorney of record at that hearing are required. If the citation or order was requested by a party, then the attorney for the requesting party, or the requesting party if in pro per, is also required to appear.

(2) If the tentative ruling states "Appearances required" then appearances are required by the proponent of the matters on calendar, and all who have responded so the Court can make appropriate case management orders (e.g. discovery deadlines, or trial setting). Attorneys of record may appear for their clients.

(Rule 7.52(a)(2) revised effective 1/1/13)

(3) The proponent and all who have responded must attend at all subsequent hearings related to case management orders (e.g. discovery deadlines, or trial setting) if a matter has been continued previously, or the parties are advised otherwise by the tentative ruling. Attorneys of record may appear for their clients.

(Rule 7.52(a)(3) revised effective 1/1/16)

(b) Sanctions for failure to appear

A failure to appear as required may result in sanctions pursuant to Code of Civil Procedure Section 177.5.

(Rule 7.52 revised effective 1/1/16)

Rule 7.53. Verifications

Verifications standards:

(1) The attorney who represents a ward or conservatee may verify pleadings filed on behalf of the ward or conservatee.

(2) An attorney's verification on behalf of a client may be sufficient for pleading purposes, but unless the verification provides that the facts are within the personal knowledge of the attorney, then this does not provide the evidentiary support necessary for a ruling.

(3) An attorney's declaration as to facts or attachments which were allegedly intended to be included in a statement previously verified by the attorney's client is ineffective. (Revised effective 1/1/03 per Code of Civil Procedure Section 2015 and California Rules of Court, Rule 7.103)

(Rule 7.53 revised effective 1/1/15)

Rule 7.54. Submission of Proposed Order Before Date of Hearing

Except in the case of confirmations of sales, orders must be submitted to the Probate Division at least three (3) court days in advance of the scheduled hearing date. The hearing date shall be stated in the order. The proposed order shall be prepared on the assumption the petition will be granted, including requested fees. Orders submitted later will be reviewed and processed after the hearing and will generally be available the morning after the hearing.

(Rule 7.54 revised effective 1/1/15)

Rule 7.55. Responses to Tentative Rulings

Tentative rulings or calendar notes are available before the calendar hearings in the Probate Guidelines section at www.cc-courts.org. In order to be considered, responses to tentative rulings must be filed no later than the close of business, two (2) court days before the hearing and endorsed filed copies delivered to the Probate Examiner.

(Rule 7.55 revised effective 1/1/16)

Rule 7.56. Continuances to Cure Defective Pleadings or Procedures

(a) Continuance of first hearing

The first hearing on a matter may be continued to enable the petitioner to correct defective pleadings or procedures identified in the tentative ruling. The continuance can be made by telephone request to the clerk, or by the Court on its own motion, even if no appearance or request for continuance is made.

(b) Continuance or dismissal of matter

After the first hearing, the matter may be dismissed unless the petitioner shows good cause for a further continuance, by a filed declaration or an appearance at the hearing. Continuances following the first hearing may not be secured by requesting a continuance from the clerk.

(c) Renotice of dropped matters

A matter once dropped must be renoticed after it has been placed back on calendar. A matter dismissed must be refiled and renoticed.

(Rule 7.56(c) revised effective 1/1/01)

(Rule 7.56 revised effective 1/1/15)

Rule 7.57. JUDICIAL COUNCIL FORMS. REPEALED (See CALIFORNIA RULES OF COURT, RULE 7.101)

Rule 7.58. Discretion to Waive

The Court for good cause may waive the application of any Local Court Rule or Probate Guideline in an individual case.

(Rule 7.58 revised effective 1/1/15)

Rule 7.59. Fees

(a) Fee guidelines

The Probate Division may, from time to time, publish fee guidelines for the assistance of counsel and others. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.59(a) revised effective 1/1/16)

(b) Fee petitions for fiduciaries

Fee petitions for fiduciaries and their attorneys, as well as for others seeking payment from an estate in a probate department case (e.g., court-appointed counsel for conservatees with an adequate estate) are governed by a common set of guidelines but are subject to somewhat different considerations depending on the type of case in which they are presented. The common guidelines, dealing with format and acceptable rates and reimbursable costs, are contained in Chapter 12 below, and in the Contra Costa Probate Court Fees and Costs Guidelines at www.cc-courts.org.

(Rule 7.59(b) revised effective 1/1/16)

(c) Evaluation of fee petitions

Other considerations for evaluating fee petitions in more specific contexts are referenced in Local Rules 7.306 (probate administration), 7.426 (probate guardianships and conservatorships, including LPS conservatorships), and 7.450 (trusts). Also, see Local Rules 112 and 116 for additional instructions applying to all fee petitions.

(Rule 7.59(c) revised effective 1/1/15)

(Rule 7.59 revised effective 1/1/16)

Rule 7.60. Record Title

(a) Disclosure of title of record

If a Title of Record for a decedent's interest in an asset is different than the decedent's interest is alleged to be in a petition determining the characterization or disposition of the decedent's interest, the petition shall disclose to the Court what the Title of Record is for the asset. For example, if a Spousal Property Petition is filed seeking determination that community property realty passed to the surviving spouse, and the title of record for the property to the property is held as "joint tenants with right of survivorship" then that fact shall be disclosed.

(b) Community property

Community property held in joint tenancy title will be treated as community property unless there was a formal and express transmutation from community property.

(Rule 7.60 revised effective 1/1/15)

Rule 7.61. Court Ordered Fees for Fiduciaries and Attorneys

(a) No attorney for a guardian, guardian ad litem, minor, conservator, conservatee or personal representative shall request or accept any compensation from the estate (whether or not subject to court supervision) of the ward, incapacitated person, conservatee or decedent's estate without prior court order. This does not require prior court approval of payments received from trusts or other persons.

(b) The requirement of prior court approval applies to any attorney for any of the specified fiduciaries who is representing the fiduciary in any other civil action. For example, if a creditor files suit against a decedent's estate, and the personal representative hires separate counsel to defend the suit, prior court approval is required before payment of any fees to the separate counsel.

(c) In awarding or allowing reimbursement for compensation in situations described in paragraph (a), the Court is neither bound by (1) the terms of any attorney fee agreement executed without prior court approval in the proceeding nor (2) any amounts that have been paid previously. (See California Rules of Court, 7.753, 7.754, 7.755) For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.61 revised effective 1/1/16)

Rule 7.62. Factual Allegations

Declarations which merely recite or incorporate reference to code sections do not provide an evidentiary basis for action by the Court absent evidence that the declarant is an attorney or otherwise has sufficient expertise to express a credible opinion as to the operation of the code section. Absent such expertise, facts evidencing necessary compliance with a code section shall be stated in the pleadings.

(Rule 7.62 revised effective 1/1/16)

Rule 7.63. Guardian ad Litem

(a) Representation of guardian ad litem

A guardian ad litem must be an attorney or must be represented by an attorney.

(b) Waiver of beneficiary rights

A guardian ad litem may not waive or disclaim any substantive rights of the beneficiary without prior approval by the Court.

(Rule 7.63 revised effective 1/1/15)

Rule 7.64. Special Notice to Attorneys and Clients

A request for special notice by an attorney, absent an express statement otherwise, does not constitute a waiver of the notices required to be sent to the attorney's client under Probate Code Section 1214.

(Rule 7.64 revised effective 1/1/15)

Rule 7.65. Coordination of Fee Petitions with Accountings

(a) Filing fee petitions

Although the Probate Code does not prohibit fee petitions from being filed separately from accountings, the Court prefers to determine the amount of fees for fiduciaries and their attorneys (and if possible, for other attorneys who need prior approval for payment in the case) at the time the fiduciary's accounts are reviewed.

(b) Filing requirements

A petition before an accounting may be filed to determine compensation as long as the Inventory and Appraisal has been filed showing sufficient assets to pay the requested compensation (this condition does not apply to cases, such as trust administration, where an Inventory and Appraisal is not required to be filed). However, the fiduciary and counsel will not be allowed fees or costs from the estate for bringing such early petition, unless good cause for allowing fees before an accounting is shown.

(c) Fee petition clarification

A petition for appointment of a fiduciary that includes a request for periodic payment of fees on account under Probate Code §2643 or §10832 shall not be deemed a "fee petition" under this rule.

(d) Trust administrations

This rule does not apply to trust administrations where court-approved accountings are not required.

(Rule 7.65(d) new effective 1/1/13)

(e) Fee petition by counsel

A fee petition by counsel for a proposed conservatee or ward requesting less than $5,000 may be submitted for decision during ex parte hours, apart from an accounting, with fifteen (15) calendar days' notice to all persons who would be entitled to notice of the hearing if such petition were set on the regular calendar. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.65(e) new effective 1/1/16)

(Rule 7.65 revised effective 1/1/16)

Chapter 3. Petitions, Orders and Notices

Rule 7.100. Titles for Petitions and Orders [Repealed 1/1/03]

Rule 7.101. Material to be Included in Formal Rulings

Formal orders, judgment and decrees shall be drawn so that their full effect may be determined without reference to the petition on which they are based. As necessary for this purpose, documents shall be attached to, and referenced in, the order, judgment or decree, instead of referring to the other document by reference. All probate orders, judgments or decrees shall set forth all matters actually passed on by the Court, giving the relief granted, the names of the persons affected, and the full legal description of any real property (including Assessor's Parcel Number), or the amounts of money affected.

(Rule 7.101 revised effective 1/1/15)

Rule 7.102. Written Response

An objection or other written response to moving papers will be deemed a waiver of further notice as to those papers.

(Rule 7.102 revised effective 1/1/15)

Rule 7.103. Reserved. [REPEALED 1/1/03]

Rule 7.104. Applications for Ex Parte Orders

(a) Ex parte applications

Applications for ex parte orders must be accompanied by a separate order complete in itself. It is not sufficient for such an order to provide merely that the application has been granted, or that the sale of property set forth in the petition has been approved.

An application for an ex parte order must be verified and must contain sufficient evidentiary facts to justify issuing the order. Conclusions or statements of ultimate facts are not sufficient and a foundation should be shown for the petitioner's personal knowledge.

(b) Notice requirements

Since no testimony is taken in connection with ex parte petitions, the application must contain sufficient facts to justify granting the ex parte order. Petitioner must notify all interested or opposing parties by fax or telephone no later than 10:00 a.m. on the day before the scheduled hearing as provided by CRC, Rule 3.1203 and CRC, Rule 3.1204. An endorsed filed copy of a declaration regarding notice in compliance with CRC, Rule 3.1204 must be delivered to the Probate Department prior to the hearing. Orders dispensing with notice must be supported by a declaration setting forth the exceptional

circumstances that justify dispensing with notice. REPEALED IN PART (see California Rules of Court Rule 3.1203, Rule 3.1204, and Rule 7.55 & Probate Code 1202)

(Rule 7.104(b) revised effective 1/1/17)

(Rule 7.104 revised effective 1/1/17)

Rule 7.105. Petitions for Family Allowance

(a) Income and expense requirement

A petition for the family allowance under Probate Code Section 6540 et seq. must include a detailed statement of proposed recipient's income and expenses.

(b) Notice requirement for petitions for family allowance

A petition for family allowance, if made before the filing of the Inventory and Appraisal ordinarily may be presented ex parte. However, if the petitioner is someone other than the executor or there is a dispute as evidenced by papers on file in the proceedings, or there is a request for special notice, then all other parties must be notified in person or by telephone at least twenty-four (24) hours in advance of the time and place where the application for the ex parte order will be made. The petition must be presented by the attorney or unrepresented party requesting the ex parte order. Ordinarily, the order will be made for a period commencing with the date of death and continuing until the inventory is filed, but not to exceed six (6) months. If the order will be opposed, call the Probate Division ahead of time to make a specific appointment with the Court.

(c) Application and notification after personal representative qualified

If the application is made more than six (6) months after the personal representative has qualified, it shall be noticed and placed on the calendar.

(d) Time period for subsequent orders

Subsequent orders will be limited to a definite period, usually not to exceed twelve (12) months duration. It is the policy of this Court not to make orders for family allowance for an unlimited period.

(Rule 7.105 revised effective 1/1/15)

Rule 7.106. Bond on Petitions for Authority to Borrow Money

Petitions for authority to borrow money shall set forth the amount of bond in force and the amount of loan proceeds eligible to be covered by bond. If no additional bond is required, or if bond is waived, that fact shall be alleged.

(Rule 7.106 revised effective 1/1/15)

Rule 7.107. Nunc Pro Tunc Orders Correcting Clerical Errors

(a) Correction of error on order

If, through inadvertence, the signed order, judgment or decree fails to state the ruling actually made by the Court, or through some writer's error portions of the order, judgment or decree are incorrect, the Court will make a nunc pro tunc, judgment or decree order correcting the mistake upon declaration detailing the defect. If the modification to the order is the result of an error by an attorney or party, an ex parte application is required. If modification is the result of court error, a declaration in support of the amended order is sufficient.

(b) Nunc pro tunc order

A nunc pro tunc order, judgment or decree must take the form of a complete amended order, judgment or decree. The previously signed order must be attached to the ex parte application or declaration.

(Rule 7.107 revised effective 1/1/16)

Rule 7.108. General Notice Requirements

Counsel are reminded that the notice requirements in the Probate Code vary greatly. No set pattern may be discerned. The specific requirements of the Code (i.e., posting, mailing, publication, personal service, etc.). must be checked for every petition filed.

(Rule 7.108 revised effective 1/1/15)

Rule 7.109. Probate Hearing Once Noticed Cannot be Advanced

When a hearing on a probate matter has been noticed, or when it has been noticed and then continued to a definite date, the matter cannot be heard before the date set, except by Court order and new notice.

(Rule 7.109 revised effective 1/1/15)

Rule 7.110. Orders, etc., to be Complete

A judgment, degree or order shall be complete in itself, with attachments as necessary to avoid incorporating other documents by reference.

(Rule 7.110 revised effective 1/1/15)

Rule 7.111. Accounts and Reports

(a) Accountings submitted for court approval

Accountings submitted for court approval shall comply with Probate Code Section 1060 et seq.

(b) Statement of bond in accounting report

The report accompanying an accounting shall include a statement regarding the bond. This shall include the following:

(1) The amount of the currently posted bond.

(2) If no bond is posted, a statement of why no bond was required (e.g., "At the time of appointment, there were no assets subject to disposition by the fiduciary" or "Bond was waived in the will").

(3) If bond is required, the report shall state:

(A) the current value of all personal property subject to the petitioner's control;

(B) the amount of the estimated annual income for the next year;

(C) the fair market value, less encumbrances, of any real property which the fiduciary can sell without prior court order; and

(D) the amount of any public benefits regarding accounts for guardianships and conservatorships being received by or for the benefit of the ward or conservatee, including the identity of the person receiving the benefit.

(Rule 7.111 revised effective 1/1/16)

Rule 7.112. Petitions to Show who is Entitled to Notice

All petitions shall identify the names, addresses, and relationships of all persons entitled to notice.

(Rule 7.112 revised effective 1/1/15)

Rule 7.113. Identity or Whereabouts Unknown [repealed 1/1/03] (see California Rules of Court, Rule 7.52)

Rule 7.114. Notice Regarding Interests of Deceased Persons [repealed 1/1/03] (see California Rules of Court, Rule 7.51(e))

Chapter 4. Appointment of Executors and Administrators

Rule 7.150. Notice re: Special Letters

Petitions for letters of special administration will not be granted without twenty-four (24) hour (oral or written) notice to the surviving spouse or domestic partner as defined in Probate Code Section 1894, to the person nominated as executor, and to any other person whom the Court determines to be equitably entitled to notice. In making the appointment, preference is given to the person entitled to Letters Testamentary or of Administration, but if it appears that a bona fide contest

exists between these persons, the Court will consider the advisability of appointing a neutral person or corporation as Special Administrator, upon the filing of a proper petition.

(Rule 7.150 revised effective 1/1/15)

Rule 7.151. Petitions for Probate of Will and for Letters Testamentary; for Letters of Administration; or for Letters of Administration with Will Annexed

(a) Photographic copy of holographic instrument

When a holographic instrument is offered for probate, a photocopy of the instrument must be accompanied by an exact typewritten copy of the instrument, reproducing the instrument line by line and showing any words crossed out. Where an instrument written in a foreign language is offered, it must be accompanied by a copy translated into English by a Court certified translator.

(b) Name of predeceased beneficiary

If a named beneficiary predeceased the decedent or did not survive the designated survival period, that fact must be stated in Attachment 8 of the Petition.

(c) Requirement of personal representative form

Confidential Statement of Birth Date and Driver's License Number (Judicial Council Form DE-147S) is not required.

(d) Name of spouse or deceased person on petition

If Attachment 8 includes a spouse or any other person who is deceased as of the date of the petition, the petition shall state that person's date of death. The Court needs to know whether the person predeceased or survived the decedent.

(Rule 7.151(a)-(d) revised effective 1/1/15)

(e) Proof of Service of Notice of Petition to Administer Estate

A copy of the petition must be served with the initial Notice of Petition to Administer Estate. A copy of the petition should not be published with the Notice.

(Rule 7.151(e) new effective 1/1/15)

(Rule 7.151 revised effective 1/1/15)

Rule 7.152. Notice

(a) The following persons are entitled to NOTICE (see Probate Code § 8110):

(1) Heirs of the Decedent: Whether or not a decedent died with a will, the petition must contain the names and relationships of all of the decedent's heirs-at-law. An heir-at-law is any person who would be entitled to distribution of a part of the decedent's estate (including distribution by virtue of Probate Code Section 6402.5 if the

decedent had a predeceased spouse) if the decedent died intestate (without leaving a will);

(2) Beneficiaries Named in the Will: This includes all named contingent beneficiaries who may be entitled to share in the estate, and also includes persons provided for in the Will but whose gifts have been revoked by a subsequent modification to the will;

(3) Deceased Heir or Beneficiary See California Rules of Court, Rule 7.51(e); if heir or beneficiary died before decedent, see also Probate Code § 21110. [REPEALED 1/1/03] (See California Rules of Court, Rule 7.51(e));

(4) Trustee Nominee. Any nominated trustee of a trust created by the will;

(5) Beneficiaries of Testamentary Trusts. The terms "beneficiaries named in the Will" and "named contingent beneficiaries" used above include beneficiaries named in testamentary trusts. It is not adequate merely to give notice to the trustee of a trust where beneficiaries or contingent beneficiaries are named in testamentary trusts;

(6) Trustees of Inter-Vivos Trusts who will receive "pour over" gifts from the decedent's estate. Item 8 on the Petition For Probate (Judicial Council Form DE-111) requires the petitioner to list "all beneficiaries of a trust named in the decedent's will or any codicil in which the trustee and personal representative are the same person." Since use of applicable Judicial Council forms is mandatory and the purpose of Item 8 is to identify persons entitled to receive notice of the petition, the Probate Division will require notice to be given to present and contingent beneficiaries of trusts where the trustee is a beneficiary of the will and the trustee is identical to the proposed personal representative;

(7) Any non-petitioning Executor, including alternate executors named in the Will; and

(8) The California Attorney General, where there is a charitable trust involved (Probate Code Section 8111).

(b) Method of giving various notices

(1) **Unknown Address.** If the address of an heir or beneficiary is unknown, the Court requires a declaration stating specifically what efforts were made to locate such heir or beneficiary before the Court will dispense with notice or prescribe an alternate form of notice. See Probate Code Section 1212 and Code of Civil Procedure Section 413.30 as to what efforts are necessary. In general, these efforts shall include inquiry of relatives, friends, acquaintances, and employers and investigation of appropriate city and telephone directories, and the real and personal property index at the County Assessor's Office of the county of last known residence of the missing heir or beneficiary. REPEALED IN PART (see California Rules of Court, Rule 7.51(d))

(2) **Minors**. See Probate Code Section 1460.1 and California Rules of Court, Rule 7.51(d).

(c) Notice by mail - by whom given

If a Probate Code Section requires the clerk to "cause notice of the hearing to be mailed", the clerk fulfills this function by requiring counsel to do the mailing. Therefore, counsel is charged with this duty.

(Rule 7.152 revised effective 1/1/16)

Rule 7.153. Requirements of Publication for Notice of Petition to Administer Estate

(a) Publication and mailing of notice of petition to administer estate

The publication and mailing of Notice of Petition to Administer Estate under Probate Code Section 8120 is sufficient to include all instruments which are offered for probate filed with, and specifically referred to in the Petition for which notice is given. Any other Wills or supplement to a Will not specifically mentioned in the Petition must be presented to the Court in an amended or second Petition and a new Notice of Petition to Administer Estate must be published and mailed. (Probate Code Sections 8110 and 8120).

(b) Petitioner's responsibility to publish petition to administer estate

It is the responsibility of the petitioner to arrange for publication. The County Clerk does not have this responsibility.

(Rule 7.153 revised effective 1/1/16)

Rule 7.154. Court Discretion Regarding Bond

Executors nominated to serve without bond may nevertheless be required to post such bond as the Court may require. If the nominated executor is a nonresident of California, the Court will require bond as though the will had not waived bond. If all beneficiaries or heirs waive bond, or if one of multiple personal representatives is a California resident, the Court will consider reducing the bonding requirement for non-resident personal representatives to no less than $20,000 to provide protection for creditors. A declaration or attachment to the petition setting forth in detail the anticipated liabilities of the decedent and claims against the estate will be necessary to help the court determine the proper amount. FORMER SUBDIVISION B REPEALED IN PART (See California Rules of Court, Rule 7.204)

(Rule 7.154 revised effective 1/1/15)

Rule 7.155. Continuance to Permit Filing of Contest

When a petition for the probate of a Will is called for hearing, if an interested person appears and orally objects and declares that he or she desires to file a written contest, the Court will continue the hearing with the understanding that if a contest is not actually on file at the new hearing date, the hearing will nevertheless proceed as though there were no contest.

(Rule 7.155 revised effective 1/1/15)

Rule 7.156. Multiple Representatives

When multiple personal representatives are appointed, the clerk will not issue letters to less than all of them or separately to any of them, unless the order specifies otherwise.

(Rule 7.156 revised effective 1/1/15)

Chapter 5. Creditors' Claims

Rule 7.200. Nature and Form of Claims

(a) Claim vs. expense of administration

(1) The Court will not approve "creditors' claims" which represent obligations of the estate arising after the death of the decedent (except reasonable funeral expense). Such expenses are properly expenses of administration, not creditor's claims, and may be included for approval in the account or report.

(2) The Court will not approve "creditors' claims" which are requests for reimbursement by the person who paid what may otherwise have been a creditor claim. These are claims for equitable subrogation, and may be included for approval in the account or report.

(b) Form of creditor's claims

Creditor's claims will be liberally construed in favor of their sufficiency.

(Rule 7.200 revised effective 1/1/15)

Rule 7.201. Claims Filed with Clerk and Mailed to Personal Representative [Repealed 1/1/03] (see California Rules of Court, Rule 7.401; Probate Code 9150)

Rule 7.202. Claims of Personal Representatives and Attorneys

(a) Creditor's claim by personal representative

A creditor's claim of the personal representative or attorney shall be noted as such. Such a claim must be processed as provided in Probate Code Section 9252 notwithstanding authority to act under the IAEA. Where there is more than one personal representative, a creditor's claim submitted by one of the personal representatives must be approved by the other(s) before submission to the Court for approval.

(b) Hearing on claim of personal representatives or attorney

Unless a claim by a personal representative or attorney for the personal representative appears reasonable, and any persons requesting special notice have waived the notice as to the claim, a hearing shall be held as set forth in Probate Code Section 9252(a) and

notice given to all persons entitled to such notice, including all residuary beneficiaries, together with a copy of the claim, pursuant to Probate Code Section 1220.

(Rule 7.202(b) revised effective 1/1/15)

(Rule 7.202 revised effective 1/1/15)

Rule 7.203. Funeral Claims

An unusually large claim for the decedent's funeral and/or interment is a questionable claim and may be set for hearing pursuant to the procedure set forth in Local Court Rule 7.202(b) above. Counsel is advised to review the case of Estate of Malgor (1947) 77 Cal.App.2d 535, 176 P2d 66. Where appropriate, the personal representative shall either include facts in the petition or file a separate declaration to justify an unusually large expenditure for funeral expenses by reason of the value of the estate and/or the standard of living adopted by the decedent during his lifetime. Interest will be allowed on creditor's claims for funeral expenses only as made payable by Health and Safety Code Section 7101.

(Rule 7.203 revised effective 1/1/15)

Chapter 6. Sales

Rule 7.250. Sales of Real Property not under IAEA

Rule 7.251. Return of Private Sale

(a) Cash deposit required for purchases to be confirmed by court

Bids for the purchase of real property, when required to be returned to the Court for confirmation, must be accompanied by a minimum deposit of ten percent (10%) of the purchase price at the time of hearing unless the buyers' committed loan proceeds exceed ninety percent (90%) of the purchase price, in which event the minimum deposit shall be the difference between the committed loan proceeds and the purchase price.

(b) REPEALED IN PART (See California Rules of Court, Rule 7.451)

(Rule 7.251(b) revised effective 1/1/03)

(c) Court approval of secured junior deed of trust

The Court will approve the taking of a promissory note secured by a junior deed of trust upon a showing that it serves the best interests of the estate.

(d) Application of statutory formula re overbid

The Court must consider not only whether the bid is arithmetically the highest, but also whether it is in the best interest of the estate. Counsel for the parties involved shall be prepared with factual information that will aid the Court in making this determination.

(e) REPEALED IN PART (See California Rules of Court, Rule 7.452)

(Rule 7.251(e) revised effective 1/1/03)

(Rule 7.251 revised effective 1/1/15)

Rule 7.252. Broker's Commissions

(a) Improved property

Upon the confirmation of sale of improved real property, the Court will ordinarily allow a broker's commission not to exceed six percent (6%). If a greater amount is requested, the petition to confirm sale must be accompanied by written declarations setting forth the advantages to the estate in allowing a larger percentage as commission.

(b) Unimproved property

Upon the confirmation of sale of unimproved real property, the Court will ordinarily allow a broker's commission not to exceed ten percent (10%). The Court will determine the kind of property which constitutes unimproved property in each case and may request counsel to file declarations setting forth relevant facts in the determination of what is "unimproved" real property.

(c) Order must show commission allocation

The order confirming sale must show the total commissions allowed and any allocation agreed upon between the brokers.

(Rule 7.252 revised effective 1/1/15)

Rule 7.253. Broker's Commissions in Overbid Situation

See Probate Code Section 10160 et seq. A chart demonstrating the division of the broker commission when estate property is sold subject to Court confirmation is available in the Probate Guidelines section at www.cc-courts.org.

(Rule 7.253 revised effective 1/1/16)

Rule 7.254. Exclusive Listings for Sale of Property (Probate Code Section 10150(c) [Repealed 1/1/03] (see California Rules of Court, Rule 7.453)

Rule 7.255. Condominiums, Community or Cooperative Apartments

A condominium is an interest in real property and must be sold as such, unless it is held as a limited partnership. A cooperative apartment is also real property and must be sold as such.

(Rule 7.255 revised effective 1/1/15)

Rule 7.256. Purchase of Estate Property by Personal Representative or His or Her Attorney

The purchase of estate property by the personal representative or by the personal representative's attorney is permitted only as set forth in Probate Code Sections 9881-9885. The Court will approve such a purchase with the consent of all residual beneficiaries by a writing filed with the Court.

(Rule 7.256 revised effective 1/1/15)

Rule 7.257. Tangible Personal Property

(a) Perishable or depreciating property

Perishable or depreciating property in an estate shall be disposed of promptly. The personal representative may be held accountable for the value of the property if there has been an unreasonable delay in disposing of such property. Such property may be sold without notice. See Probate Code Sections 10252 and 10259(a)1. If counsel wishes Court confirmation of such sales (10259c), counsel shall use the form Ex Parte Petition for Approval of Sale of Personal Property and Order (Judicial Council Form DE-275).

(b) Non-perishable or non-depreciating property

With the exceptions set forth in Probate Code Sections 10252(a), (b) and (d), non-perishable or non-depreciating personal property may be sold subject to Court confirmation at either public auction or at private sale, after giving notice as set forth in Probate Code Section 10250, et seq. The time for giving notice may be shortened in the discretion of the Court.

(Rule 7.257 revised effective 1/1/15)

Chapter 7. Accounts, Fees and Petition for Distribution

Rule 7.300. Notice of Petition for Distribution

At least fifteen (15) calendar days before the hearing of the petition, notice of the hearing must be served upon each named beneficiary whose interest is affected by the petition and to the heirs of the decedent in intestate estates. Also see Probate Code Section 1220. Notice shall also be given to: a) the trustee of any intervivos trust to which the estate pours over; b) to trust beneficiaries if required under Probate Code Section 1208; c) to the trustee of any testamentary trust.

(Rule 7.300 revised effective 1/1/16)

Rule 7.301. Property to be Distributed must be Listed

(a) Description of property

The petition for distribution must list and describe in detail all property to be distributed, either in the body of the petition or in the prayer, or by a schedule in the accounting, and incorporated in the petition by reference. This includes a statement of the amount of cash

on hand. A description by reference to the inventory is not acceptable. See also requirements in Probate Code Section 1064.

(b) Tracing survivor of interstate decedent

If an intestate decedent who survived his or her spouse leaves no issue, the applicability of Probate Code Section 6402.5 must be alleged and the necessary tracing must be carried out as far as is possible.

(Rule 7.301(b) revised effective 1/1/03)

(Rule 7.301 revised effective 1/1/15)

Rule 7.302. Form of Accounting

The general guidelines for accountings are now set forth in Probate Code Section 1060 et seq.

(Rule 7.302 revised effective 1/1/15)

Rule 7.303. Waiver of Account

(a) Waiver by residuary beneficiaries

The waiver of account by the residuary beneficiaries alone is sufficient, even though there may be specific legatees and devisees, if the petition for distribution enumerates the specific bequests and devises, shows that there are sufficient assets to satisfy such bequests and devises, and prays that they be distributed. REPEALED IN PART (See California Rules of Court, Rule 7.550 for information required in reports on waiver of account)

(Rule 7.303(a) revised effective 1/1/15)

(b) Distribution from testamentary trust

When property is being distributed in a testamentary trust, an account may be waived by the trustee and all present beneficiaries of the trust. The beneficiaries must all be ascertained, adult and competent, or represented by a guardian, conservator or guardian ad litem, who must execute the waiver.

(Rule 7.303(b) revised effective 1/1/15)

(Rule 7.303 revised effective 1/1/15)

Rule 7.304. Statutory Fees and Allowable Costs [Repealed 1/1/03] (see California Rules of Court, Rule 7.705)

Rule 7.305. Inheritance by Surviving Spouse

Formal probate of community, quasi-community, or separate property passing or confirmed to a surviving spouse in a decedent's estate pursuant to Probate Code Section 13502 must be supported by a timely written election expressing acknowledgement of a consideration of the alternative procedures available pursuant to Probate Code Section 13650. Written elections

pursuant to Probate Code Section 13502 shall contain an express acknowledgment that the inclusion of property passing to or belonging to the surviving spouse in the probate estate could result in additional appraisal fees, commissions, and attorney fees.

(Rule 7.305 revised effective 1/1/15)

Rule 7.306. Extraordinary Fees

Petitions for compensation for extraordinary services under Probate Code § 10811 shall be supported by a declaration, complying with Contra Costa Probate Court Guidelines from each individual requesting approval of extraordinary fees. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org. The petition should recite only the amounts claimed and the relevant period of time, referring to the accompanying declaration(s), which should contain the explanation and justification. See also California Rules of Court, Rules 7.702 and 7.703 for declaration content.

(Rule 7.306 revised effective 1/1/16)

Rule 7.307. The Order

(a) Distribution and listing of cash and non-cash assets

The distribution of property must be separately stated in detail, listing non-cash assets to be distributed as described in the Inventory and Appraisal, as well as the amount of cash to be distributed, under the name of each beneficiary. The order must be complete in itself and the total estate distributed must agree with property on hand as shown on Schedule F of the Summary of Account. Description by reference to the inventory is not acceptable.

(b) Distribution of real property included in order

For real property to be distributed, the order must include the legal description, the street address, if any, and the assessor's parcel number.

(c) Testamentary trusts

For orders establishing testamentary trusts, see California Rules of Court, Rule 7.650.

(7.307(c) revised effective 1/1/08)

(Rule 7.307 revised effective 1/1/15)

Rule 7.308. Segregating Trust Income and Principal

When any part of the estate is to be distributed to a trustee, and the accumulated income is to be paid by the trustee to the trust beneficiaries, the order shall allocate receipts and disbursements between principal and income.

(Rule 7.308 revised effective 1/1/15)

Rule 7.309. Creditor's Claims

(a) Petition for final distribution

The Petition for Final Distribution must show that all of decedent's creditors received a Notice of Administration to Creditors (Judicial Council Form DE-157) at least seventy-five (75) calendar days before the hearing, or were paid or that there were no known creditors of decedent. (Probate Code Section 10900)

(Rule 7.309(a) revised effective 1/1/16)

(b) Payment of funeral or debt expenses after general powers issued

Unless accountings are waived, if any funeral expense or debt of the decedent was paid more than four months after letters with general powers issued, the petition shall show why the claim was not barred or the personal representative may be surcharged with interest for the payment.

(*Rule 7.309(b) revised effective 1/1/01)*

(c) Payment of funeral and debt expenses from estate

Unless accounts are waived, if a decedent's debt or funeral expense was paid from the estate without the filing of a creditor claim, the petition shall address the five elements (including timeliness of payment) of Probate Code Section 11005.

(Rule 7.309(c) revised effective 1/1/01)

(Rule 7.309 revised effective 1/1/16)

Rule 7.310. Federal Estate Taxes

(a) Proration of federal estate taxes

When proration of federal estate taxes is required by Probate Code Section 20110 et seq., the petition for distribution shall include a schedule showing the computation of the proration.

(b) Final distribution of estate after estate taxes filed and paid

An estate is not ready for final distribution until the estate tax returns have been filed, and the tax paid, unless no estate tax return is required to be filed.

If an estate tax return is required, the order for final distribution shall include a provision that there will be no final discharge until final resolution of the estate tax liability (e.g. receipt of closing letter).

(Rule 7.310(b) revised effective 1/1/08)

(Rule 7.310 revised effective 1/1/15)

Rule 7.311. Specifically Devised Property

As to expenses allocable to specifically devised property (e.g., taxes, maintenance, repairs, insurance, debt servicing) see Estate of McSweeney (1954) 123 Cal.App.2d 787). For apportionment of income and expenses, see Probate Code Sections 12002, 9650, and 1063.

(Rule 7.311 revised effective 1/1/15)

Rule 7.312. Distribution to Minors

Where the Court has discretion, funds for minors or incompetent persons without a guardian or conservator of the estate will be required to be placed in a blocked, federally insured account. The Court does not favor transfer under the California Uniform Transfers to Minors Act unless the Will so provides.

(Rule 7.312 revised effective 1/1/15)

Rule 7.313. Preliminary Distribution

(a) Waiver of bond requirement

In the event of a preliminary distribution made before the time for filing creditor's claims has expired, a bond MUST be required of the distributees (Probate Code Section 11622). After the time for filing claims has expired, the Court will usually require a distributee's bond unless the Inventory and Appraisal has been filed and the Petition sets forth sufficient facts showing that the distribution may be made without loss to creditors or injury to the estate or any interested person.

(b) Petition to not require bond

If the petition requests that no bond be required of the distributees, a clear and concise statement showing why bond should not be required must be included in the petition.

(Rule 7.313 revised effective 1/1/15)

Rule 7.314. Procedure to be Followed by a Personal Representative in Actions for Damages Following Wrongful Death of Decedent or Other Actions that Survive the Death of Decedent

(a) Issue special letters

Special letters may be the proper vehicle for such actions. In appropriate circumstances, the Court may appoint a Special Administrator for a limited purpose with a termination date specified in the order and may require an appearance at a scheduled hearing date for a status report and to continue the appointment of the Special Administrator beyond that date.

(b) Property of the estate

If a personal representative collects damages arising out of the physical injury of the decedent or covering funeral expenses and costs of last illness, he or she shall hold such money in his or her representative capacity as property of the estate.

(c) Damages for wrongful death

Damages for wrongful death are held by the personal representative as a representative of the statutory beneficiaries and are not part of the estate. (Estate of Waits (1944) 23 Cal.2d 676). The disposition of such damages for wrongful death and the amount of attorney's fees and costs shall be determined by the Court on a petition pursuant to Probate Code Section 9835.

(d) Notice requirements

In addition to the usual notices given on hearing of such a petition, under Probate Code Section 9835, notice shall be served on the heirs at law in the same manner as if each had filed a request for special notice. (See also Code of Civil Procedure Sections 377.10 et seq.).

(Rule 7.314 revised effective 1/1/15)

Rule 7.315. Grant of Additional Powers to Testamentary Trustee

Notice must be given under Probate Code Section 17203 where the Petition for Distribution requests the Court to grant a trustee additional powers not conferred by the Will. The Court may require that a guardian ad litem be appointed for persons unascertained or not in being. (Probate Code Section 15405)

(Rule 7.315 revised effective 1/1/15)

Rule 7.316. Application for Final Discharge

All Ex Parte Petitions for Final Discharge and Order (Judicial Council Form DE-295) shall be submitted with a copy of the order of final distribution, and copies of any receipts from distributees. If the order requires distribution of funds to a blocked account, the request for final discharge shall be accompanied by a completed Receipt and Acknowledgment of Order for the Deposit of Money Into Blocked Account (Judicial Council Form MC-356). If the order distributes real property, the copy of the order submitted with the request for final discharge shall show that the order has been recorded in the appropriate county. If the order provided for a withhold greater than $1000.00 there shall be included a schedule of disbursements for the withhold.

(Rule 7.316 revised effective 1/1/15)

Rule 7.317. Payment of Costs of Administration

A petition for final distribution or to terminate the proceeding must expressly state that all charges for legal advertising, bond premiums, probate referee's services and costs of administration have been paid.

(Rule 7.317 revised effective 1/1/15)

Chapter 8. Inventory and Appraisal

Rule 7.350. Preparation of Inventory and Appraisal

Provide complete descriptions of each asset in the estate. (See Probate Code Section 8850). The legal description, street address (or a notation that the property is "unimproved") and APN shall be shown for each parcel of real property. See California Decedent Estate Practice (CEB Rev. 2013, Chapter 13); see also California Probate Referees website: probatereferees.net and the Guide to Using California Probate Referees found therein for a complete description of how properly to list assets on the Inventory.

(Rule 7.350 revised effective 1/1/15)

Rule 7.351. Waiver of Appraisal by Probate Referee

(a) Waiver of Probate Referee's appraisal

The Court does not favor the waiver of the Probate Referee's appraisal under Probate Code Section 8903 in the absence of exceptional circumstances.

(b) Deferral of Probate Referee's appraisal

The Court may allow deferral of the Probate Referee's appraisal on a showing (1) that all beneficiaries have waived the Probate Referee's Appraisal and (2) that fees and commissions for the personal representative and attorney have been waived. If these conditions remain when the estate is ready for final distribution, the Court may then waive the Probate Referee's appraisal.

(Rule 7.351 revised effective 1/1/15)

Chapter 9. Guardianships and Conservatorships

Guardianships

Rule 7.400. Initiation of Guardianship Investigation

The Probate Investigations Unit will initiate a guardianship investigation except when the court specifically directs otherwise, only after the petitioner(s) has submitted a complete "Proposed Guardianship Information" (Local Court Form GC-20). The Probate Investigations Unit will initiate a termination of guardianship investigation only after the petitioner(s) has submitted a complete "Termination of Guardianship Information" (Local Court Form GC-21).

(Rule 7.400 new effective 1/1/15)

Rule 7.401. Temporary Guardianships

The Court will not order a change of custody under a temporary guardianship unless doing so appears necessary for the protection of the minor. Minimum notice to parents will be required unless justified by a supporting declaration.

(Rule 7.401 revised effective 1/1/15)

Rule 7.402. Consultation with Other Departments re: Custody or Dependency Proceedings

Where a petition for guardianship of the person of a minor is pending and where it appears to the Court that a custody or dependency proceeding concerning the same minor is pending in any other department of the Superior Court, a consultation will be had between the judicial officers of the department in which such proceeding or writ is pending, and a determination made as to whether or not the matter should be heard separately or a consolidation arranged.

(Rule 7.402 revised effective 1/1/15)

Rule 7.403. Guardianships for Dependent Children

A guardianship for dependent minor children must be established in Juvenile Court under Welfare and Institutions Code Sections 366.25(e) or 366.26(d). The Juvenile Court retains jurisdiction to modify, revoke or terminate such guardianships. See Welfare and Institutions Code Sections 366.3 and 366.4.

(Rule 7.403 revised effective 1/1/15)

Rule 7.404. Restriction on Parental Use of Minor's Estate

As there is a statutory liability upon the parents to support their children, where one or both parents are living, the Court will not permit guardianship funds to be used for the minor's ordinary support and maintenance except upon a showing of the parents' financial inability or other circumstances which would justify the Court in departing from this rule in the best interest of the minor.

(Rule 7.404 revised effective 1/1/15)

Rule 7.405. Final Account of Guardian

(a) Appearance by ward

An appearance by the ward at the hearing on the guardian's final account and petition will be required unless either:

(1) Proof of service is on file verifying that a copy of the final account and petition, and notice of hearing thereon, has been served upon the ward not less than fifteen (15) calendar days before the hearing, (Probate Code Section 1460), or

(2) The ward's written acknowledgment of receipt and approval of the petition and final account is on file.

(b) Waiver of account by ward

The Court does not favor the waiving by the ward of a guardian's final account when the ward has reached majority, and normally the Court will not approve a petition when the final account is waived, unless the ward is present in Court at the time of the hearing.

(c) Discharge of guardian

(1) A guardianship of the person and estate will terminate pursuant to Probate Code Sections 1600 and 1601.

(2) A discharge of the guardian will not occur until the expiration of one (1) year from the date the minor attained the age of eighteen (18) years. See Probate Code Section 2627.

(3) In the case of a minor for whom a conservatorship will be required, a petition for appointment of a conservator may be filed during the proposed conservatee's minority in order to make the appointment of a conservator effective immediately upon the minor's attaining the age of eighteen (18) years (Probate Code Section 1820 (b).

(Rule 7.405 revised effective 1/1/16)

Rule 7.406. Setting guardianship hearing when a temporary guardianship has NOT been granted

The matter shall be set for hearing generally not sooner than sixty (60) calendar days after the filing date to allow time for the Court Investigator's Report.

(Rule 7.406 new effective 1/1/17)

Rule 7.407. – Rule 7.410. Intentionally Omitted

Rule 7.411. Appointment of Conservator

(a) Appointment of conservator

Although Probate Code Section 2106 gives the Court discretion to appoint one conservator for several conservatees, the Court will generally not grant a petition joining more than one conservatee in a single proceeding, except husband and wife or domestic partners as defined in Probate Code Section 1894.

(b) Appointment of Conservator

The matter shall be set for hearing generally not sooner than sixty (60) calendar days after the filing date to allow time for the Court Investigator's Report (Probate Code Section 1894).

(Rule 7.411(b) revised effective 1/1/17)

(Rule 7.411 revised effective 1/1/17)

Rule 7.412. Ex Parte Petitions for Appointment of Temporary Conservatorships

(a) Notice

Petitioner must notify all interested or opposing parties by fax or telephone no later than 10:00 a.m. on the day before the scheduled hearing as provided by CRC, Rule 3.1203 and CRC, Rule 3.1204. An endorsed filed copy of a declaration regarding notice in compliance with CRC, Rule 3.1204 must be delivered to the Probate Department prior to the hearing. Orders dispensing with notice must be supported by a declaration setting forth the exceptional circumstances that justify dispensing with notice. REPEALED IN PART (see California Rules of Court, Rule 3.1203, Rule 3.1204, Rule 7.55) Minimum notice to the conservatee and conservatee's spouse, if any, pursuant to Probate Code Section 2250(e)(2) and (3) will be required unless the Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Judicial Council Form GC-112) is approved by the Court prior to the hearing.

(b) Contents of Ex Parte Petition for Appointment of Temporary Conservatorship

An application for an ex parte order appointing temporary conservator (Judicial Council Form GC-111) must be verified and must contain sufficient evidentiary facts to justify.

(Rule 7.412 revised effective 1/1/17)

Rule 7.413. Specific Medical Treatment and Placement

(a) Authority of conservator

A conservator of the person generally has authority to fix the residence of, and place the conservatee in, any facility in this state, including a facility which restricts conservatee's ability to leave. This authority is subject to limitations which may be placed on the conservator by statute or court order. These limitations include, but are not limited to, the following:

(1) The placement must be the least restrictive appropriate setting which is available and necessary to meet the conservatee's needs. Ordinarily, a conservatee should be allowed to remain in the conservatee's residence in which the conservatee resided before the establishment of the conservatorship so long as this is feasible.

(2) A conservatee with dementia may be placed in a facility specifically described in Probate Code Section 2356.5(b) only with authorization as provided in that section. The Court will not make an order for placement under Probate Code Section 2356.5(b) absent a showing that the specifically proposed placement is described in Probate Code Section 2356.5(b). A petition for a court order regarding placements in a facility not specifically described in Probate Code Section 2356.5(b) will be deemed a petition for instructions pursuant to Probate Code Section 2359.

(3) Placement in a mental health treatment facility as defined in Probate Code Section 2356(a) requires an LPS conservatorship.

(Rule 7.413(a) revised effective 1/1/16)

(b) Consent for psychotropic medications in conservatorships

Psychotropic medication in conservatorships under the Probate Code is generally governed by the same provisions as other medical treatment. If the conservatee has been adjudicated to lack the capacity to consent to medical treatment generally, or to the application of psychotropic medication, then the conservator of the person generally has authority to consent to the medication. However, if the medication as described in Probate Code Section 2356.5 is to be given to a conservatee for the treatment of dementia who lacks the capacity to give informed consent to that medication, then the conservator of the person may authorize the medication only with prior authorization as provided by that Section.

(Rule 7.413(b) revised effective 1/1/13)

(Rule 7.413 revised effective 1/1/16)

Rule 7.414. Termination

Conservatorship may be terminated pursuant to Probate Code Sections 1860 et seq., and Section 2626. The filing of a certification of competency issued by the superintendent of a state hospital pursuant to Welfare and Institutions Code Section 7357, or other provision of law, does not, of itself, terminate a conservatorship. Conservatorships terminate by operation of law upon the death of the conservatee. Termination does not cause the Court to lose jurisdiction as to some issues, such as approval of accountings or awarding fees (Probate Code Section 2630 et seq.).

(Rule 7.414 revised effective 1/1/15)

Rule 7.415. Accounts of Conservator

Probate Code Section 2621 prescribes the requirement for giving notice of hearing on the account. See, also, Probate Code Sections 2620 and 2630 et seq., regarding provisions pertaining to accounts on termination of conservatorships.

(Rule 7.415 revised effective 1/1/15)

Rule 7.416. Orientation Class Requirements for Unlicensed Conservators

All conservators of person and/or estate who are not California Licensed Professional Fiduciaries (licensed by the Professional Fiduciary Bureau) should make reasonable efforts to complete either or both, depending on appointment, the Contra Costa Superior Court Probate Division Conservator of Person and/or Conservator of Estate classes that are offered monthly by the Contra Costa County Public Law Library. If a course is completed, the course completion form should be filed with the court.

(Rule 7.416 revised effective 1/1/15)

Rule 7.417. – Rule 7.418. Intentionally Omitted

Rule 7.419. Warning on Order [Repealed 1/1/03]

Rule 7.420. Copies for Court Investigator

(a) Extra copy of pleadings

When an account, report or petition is filed as to which an investigation and/or report by the Probate Court Investigator is required, an extra copy of that pleading along with any other pleadings filed in relation to the matter shall be given to the legal process clerk at the time of filing. It is then to be routed to the Court Investigator. This includes (a) any petition for appointment of guardian or conservator, (b) any petition for appointment of temporary guardian or conservator, (c) any accounting except when the guardianship or conservatorship has terminated; and, (d) any petition for medical consent authority.

(Rule 7.420(a) revised effective 1/1/15)

(b) Petitioner to provide copies of pleadings to Court Investigator's office

If the Court requires a report from the Court Investigator after a pleading is filed, or if the extra copy required under this provision was inadvertently not given to the legal process clerk, then copies of all related pleadings, including the petition, accounting, orders, letters, inventory and appraisals, etc., shall be furnished by the petitioner by delivery or transmission to the Court Investigator's office.

(Rule 7.420(b) revised effective 1/1/15)

(Rule 7.420 revised effective 1/1/15)

Rule 7.421. Intentionally Omitted and Reserved [Repealed 1/1/13]

Rule 7.422. Temporary Guardian or Conservator

Upon the filing of a petition, a temporary guardian or conservator of the person or estate, or both, may be appointed under Probate Code Section 2250 et seq. A separate petition for the appointment of a general guardian or conservator must be presented to the Court to be filed before a petition for a temporary guardian or conservator will be considered.

(Rule 7.422 revised effective 1/1/15)

Rule 7.423. Instructions Regarding General Duties and Conflicts of Guardian or Conservator

Before Letters are issued, each guardian or conservator must complete, sign and file a Letters of Guardianship (Probate-Guardianships and Conservatorships) (Judicial Council Form GC-250) provided by the Judicial Council. The form shall set forth the guardian or conservator's duties as a fiduciary and outline the responsibilities as an officer of the Court. Social Security Number, driver's license number and date of birth do not need to be supplied on the form.

(Rule 7.423 revised effective 1/1/15)

Rule 7.424. Bonds of Conservators and Guardians

Bond for an individual conservator or guardian will generally not be waived. The Court generally will not require a bond for amounts in blocked accounts. (See Probate Code Section 2328).

(Rule 7.424 revised effective 1/1/15)

Rule 7.425. Accounts

(a) Time of filing accounts with court

The first account shall be filed on or before the first anniversary date of the order appointing the guardian or conservator; and subsequent accounts shall be filed at least biennially thereafter. The first account shall be for a minimum period of nine months from the date of appointment of the general conservator and shall also include any period of temporary appointment of the person as conservator or guardian.

(b) Separate accounts required

Where there are multiple wards or conservatees joined in a single guardianship or conservatorship proceeding, a separate accounting shall be provided for each of them.

(c) Account ending date

The ending date of an account, except an account ending upon the death of a conservatee, shall not be more than three months before the date it is filed with the Court. Filing an accounting late is not good cause for preventing the Court and court investigators from reviewing the current information regarding the matter.

(Rule 7.425(c) revised effective 1/1/03)

(d) Final account upon termination of guardianship

The final account following termination of a guardianship or conservatorship of the estate must state that all charges for legal advertising, bond premiums, probate referee's services and costs of administration have been paid.

(Rule 7.425(d) revised effective 1/1/13)

(e) Status report in lieu of final account following termination

The final account following the termination of a conservatorship or guardianship of the estate should be filed within six (6) months of the termination date (e.g., the death of the conservatee or age the ward attains majority). If the conservator or guardian is unable to file the final account with the six-month period, the conservator or guardian shall file a status report setting forth the reasons for the delay and how much additional time is needed.

(Rule 7.425(e) new effective 1/1/15)

(Rule 7.425 revised effective 1/1/15)

Rule 7.426. Conservator and Guardian Compensation and Attorney's Fees

(a) Compensation of guardians and conservators

Petitions for compensation of guardians and conservators and their attorneys shall be supported by a declaration, complying with Contra Costa Probate Court Guideline Attachment #2 from each individual requesting approval of fees. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org. The court prefers that the petition itself recite only the amounts claimed and the relevant period of time, referring to the accompanying declaration(s), which should contain the explanation and justification. See also California Rules of Court, Rules 7.751(b) and 7.756 for declaration content.

(Rule 7.426(a) revised effective 1/1/16)

(b) Compensation of attorneys

Petitions for compensation of attorneys not representing fiduciaries may incorporate the explanation and justification into the petition, without a separate declaration.

(Rule 7.426 (b) revised effective 1/1/13)

(Rule 7.426 revised effective 1/1/16)

Rule 7.427. Independent Exercise of Powers

(a) Declaration required for independent powers request

The Court will ordinarily not grant the powers enumerated in Probate Code Section 2591. Because of the broad scope of this section, the Court requires a detailed declaration as to the necessity for the specific independent power desired.

(b) Nature of independent power

When independent powers are requested and granted, it is not sufficient to incorporate by reference the statute or its subsections. The power must be described in sufficient detail so that any person reading the document can determine the nature of the power requested or granted. Quoting the full text of the subsection enumerating the power under Probate Code Section 2591 is the preferred method of complying with this rule. Even when granting the requested powers, the Court will normally require confirmation of sale of real property and prior court approval of attorney's fees.

(Rule 7.427(b) revised effective 1/1/15)

(Rule 7.427 revised effective 1/1/15)

Rule 7.428. Investments by Guardian or Conservator (Probate Code Section 2570 et seq.)

(a) Real estate investment

Investment in real estate, either by purchase or encumbrance, will not be authorized unless supported by an appraisal by the Probate Referee regularly appointed in the guardianship or conservatorship proceeding.

(b) Life insurance

A purchase of life insurance on the minor ward's life will not be authorized.

(c) Declaration required for request to invest

If a request for special notice has not been filed, a petition for authority to invest may be heard ex parte provided the Court makes an order dispensing with notice. A declaration justifying dispensing with notice shall accompany or be incorporated in the petition.

(Rule 7.428 revised effective 1/1/15)

Rule 7.429. Account Statements with Accountings

Any account statement submitted pursuant to Probate Code Section 2620 which is required by that section to be confidential shall be filed as a separate document complying with California Rules of Court, Rules 2.100 et seq., including a verified statement by the petitioner identifying the document. The caption of the document shall include the word "CONFIDENTIAL" in all capital letters.

(Rule 7.429 revised effective 1/1/15)

Chapter 10. Trusts

Rule 7.450. Trustee Compensation, and Attorney's Fees

Petitions for approval of prospective or previously paid compensation to trustees and/or their attorneys should discuss the factors in California Rules of Court, Rule 7.776 to the extent warranted by the circumstances of the case. See Probate Code §§ 16243 and 16247. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.450 revised effective 1/1/16)

Rule 7.451. Establishment of a Trust

(a) Trust provisions for incapacitated person

Absent special circumstances, whenever a trust is to be established by court order for the benefit of an incapacitated person, the trust shall contain the following provisions:

Protector of Trustor: Regardless of any other provision of the trust, in administering the trust, the trustee shall be subject to the same terms and conditions as a conservator of the estate during the lifetime of the trustor, including but not limited to:

(1) Posting bond for assets and income of the trust.

(2) Accounting to the Court (to be filed in this proceeding).

(3) Abiding with investment limitations.

(4) Adhering to limitations on gifts, pledge or sales of assets (including returns for confirmation and overbids).

(5) Providing for the trustor's needs without regard for the interest of the remainder beneficiaries.

(6) Obtaining prior court approval for payment of fees to attorneys, conservators and trustees.

(7) Obtaining prior court approval of any change of trustee during the trustor's lifetime.

(8) Obtaining prior court approval for sale of beneficiary's personal residence, regardless of whether or not the residence was previously property of a conservatorship estate

(Rule 7.451(a)(8) revised effective 1/1/15)

(b) Bond requirement in order

The formal order shall provide that the trustee may not receive assets or otherwise act until the filing of a bond in the amount set by court.

(Rule 7.451 revised effective 1/1/16)

Rule 7.452. Establishment of Special Needs Trust from Inheritance by Court Order

To the extent that a person with special needs has not received a distribution of an inheritance from a probate or trust estate, the court may, upon suitable petition, issue an order establishing a special needs trust under Probate Code 3600 et seq. or 4541 complying with 42 United States Code §1396p(d)(4)(A). Unless the order explicitly excludes application of Local Rule 902. Local Rule 902 shall apply to administration of the special needs trust.

NOTE: For discussion of establishment of special needs trusts by court order, see Sections 11.32 through 11.51 and 15.24 of the CEB treatise on Special Needs Trusts.

(Rule 7.452 revised effective 1/1/15)

Chapter 11. Protective Proceedings

Rule 7.501. Proceeding for Spousal Property Transaction

As to petitions pursuant to Probate Code Section 3100 et seq.:

(1) The petition must be supported by a declaration of a licensed physician or licensed psychologist within the scope of his or her licensure as to the capacity of the non-petitioning spouse (Probate Code Section 810 et seq.).

(2) Counsel will be appointed for the non-petitioning spouse if the petition proposes a substantial transfer to the petitioner.

(3) When the petitioner is predicated upon the non-petitioning spouse's qualification for Medi-Cal benefits, notice shall also be given to the Director of the California Department of Health Services.

(4) In petitions to transfer assets, related to Medi-Cal eligibility, the petitioner shall provide the Court with schedules showing such calculations as would be required in an administrative hearing to the extent that the Community Spouse Resource Allowance or the Minimum Monthly Maintenance Needs Allowance would be in issue. The Court will not make orders modifying the Community Spouse Resource Allowance nor the Minimum Maintenance Monthly Needs Allowance but may make findings as to the proper amounts as needed to support the order.

(5) The Court will not issue general support orders in petitions under Probate Code Section 3100 et seq.

(Rule 7.501 revised effective 1/1/15)

Rule 7.502. Establishment of a Trust [Repealed 1/1/13]

Chapter 12. Guidelines for Probate Rules - Attachments

Guideline, Attachment 1 – The ABCs of Dividing the Commission Pie in Probate Sales (includes chart)

LLOYD W. HOMER, ESQ.

CAMPBELL

(a) Division of broker commission

The following chart demonstrates the division of the broker commission when estate property is sold subject to Court confirmation pursuant to Probate Code Sections 10160-10167. If the property subject to sale is being sold pursuant to the personal representative's authority under independent administration, the chart is inapplicable and Probate Code Sections 10400-10600 must be consulted. For sales subject to Court confirmation, the personal representative also needs to consult Probate Code Sections 10250-10264 (personal property) and Probate Code Sections 10300-10316 (real property) regarding the manner of conducting the sale.

THIS SPACE LEFT INTENTIONALLY BLANK

WHO ARE A, B AND C?

A = The estate (Seller). If the estate has a broker, that will be broker A.

B = The bidder (Buyer). If the bidder has a broker, that will be broker B.

C = The successful overbidder (New Buyer). If C has a broker, that will be broker

FACTS:

Original bid $100,000.

Where there is an overbid, the increased bid is $110,000

Commission allowed by the Court is 6%

	A SELLER	B BIDDER	C OVERBIDDER	PROBATE CODE SECTION	COMMISSION TO BROKER
1	No Broker	No Broker	No Over bid	None	None
2	No Broker	No Broker	No Over bid	None	None
3	No Broker	No Broker	Broker	10163(b)	"C" receives $5,000 (Not $6,600 because of limitation of Section 10162)
4	No Broker	Broker	No Over bid	10162.3	"C" receives $6,000
5	No Broker	Broker	No Broker	10164	"C" receives $6,000
6	No Broker	Broker	Broker	10165(c)(2) 10165(b)	"B" receives $3,000 "C" receives $3,600 ($3,000 on original bid and $600 on the increased bid)
7	Broker	No Broker	No Over bid	10162.5	"A" receives $6,000
8	No Broker	Broker	No Over bid	10162.7	"A" receives $3,000 "B" receives $3,000 (or as "A" and "B" have agreed)
9	Broker	No Broker	No Broker	10162.5	"A" receives $6,000
10	Broker	No Broker	Broker	10165(c)(1) 10165(b)	"A" receives $3,000 "C" receives $3,600 ($3,000 on original bid and $600 on the increased bid)
11	Broker	Broker	No Broker	10164(c)	"A" receives $3,000 "B" receives $3,000 (or as "A" and "B" have agreed)
12	Broker	Broker	Broker	10165(c)(3)	"A" receives $1,500 "B" receives $1,500 (or as "A" and "B" have agreed) "C" receives $3,600 ($3000 on original bid and $600 on the increased bid)

The following documents are provided as referenced by the local rules, but are not intended to be adopted as local rules. These documents are included for informational purposes only.

(Guideline Attachment 1, revised effective 7/1/06)

Guideline, Attachment 2 – Probate Department Fees and Costs Guidelines

The Probate Department has established these general guidelines for allowable fees and costs in probate, trust, guardianship and conservatorship proceedings.

FEES

(a) Attorney's rates:

The standard maximum attorney's fees for guardianships, conservatorships and extraordinary probate services is $400.00 per hour. The Court will consider higher hourly rates upon a showing of good cause. The standard maximum attorney's legal assistant rate is $150.00 per hour.

(Guideline, Attachment 2, Fees (a) revised effective 1/1/17)

(b) Fiduciary rates:

The standard maximum hourly rate allowed for professional fiduciaries is $150.00 per hour.

(Guideline, Attachment 2, Fees (b) revised effective 1/1/17)

(c) Non-professional fiduciary rates:

The standard maximum hourly rate for other fiduciaries is $50.00 per hour.

(Guideline, Attachment 2, Fees (c) revised effective 1/1/17)

(d) Higher rates:

The determination of requests for higher rates will be based on all relevant factors presented, including special expertise applicable to the services provided, circumstances of the service, and relationship to the decedent, or other parties.

(Guideline, Attachment 2, Fees (d) revised effective 7/1/02)

(e) Travel time:

The Court will not generally allow attorney fees for more than one hour travel time, total, per appearance.

(Guideline, Attachment 2, Fees (e) revised effective 7/1/02)

(f) Format and content:

(1) Fee requests, except those calculated using a percentage of the assets, shall include a narrative description of the types of services performed, including the

number of hours and the rates requested for each type, distinguishing between hours and rates for each person performing each type of service. "Types of services" means a project-based approach, so that all activities (e.g., correspondence and phone calls, drafting pleadings, court appearances, research, etc.) related to a particular objective (e.g., initial petition, general administration, each contested matter, sale of property, substituted judgment, preparation of each accounting, etc.) should be summarized and addressed together as one "type." Do not group and discuss services based on activity (e.g., all court appearances as one "type," all correspondence as another "type," etc.).

(Guideline, Attachment 2, Fees (f)(1) revised effective 1/1/13)

(2) Copies of timesheets or billing statements need not be attached or provided unless requested by the Court or its staff (probate examiners or court investigators). However, in anticipation that time records or statements may be requested, separate entries should be made for each different activity and project, so that the amount of time expended for one activity is not obscured by "clumping" it with other activities in a single time entry.

(3) Fee requests, except those calculated using a percentage of the assets (see paragraph G below) and those below the maximum amount without a declaration (see subparagraph F.4 below), shall state the number of hours expended by the attorney in preparing the explanation and justification of the attorney's compensation, and also the number of hours expended by the attorney in preparing the explanation and justification of the fiduciary's compensation, if applicable. The Court will ordinarily approve up to two and a half hours for preparation of the attorney fee explanation without requiring separate justification for the amount of time spent. The Court is likely to require separate justification for attorney time spent in excess of two and a half hours for the attorney fee portion. The Court may require separate justification for any amount of attorney time spent on the fiduciary fee portion. Such justifications are not required with the fee petition or declaration, but parties and attorneys might choose to provide them at the outset to avoid a possible continuance.

(4) Notwithstanding the foregoing, the Court will ordinarily approve an annual fiduciary fee of up to $1,500.00 for non-professional fiduciaries, and up to $3,000.00 for professional fiduciaries, without requiring a declaration.

(5) See Fee Declaration Template below for example of how narrative description and explanation might be presented.

(Guideline, Attachment 2, Fees (f) revised effective 1/1/16)

(g) Percentage of assets calculations:

The Court will approve, without a supporting declaration, annual fees of one percent (1%) of the present fair market value of all estate property, real or personal, at the beginning of the accounting period, but not including income received during the accounting period nor net gains and/or losses. Good faith estimates of fair market value of real property by the

fiduciary are sufficient for this purpose. The Court will ordinarily approve a minimum annual fiduciary fee of up to $1,500.00 for non-professional fiduciaries, and up to $3,000.00 for professional fiduciaries.

(Guideline, Attachment 2, Fees (g) revised effective 1/1/16)

COSTS AND EXPENSES

(h) Reasonable costs

Reasonable court costs will be allowed.

(i) Disallowed costs

The Court will not allow reimbursement, or approve expenditures, for expenses incurred for ordinary business operations associated with services compensated by:

(1) statutory compensation or;

(2) professional fees (e.g., attorneys, professional fiduciaries and corporate fiduciaries). Unusual amounts of such expenses which are disproportionately large in consideration of the fee amount may be approved.

These expenses include, without limitation, copying, postage, telephone calls, cellular telephone charges, facsimile transmissions, email or internet access. Courier rates and charges may be subject to court review. Upon a proper and detailed showing, reimbursement for travel and other expenses may be allowed. Attorneys and fiduciaries may claim copy expenses for any timesheets or billing invoices attached to fee declarations or petitions or produced upon request, and for reproduction of documents required under Probate Code § 2620(c), at the rate of 10 cents per page (if reproduced in-house) or actual out-of-pocket expense (if reproduced by outside copy service, for black and white on ordinary copy paper).

(Guideline, Attachment 2, Costs (i)(2) revised effective 1/1/17)

(Guideline, Attachment 2, revised effective 1/1/17)

Guideline, Attachment 3 – Fee Declaration Template

Components of fee declaration

[caption]

1. I am [identifying information]. I make this declaration in support of [reference to petition or other purpose]. Statements herein are true of my personal knowledge, except for those stated upon information and belief, which I also believe to be true for the reasons stated.
2. This declaration describes services I have provided from [beginning date] through [ending date]. I am requesting compensation at the rate of $[rate] per hour for my

services and [specify other rates for each person billing time included in this fee request]. Total compensation requested is $[total amount], based on [X] hours @ $[first rate] ($[subtotal]) plus [Y] hours @ $[second rate] ($[subtotal]) [continue if needed for more than two persons].

3. In addition, I am requesting reimbursement for the following costs: [specify]

4. Services for which I am now seeking compensation are summarized as follows [categories are examples only]:

[The following categories are more typical of attorney services than fiduciary services]

A. Initial Petition: [Describe services rendered by each person involved.]

B. Temporary Powers Petition: [Describe services rendered by each person involved.]

C. General Administration: [Describe services rendered by each person involved.] [Typical activities for this category would be marshalling assets, preparation of inventory and appraisal, investment decisions, bill-paying and account reconciliation. This is by no means an exhaustive list.]

D. Sale of Residence: [Describe services rendered by each person involved.]

E. Contested Claim: [Describe services rendered by each person involved.]

F. Substituted Judgment Petition: [Describe services rendered by each person involved.]

G. Accounting and Fee Petition: [Describe services rendered by each person involved. In addition, specify amount of time spent preparing this fee declaration and (if declarant is the attorney) amount of time spent preparing client-fiduciary's fee declaration.]

[The following categories are more typical of fiduciary services than attorney services]

H. Initial Case Evaluation and Document Review: [Describe services rendered by each person involved. This would include conferring with fiduciary's attorney, proposed beneficiary of services and/or his/her attorney, and preparation of pleadings before appointment.]

I. General Care Management: [Describe services rendered by each person involved.] [Typical activities for this category would be evaluating care needs, hiring and supervising care providers, client status monitoring and visitation, accompaniment on medical professional office visits, and communications with family members and other interested persons regarding general health and care status, including fiduciary's attorney. This is by no means an exhaustive list.]

J. General Financial Administration: [Describe services rendered by each person involved.] [Typical activities for this category would be marshalling assets, preparation of inventory and appraisal, investment decisions, bill-paying and

account reconciliation, and communications with fiduciary's attorney regarding these matters. This is by no means an exhaustive list.]

K. Sale or Encumbrance of Property: [Describe services rendered by each person involved.]

L. Eviction or Other Special Proceeding: [Describe services rendered by each person involved.]

M. Accounting and Fee Petition: [Describe services rendered by each person involved.]

5. Time spent on each type of service is summarized as follows:

[Match first column categories to descriptions used in paragraph 4. For example, if using the attorney-type categories (which are only examples, not mandatory), row descriptions would be as follows:]

	Declarant ($X/hr)	Person #2 ($Y/hr)	Person #3 ($Z/hr)
Initial Petition			
Temporary Powers Petition			
General Administration			
Sale of Residence			
Contested Claim			
Substituted Judgment Pet.			
Accounting and Fee Pet.			
Total hours			
Charges			

6. [If paralegal used, give facts to show compliance Probate Code § 2642(a) and California Rules of Court, Rule 7.754.]

7. [To extent appropriate, add further explanation or justification, including any relevant and significant factors in California Rules of Court 7.702, 7.756, or 7.776.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: [Date]

_____

[Declarant Name and Office]

(Guideline, Attachment 3, revised effective 1/1/16)

Guideline, Attachment 4 – Probate Department Operations

(a) Calendars

The probate calendars are as follows:

Tuesdays at 1:30 p.m. in Dept 15 – all probate cases involving the Public Guardian.

Tuesdays at 1:40 p.m. in Dept. 15 – all probate cases (e.g. LPS Conservatorships) governed by the Welfare & Institutions Code.

All other probate matters are currently scheduled as follows:

Mondays, Wednesdays and Fridays at 9:00 a.m. for all other conservatorships.

Mondays, Wednesdays and Fridays at 9:30 a.m. for guardianships.

Tuesdays and Thursdays at 9:00 a.m. – all other probate matters.

(Guideline, Attachment 4(a), revised effective 1/1/15)

(b) Ex parte applications

All requests for ex parte orders shall be submitted to the Probate Examiners for review between 9:30 a.m. and 11:00 a.m. Monday through Friday, 725 Court Street, Room 210, Martinez, CA.

(Guideline, Attachment 4(b), revised effective 1/1/15)

(c) Tentative rulings

Tentative rulings are generally available at least five (5) court days before the hearing on the Tentative Rulings Website at www.cc-courts.org/tr. If the website is down, or for some reason cannot be accessed, the number to call between 1:30 p.m. and 4:00 p.m. any time after the ruling is posted, is (925) 608-2613.

Tentative rulings are not posted for matters on the Tuesday, 1:40 p.m. calendars due to confidentiality requirements. Parties to such matters and their attorneys may receive the tentative rulings for their specific matters by calling the probate staff between 1:30 p.m. and 4:00 p.m. at (925) 608-2613.

(Guideline, Attachment 4(c), revised effective 1/1/16)

(Guideline, Attachment 4 revised effective 1/1/16)

Title Eight. Appellate Rules

Chapter 1. General Provision

Rule 8.1. Appellate Department

(a) Sessions

Regular sessions of the Appellate Department of the Superior Court, County of Contra Costa shall be held on the first Friday of each calendar month at 1:30 p.m. Special sessions shall be held at the call of the Presiding Judge.

(Rule 8.1(a) revised effective 1/1/00)

(b) Court record

Pursuant to California Rules of Court Sections 8.830(a)(1)(B) and 8.833(a), the Court elects to use the original trial court file as the record of the written documents from the trial court proceedings instead of a clerk's transcript.

(Rule 8.1(b) revised effective 1/1/11)

(c) Record of oral proceedings

(1) In appeals of infraction cases, the Appellate Division permits the Appellant, pursuant to California Rules of Court, Rule 8.915, to submit as the record of oral proceedings the official electronic recording of the proceedings.

(2) The Appellate Division prefers a transcript or recording of oral proceedings over a Statement on Appeal. If Appellant elects to use a Statement on Appeal, the Appellate Division requires strict compliance with Rule of Court 8.916. If appellant does not comply with Local Rule 8.916, the Appellate Division may dismiss the appeal for lack of an adequate record. If a Statement on Appeal does not adequately apprise the Appellate Division of the content of the proceedings below, the Appellate Division may, on its own motion and with notice to the parties, augment the record pursuant to Rules of Court 8.923 and 8.841 with an official transcript or electronic recording of proceedings.

(Rule 8.1(c) revised effective 1/1/14)

(d) Oral argument

Unless otherwise ordered, counsel for each party, upon all direct appeal matters, shall be allowed fifteen (15) minutes for oral argument. The appellant or the moving party shall have the right to open and close.

(Rule 8.1(d) revised effective 7/1/08)

(e) Briefs

Briefs shall be prepared, served, and filed as provided by California Rules of Court, Rule 8.88. Briefs shall comply with the provisions of California Rules of Court 8.883 and 8.884.

(Rule 8.1(e) revised effective 1/1/10)

(f) Calendaring

A hearing will be set as a matter of right in direct appeals only. All other appellate matters, for example writs, will be set at the discretion of the Appellate Department.

Hearings will be set pursuant to the California Rules of Court. The Appellate Department generally hears all appeals at 1:30 p.m. on the first Friday of each month.

(Rule 8.1(f) revised effective 7/1/08)

(g) Motions

All motions shall be heard at regular sessions unless a different time of the hearing of a particular motion is designated by the Presiding Judge of the Appellate Department.

(Rule 8.1(g) revised effective 1/1/00)

(Rule 8.1 revised effective 1/1/15)

LIST OF FORMS MENTIONED IN LOCAL COURT RULES

(Forms list revised effective 1/1/16)

LOCAL COURT FORMS:

ADR-201	Panel Member Selection *(Mandatory)*
ADR-304	Mediation Statement *(Optional)*
ADR-305	Mediator Report *(Mandatory)*
ADR-404	Arbitration Statement *(Optional)*
ADR-504	Neutral Case Evaluator Statement *(Optional)*
ADR-610	Request for Assignment of Discovery Facilitator *(Mandatory)*
ADR-612	Notice of Assignment of Discovery Facilitator *(Mandatory)*
ADR-614	Finding of Non-Compliance *(Mandatory)*
ADR-615	Notice of Termination of Appointment of Discovery Facilitator *(Mandatory)*
ADR-616	Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator *(Mandatory)*
ADR-617	Rejection of Assigned Discovery Facilitator *(Mandatory)*
ADR-618	Notice to Deponent and Deposition Officer of Assignment to Discovery Facilitator Program and Stay of Records Production Date *(Mandatory)*
CV-655b	ADR Case Management Stipulation and Order (Unlimited Civil) *(Mandatory)*
CV-655d	Notice to Defendants *(Optional)*
CV-659d	ADR Case Management Stipulation (Limited Civil) *(Mandatory)*
FamLaw-107	Declaration Re Requests for Emergency Orders *(Mandatory)*
FamLaw-110	At Issue Memorandum *(Mandatory)*
FamLaw-112	Request for Case Management Conference *(Mandatory)*
FamLaw-113	Case Management Conference Statement *(Mandatory)*
GC-20	Proposed Guardian(s) Information *(Mandatory)*
GC-21	Termination of Guardianship Information *(Mandatory)*
TR-121	Defendant's Request and Declaration to Vacate Civil Assessment *(Mandatory)*

JUDICIAL COUNCIL FORMS:

CM-110	Case Management Statement
DE-111	Petition for Probate

DE-157	Notice of Administration to Creditors
DE-275	Ex Parte Petition for Approval of Sale of Personal Property and Order *(Mandatory)*
DE-295	Ex Parte Petition for Final Discharge and Order
DE-147S	Confidential Statement of Birth Date and Driver's License Number
FL-141	Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration
FL-150	Income and Expense Declaration
FL-182	Judgment Checklist-Dissolution/Legal Separation
FL-300	Request for Order
FL-326	Declaration of Private Child Custody Evaluator Regarding Qualifications
FL-327	Order Appointing Child Custody Evaluator
GC-112	Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator
GC-250	Letters of Guardianship (Probate-Guardianships and Conservatorships)
JV-200/JV-205	Custody Order-Juvenile-Final Judgment-Visitation Order-Juvenile
JV-290	Caregiver Information Form
JV-290-INFO	Instructions to Complete the Caregiver Information Form
JV-570	Request for Disclosure of Juvenile Case File
JV-575	Petition to Obtain Report of Law Enforcement Agency
MC-051	Notice of Motion and Motion to Be Relieved As Counsel-Civil
MC-052	Declaration In Support of Attorney's Motion to Be Relieved As Counsel-Civil
MC-053	Order Granting Attorney's Motion to Be Relieved As Counsel-Civil
MC-356	Receipt and Acknowledgment of Order for The Deposit of Money Into Blocked Account
MC-500	Media Request to Photograph, Record, or Broadcast
MC-510	Order on Media Request to Permit Coverage
NC-100	Petition for Change of Name
NC-110	Attachment to Petition for Change of Name
NC-120	Order to Show Cause for Change of Name (Change of Name)

For local court forms, visit: www.cc-courts.org/forms

For Judicial Council forms, visit: www.courts.ca.gov/forms

INDEX

SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

LOCAL RULES OF COURT

EFFECTIVE JANUARY 1, 2017

TABLE OF CONTENTS

Title One. General Governance of Judicial and Non-Judicial Court Operations

Chapter 1. Administrative Rules

Rule 1.1. Adoption and Amendment of Rules

(a) Rules

(1) These rules shall be known and cited as the Local Rules for the Superior Court of California, County of Contra Costa.

(2) Effective January 1, 2015, these rules have been substantially reorganized and renumbered to correspond with the structure of the California Rules of Court. They have also been restructured to incorporate all content previously included as Appendices into the body of the Rules. Nothing in these actions, nor in any subsequent amendments, shall be deemed to make invalid or ineffective any actions taken, before such enactments or amendments, in compliance with a rule or rules in effect at the time of such action.

(Rule 1.1(a)(2) revised effective 1/1/15)

(3) These rules may be amended at any time by a majority of the judges of the Superior Court of Contra Costa County.

(b) Good cause

The Court, for good cause, may waive the application of these rules in an individual case.

(Rule 1.1(b) revised effective 7/1/02)

(Rule 1.1 revised effective 1/1/15)

Rule 1.2. Department Designations

Certain departments shall operate under the following designations: Presiding Judge, Probate, Civil Litigation, Criminal, Juvenile, Family Law and Grand Jury, and they shall exercise the particular functions provided herein. There may be other departments as designated by the Presiding Judge.

(Rule 1.2 revised effective 1/1/15)

Rule 1.3. Presiding Judge

The Presiding Judge and Assistant Presiding Judge shall be selected and have the authority as provided in the California Rules of Court and shall serve for a term of two calendar years.

(Rule 1.3 revised effective 1/1/15)

Rule 1.4. Executive Committee

(a) The Executive Committee

The Executive Committee shall consist of: the Presiding Judge, the Assistant Presiding Judge, the Supervising Judge of the Civil, Criminal, Juvenile, Family Law, Probate and Traffic Divisions; the Supervising Judges in branch court locations, and the immediate past Presiding Judge. The Presiding Judge shall preside over the proceedings of the Executive Committee, but shall not be entitled to vote except to break ties.

(Rule 1.4(a) revised effective 1/1/14)

(b) Duties of the Executive Committee

(1) The Executive Committee shall review, in its discretion, the decisions and actions of the Presiding Judge and the Executive Officer and, where appropriate, recommend Court policy and procedures for implementation by the Presiding Judge and assist the Presiding Judge on all matters related to court administration.

(2) With the assistance of the Executive Officer, the Executive Committee shall adopt an annual budget for submission to the Judicial Council.

(3) The Executive Committee shall review and approve the organizational structure for the administration of the Court under the Court's Executive Officer.

(4) The Executive Committee shall review and recommend major personnel and administrative policies. Adoption of these policies shall be subject to the approval of a majority of the judges of the Superior Court.

(Rule 1.4(b) revised effective 1/1/10)

(Rule 1.4 revised effective 1/1/15)

Rule 1.5. Definition of Vacation for Judge

"A day of vacation" for a judge of the Contra Costa Superior Court is an approved absence of one full business day. Other absences from the court listed in California Rules of Court, Rule 10.603(c)(2) are excluded from this definition.

(Rule 1.5 revised effective 1/1/15)

Chapter 2. Media Coverage

Rule 1.20. Media Coverage

These procedures are adopted by the Court for the protection of all parties to ensure the secure and efficient handling of cases and events in all courtrooms of the Superior Court for Contra Costa County and related facilities including all buildings containing courtrooms. No filming, photography or electronic recording is permitted in the courthouses except as permitted in the courthouse or

the courtroom consistent with California Rules of Court, Rule 1.150 and this Local Court Rule. Violation of this rule may result in termination of media coverage, removal of equipment, contempt of court proceedings, or monetary sanctions as provided by law.

(Rule 1.20 revised effective 1/1/15)

Rule 1.21. Requests for Coverage

Requests for any type of video, still photography, or audio coverage, including pool cameras, must be made in compliance with California Rules of Court, Rule 1.150(e)(1), and submitted to the judicial officer assigned to hear the case on the, "Media Request to Photograph, Record, or Broadcast," (Judicial Council Form MC-500) accompanied by the, "Order on Media Request to Permit Coverage" (Judicial Council Form MC-510). For such requests that do not involve a courtroom, they must be submitted to the Presiding Judge on the same forms.

(Rule 1.21 revised effective 1/1/15)

Rule 1.22. Limitation on Coverage

The following limitations apply, unless an exception is expressly permitted by written judicial order or as permitted by of this rule 1.25.

(1) Videotaping, photographing, or electronic recording by the media and/or the general public is not permitted in any part of the courthouse, including but not limited to, lobby areas, halls, stairs, elevators, clerks' windows, or meeting rooms.

(2) Videotaping, photographic equipment, and electronic recording devices must be turned off while transporting them in any area of the Court.

(3) All audible electronic devices must be turned off when they are in courtrooms.

(4) Any photography of the interior of a courtroom through glass door windows or from between the two sets of doors to a courtroom is prohibited, even if an exception is granted for courthouse areas outside of the courtroom.

(5) When audio and/or video recording is not permitted by the judicial officer assigned to hear a case, electronic recording devices may be taken into the courtroom, only if they are not turned on and remain inside an enclosed case, bag or other container, unless otherwise prohibited by the judicial officer assigned to the case.

(Rule 1.22 revised effective 1/1/15)

Rule 1.23. Prohibited Coverage

In no event will coverage be allowed as to any of the following: [see California Rule or Court 1.150(e)(6)]

(1) A proceeding closed to the public (e.g.: juvenile cases);

(2) Jurors or spectators;

(3) Jury selection;

(4) Conferences between an attorney and client, witness, or aide;

(5) Conferences between attorneys;

(6) Conferences between counsel and a judicial officer at the bench ("sidebars"); or

(7) Proceedings held in chambers.

(Rule 1.23 revised effective 1/1/15)

Rule 1.24. Parking Limitations for Media Vehicles

No media vehicles may be parked in an unauthorized place surrounding the courthouse except with permission from the Presiding Judge. If at any time any vehicle is parked improperly, without such permission, the order permitting photographic and/or electronic coverage, in regard to the operator of that vehicle, may be revoked without further hearing.

(Rule 1.24 revised effective 1/1/16)

Rule 1.25. Areas in Court Facilities Where Media Activities are Authorized

Photos, news conferences, and on-camera statements to members of the media or the general public are allowed only in areas specified for that purpose. The following areas are allowed unless otherwise ordered by the Presiding Judge. Requests for exceptions must be made to the Presiding Judge.

(1) Wakefield Taylor Courthouse [725 Court Street, Martinez]. Front steps and sidewalk area as long as entering or exiting through the related doorways is not blocked in any way.

(2) A. F. Bray Courthouse [1020 Ward Street, Martinez]. Front entryway and sidewalk area as long as access to the exterior entrance to the courthouse is not blocked in any way.

(3) A. F. Bray Courthouse - Court Annex [entrance southeast of entry to courthouse]. Exterior entry to courtrooms or jail as long as access to the exterior entrance to the courthouse is not blocked in any way.

(4) Peter Spinetta Family Law Center [751 Pine Street, Martinez]. Front plaza and outside stairs as long as access to the exterior entrance to the courthouse is not blocked in any way.

(5) Richard E. Arnason Justice Center [1000 Center Drive, Pittsburg]. Area outside front foyer as long as the entrance is not blocked in any way.

(6) George D. Carroll Courthouse [100 37th Street, Richmond]. Courtyard in front of entrance to the courthouse as long as the entrance is not blocked in any way. [Access to adjacent County Health Building also may not be blocked or impacted in any way.]

(7) Walnut Creek Superior Court [640 Ygnacio Valley Road, Walnut Creek]. Southside sidewalk area to the west of the entry doors as long as the entrance is not blocked in any way.

Access to the courthouse means that a person or persons entering or leaving the building can pass by easily maintaining a distance of at least five feet between himself or herself and the media, interviewee, and any spectators to the media interview or conference.

(Rule 1.25 revised effective 1/1/16)

Rule 1.26. Video Recording and Still Photography

Unless otherwise specifically prohibited by a judicial officer, video recording and still photography are allowed for non-adversarial proceedings such as weddings or adoptions.

(Rule 1.26 revised effective 1/1/15)

Title Two. General and Administrative Rules

Chapter 1. Jurors

Rule 2.1. Selection of Prospective Jurors

Persons qualified to perform the public duty of jury service shall not be excused from such service except for the causes specified by Code of Civil Procedure Section 204. The Jury Commissioner shall be fair and impartial in the selection of prospective jurors, using the methods and processes under the supervision and control of the Court, best suited for these purposes. No prospective juror shall be rejected because of political affiliation, religious faith, disability, race, ethnicity, national origin, social or economic status, occupation, gender, sexual orientation, or gender identity.

(Rule 2.1 revised effective 1/1/16)

Rule 2.2. Juror Source Lists

The names of prospective trial jurors shall be taken from the last published and available registered voters list of Contra Costa County and the Department of Motor Vehicles list (see California Code of Civil Procedure Section 197(b)).

(Rule 2.2 revised effective 1/1/16)

Rule 2.3. Determining Juror Qualifications, Excluding Prospective Jurors

The Jury Commissioner shall determine the statutory qualifications of each prospective juror and the existence of any illness or ailments which would impair due performance of jury duty. The Jury Commissioner shall exclude from service all those he or she shall find are not competent to serve by law.

(Rule 2.3 revised effective 1/1/16)

Rule 2.4. Statutory Excusals of Jurors

The Jury Commissioner may grant an excuse from jury service to prospective jurors who qualify for excuse pursuant to statute and the California Rules of Court. Before granting or refusing any excuse from jury service, the Jury Commissioner shall fairly weigh and consider all pertinent data, documents and information submitted by or on behalf of the prospective juror and may require any person to answer under oath, orally or in written form, questions necessary to determine the person's qualifications and ability to serve as a prospective trial juror.

(Rule 2.4 revised effective 1/1/16)

Rule 2.5. Employment While Serving as Juror

The Court, counsel and litigants are entitled to the full attention of jurors and therefore jurors are not permitted to engage in any employment or occupation that would affect their ability to properly serve as jurors.

(Rule 2.5 revised effective 1/1/15)

Rule 2.6. Period of Juror Service

Jurors and prospective jurors shall be excused from further service or further call after they have appeared for one day or served upon a jury to a verdict, unless otherwise directed by the Court, until summoned again.

(Rule 2.6 revised effective 1/1/15)

Rule 2.7. Juror Telephone Standby

The Jury Commissioner shall utilize telephone standby for prospective jurors whenever practicable. Prospective jurors placed on telephone standby shall be given credit for service. Telephone standby jurors will not receive compensation.

(Rule 2.7 revised effective 1/1/15)

Rule 2.8. Jury Assembly Room

A jury assembly room has been provided for prospective jurors. Attorneys, litigants or witnesses are not permitted in the jury assembly room.

(Rule 2.8) revised effective 1/1/15)

Rule 2.9. REPEALED

Rule 2.10. Jury Fees

Jury fees shall be deposited and may be refunded as provided in Code of Civil Procedure Sections 631 and 631.3. No refund of the jury fees deposited shall be made unless the party making the deposit has given the Jury Commissioner written notice of settlement, of the granting of a motion

for continuance, or of the waiving of a jury, at least two (2) court days before the date set for trial, or by Order of Court.

(Rule 2.10 revised effective 1/1/15)

Chapter 2. Grand Jury

Rule 2.30. Grand Jury Impanelment

A Grand Jury shall be drawn and impaneled once each fiscal year by the appointed Grand Jury Judge.

(Rule 2.30 revised effective 1/1/16)

Rule 2.31. Solicitation for Grand Jury Applications

(1) On or before the first court day in March, the Jury Commissioner shall seek applications for appointment to the Grand Jury as follows:

(A) Mail or email notices to all relevant media outlets and public agencies;

(B) Post the application and information about grand jury service on the court's website at: www.cc-courts.org/grandjury

(C) Solicit referrals from social, community and political groups; and

(D) Solicit referrals from Judges and former Grand Jurors.

(2) All persons who submit an application are to receive a formal questionnaire which must be returned no later than April 15 of that year. This questionnaire will be available to anyone upon request from the Superior Court Secretary's Office.

(Rule 2.31(2) revised effective 1/1/16)

(Rule 2.31 revised effective 1/1/16)

Rule 2.32. Grand Jury Qualifications

The Jury Commissioner will assess the qualifications of each application according to the criteria specified under Part 2, Title 4, Chapter 2, Articles 1 and 2 of the Penal Code, and the referenced sections of the Code of Civil Procedure. The Jury Commissioner shall make such preliminary investigation of the applicants as may be directed by the Grand Jury Selection Committee.

(Rule 2.32 revised effective 1/1/16)

Rule 2.33. Grand Jury Selection Committee

The Grand Jury shall be selected in accordance with the standards and requirements of law. Accordingly, the Presiding Judge will appoint a Grand Jury Selection Committee of five (5) Judges. The selection process will be administered as follows:

(1) The Selection Committee will oversee the process by which sixty (60) applications are selected, making every reasonable effort to ensure proportional representation from supervisorial districts and sociological group representation.

(2) Each of the five Selection Committee Judges will interview twelve (12) applicants over a period of three (3) court days, allotting fifteen (15) minutes to each applicant. On the fourth day, the five Judges will meet, discuss the sixty (60) applicants and prepare a final list of thirty (30) names.

(3) The Selection Committee will present the list of thirty (30) names to the Superior Court Judges before June 1, at which time, the judges will vote whether or not to ratify and confirm the actions of the Grand Jury Selection Committee. Once approved by a majority of judges, the names shall constitute the Grand Jury list which shall be filed with the County Clerk and made a public record.

(Rule 2.33 revised effective 1/1/16)

Rule 2.34. Additional Grand Jury

The Presiding Judge may order and direct the impanelment, at any time, of one additional Grand Juror (see Penal Code Section 904.6).

(Rule 2.34 revised effective 1/1/16)

Rule 2.35. Sealing of Grand Jury Transcript

The filing party must serve all Motions to Seal a Grand Jury Transcript on all parties and the court reporter(s). When an Order is issued by the Court to seal a Grand Jury transcript, in whole or in part, the prevailing party must serve the Order on all parties and the court reporter(s).

(Rule 2.35 revised effective 1/1/06)

(Rule 2.35 revised effective 1/1/15)

Chapter 3. Attorney's Fees and Appointment of Counsel

Rule 2.40. Attorney's Fee Schedule

The following fee schedule is established for all cases where the obligation sued provides for attorney's fees, EXCEPT in Unlawful Detainer actions. This schedule will be used by the Clerk and the Court respectively to fix attorney's fees in default judgments entered pursuant to Code of

Civil Procedure Section 585 or judgment by the Court pursuant to Code of Civil Procedure Section 437(c).

In Unlawful Detainer actions, and Judgments pursuant to Section 437(c), the attorney's fee shall be fixed at the sum of $375.00 or at a fee set pursuant to the within schedule, whichever is greater.

FEE SCHEDULE

MINIMUM AMOUNT		MAXIMUM AMOUNT	FEE
$1.00	TO	$500.00	$150.00
501.00	TO	1,000.00	$150 plus 30% on amount over $500
1,001.00	TO	2,000.00	$300 plus 25% on amount over $1,000
2,001.00	TO	5,000.00	$550 plus 10% on amount over $2,000
5,001.00	TO	10,000.00	$850 plus 6% on amount over $5,000
10,001.00	TO	50,000.00	$1,150 plus 3% on amount over $10,000
50,001.00	TO	100,000.00	$2,350 plus 2% on amount over $50,000
100,001.00 and over			$3,350 plus 1% on amount over $100,000

(Rule 2.40 revised effective 1/1/15)

Rule 2.41. Schedule for Use Entering Default Judgment

When the Clerk is authorized by statute to enter judgment in an action upon a contract providing for an attorney's fee, the foregoing schedule of attorney's fees in default cases shall be used by the Clerk in determining the amount to be included in the judgment, but in no event shall the amount included by the Clerk exceed the amount of attorney's fees requested.

(Rule 2.41 revised effective 1/1/16)

Rule 2.42. Setting Attorney Fees in Contested Case

The judge shall have complete discretion in setting attorney's fees contingent upon all the attendant circumstances.

(Rule 2.42 revised effective 1/1/15)

Rule 2.43. Attorney Fees in Foreclosure Cases

When an attorney's fee is allowed on the foreclosure of a mortgage or trust deed, a reasonable attorney's fee shall be deemed to be that computed as provided in Local Court Rule 2.40, increased by ten (10) percent.

(Rule 2.43 revised effective 1/1/15)

Rule 2.44. Itemization of Extraordinary Services

Every application for compensation for extraordinary services rendered by an attorney in any case mentioned in this rule and every application in any other case, as authorized by law, for allowance, fixing or recovery of attorney's fees, shall be accompanied by an itemized statement of the services rendered.

(Rule 2.44 revised effective 1/1/16)

Chapter 4. Court Reporting Services

Rule 2.50. Notice of Availability of Court Reporting Services

The Court's policy is set forth in the Court's Notice of Availability of Court Reporting Services, which is posted in the Clerk's Office and on the Court's website.

(Rule 2.50 revised effective 1/1/15)

Rule 2.51. Unavailability of Court-Provided Court Reporters and Procurement of Outside Private Reporters

(a) Unavailability of court reporters by case type

Unless otherwise noted in the Court's Notice of Availability, pursuant to California Rules of Court, Rule 2.956, the Court does not provide court reporters for hearings in the following civil case types:

(1) Unlimited and Limited Civil

(2) Family Law

(3) Probate

(b) Procurement of private court reporter

For matters where the court does not provide a court reporter due to unavailability, any party who desires a verbatim record of a court proceeding from which a transcript can later be prepared, may procure the services of a private certified court reporter pro tempore to report any scheduled hearing or trial (see Government Code 70044 and California Rules of Court, Rule 2.956). The Court does not provide referrals to private court reporting service providers and does not have any contractual or employment obligation related to pro tempore reporters hired by the parties for this purpose. It is the party's responsibility to arrange for and pay the outside reporter's fee for attendance at the proceedings but the expense may be recoverable as part of the costs, as provided by law, (See California Rules of Court, Rule 2.956(c)).

(c) Requirement to meet and confer to select court reporter

For contested matters, the parties must meet timely and confer as to the selection of a qualified court reporter and provide a written stipulation, on the court-provided form (see Government Code 70044).

(1) The reporter must be licensed as a Certified Shorthand Reporter in California and comply with all California statutory and rule provisions for reporting court proceedings. The court reporter pro tempore must provide their name, CSR number, business address and phone number and/or email address to the courtroom clerk and all parties present on the day of the hearing in the event of an appeal or if a party wishes to procure a transcript from the reporter (see California Rules of Court, Rule 2.950).

(2) The court reporter pro tempore must execute the court's required written agreement as to the obligations of the court reporter in accepting the reporting assignment.

(3) If court reporters become available and at the court's discretion are provided by the court for any civil hearings (including family law and probate matters), the parties will be required to pay the applicable reporter attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B) in a timely manner.

(Rule 2.51(c) new effective 1/1/13)

(Rule 2.51 revised effective 1/1/16)

Rule 2.52. Requests for Transcripts

Whenever a party requests a court reporter to furnish a transcript of all or a part of a trial or proceedings, the reporter shall immediately inform all other parties of such request and inquire whether any party desires a copy of the transcript.

Parties shall be responsible for all transcript costs listed in Government Code Section 69953.

(Rule 2.52 revised effective 1/1/16)

Chapter 5. Sanctions

Rule 2.60. Sanctions

A violation of any of these rules may result in sanctions and penalties including, but not limited to, dropping a matter from the calendar, vacating a trial date, dismissal for lack of prosecution, imposition of a fine or imposition of costs payable to the Court, actual expenses and counsel fees, witness fees and jury fees arising as a result of such violation payable to opposing counsel.

(Rule 2.60 revised effective 1/1/16)

Chapter 6. Information and Forms

Rule 2.70. Form of Documents Filed with the Court

All documents filed with the Court must comply with California Rules of Court, Rules 2.100 et seq, and 3.1110.

(Rule 2.70 revised effective 1/1/15)

Rule 2.71. Identifying Information on Filed Documents

(a) Every pleading or paper filed by the Clerk of the Court must include the name, address and phone number of the attorney or party on the first page (see California Rules of Court, Rule 2.100).

(b) No substitution of a party appearing in person in place of an attorney shall be filed unless the mailing address and phone number of such party is contained in such substitution.

(Rule 2.71 revised effective 1/1/16)

Chapter 7. Facsimile Transmitted Documents

Rule 2.80. Definition of Facsimile Document

A facsimile document is a document that is produced electronically by facsimile machine (FAX) scanning and transmission or by similar means.

(Rule 2.80 revised effective 1/1/15)

Rule 2.81. Facsimile Document Compliance with California Rules of Court

Facsimile-produced documents submitted for filing with the Court shall comply with California Rules of Court, Rule 2.300, and all Contra Costa Local Rules of Court. All documents filed must be plain paper copies that are permanently legible copies. There is no provision for direct facsimile transmission to the Court or Court Clerk.

(Rule 2.81 revised effective 1/1/15)

Rule 2.82. Signatures

Signatures on facsimile-produced documents shall be treated as original signatures unless a request is timely made to produce or substitute the original document.

(Rule 2.82 revised effective 1/1/15)

Rule 2.83. Request to Produce Original Documents

When a facsimile-produced document is filed or served in an action in the Court, the party against whom the document is filed or served may, at any time, request the filing or production of the original document in the Court. The request to file or produce the original document shall be served upon the party filing or serving the facsimile-produced document, who shall file or produce the original document in the Court within fifteen (15) calendar days thereafter.

In the event that the original document is not filed or produced, the party, on notice to the filer or server of the facsimile-produced document, may petition the Court in which the action is pending to order the filer or server of the facsimile-produced document to file or produce the original document.

(Rule 2.83 revised effective 1/1/16)

Rule 2.84. Incorporation of Exhibits

In the event that a proper facsimile-produced document submitted for filing requires or refers to attached exhibits which, because of the nature of such exhibits cannot be accurately transmitted via facsimile transmission, such documents shall be filed with an insert page for each missing exhibit describing the exhibit and why it is missing. Unless the Court otherwise orders, the missing exhibits shall be mailed or otherwise delivered to the Court, for filing and attachment to the filed document, not later than five (5) court days following facsimile transmission of the document for filing. The date on which the facsimile-produced document is filed determines the filing date of the document and not the date when the exhibits are received and attached to the filed document. Failure to send the missing exhibits to the Court for attachment to the document as required by this paragraph shall be grounds for the Court to strike any such document or exhibit.

(Rule 2.84 revised effective 1/1/15)

Rule 2.85. Requirements for Service of Process

This subdivision applies only to filings with the Court. The complete document must, where required, be served on all parties in accordance with applicable time limits, and a certificate to that effect must accompany the filing.

(Rule 2.85 revised effective 1/1/15)

Rule 2.86. Pilot Project - Limited Facsimile Filings

(a) General rules - authorization of pilot project

To enable the Court to evaluate the feasibility and effectiveness of instituting direct facsimile filing of court documents, a pilot project permitting the limited filing of documents in specified areas will be allowed. Any facsimile transmissions other than as authorized by Rule 2.86 will be rejected and will not be accepted by the Clerk.

(1) A facsimile filing shall be accompanied by a Judicial Council Facsimile Filing Cover Sheet as specified in California Rules of Court, Rule 2.304(b).

(2) Each facsimile document shall contain the phrase "By fax" below the document's title.

(3) A party using facsimile transmission to file a document must utilize a machine that generates a transmission record and maintain that record in case there is an error in the transmission or the Court fails to process the document. In either instance, the filing party may move the Court for an order filing the document nunc pro tunc by including the proof of transmission with the document. The form of this proof shall be as specified in California Rules of Court, Rule 2.304(d).

(b) Special rules applicable to Juvenile Dependency filings

Subject to finalizing satisfactory arrangements with the Department of Social Services, the Court will accept the filing of initial dependency petitions and accompanying documents by way of facsimile transmission. Check the court's website at www.cc-courts.org for the correct facsimile number.

(1) For this Pilot Project, the filing of only initial dependency petitions in juvenile matters will be allowed by facsimile transmission. Any subsequent filings in these juvenile matters shall be made by regular filing process.

(2) Before filing the initial Dependency petition via facsimile, the petitioner shall contact the Clerk of Court Juvenile Department by telephone to inform the appropriate Clerk's Office staff that a juvenile dependency petition is being transmitted via facsimile.

(3) Petitions received by the Clerk's Office by 5:00 p.m. via facsimile transmission will be considered filed as of the day received. Petitions received after 5:00 p.m. will not be considered as filed by the Clerk's office until the next business day following receipt of the facsimile transmission.

(4) In addition to any other required information, the Facsimile Filing cover sheet shall indicate the time, location and department of the scheduled detention hearing in the matter.

(5) Upon receipt, the Clerk's Office shall stamp the petition as filed, and shall transmit by return facsimile to the petitioner a copy of the initial page of the petition reflecting the dated file stamp. The petitioner shall present a copy of that file stamped petition to the Court at the detention hearing.

(6) The original petition shall be delivered to the Clerk of Court Juvenile Department for filing the next business day following the facsimile filing of the petition. The original petition shall be stamped as filed by the Clerk with the date the facsimile petition was received and filed. The facsimile copy of the petition shall be retained in the court file along with the original petition.

(Rule 2.86(b)(6) revised effective 1/1/13)

(Rule 2.86 revised effective 1/1/16)

Chapter 8. Standards of Professional Courtesy

Rule 2.90. Consideration of History of Breaches in Professional Courtesy

The Court acknowledges that the Contra Costa County Bar Association has adopted "Standards of Professional Courtesy," which are incorporated in these Local Court Rules.

In any motion filed pursuant to Code of Civil Procedure Sections 128, 128.7, 177 and 177.5 and various local rules, the Court may take into consideration counsel's history of breaches of these standards in deciding what, if any, sanctions to impose.

(Rule 2.90 revised effective 1/1/15)

Rule 2.91. Standards of Professional Courtesy

(a) Purpose of these standards

Attorneys are most often retained to represent their clients in disputes. The practice of law is largely an adversarial process. Attorneys are ethically bound to zealously represent and advocate their clients' interest. Nonetheless, there exist certain standards of professional courtesy that are observed, and certain duties of professionalism are owed by attorneys to their clients, opposing parties and their counsel, the Courts and other tribunals, and the public as a whole. Members of the Contra Costa County Bar Association have practiced law with a level of professionalism that goes well beyond the requirements of the State Bar mandated Code of Professional Conduct. The following standards of professional courtesy describe the conduct preferred and expected by a majority of attorneys practicing in Contra Costa County in performing their duties of civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence. These standards are not meant to be exhaustive. They should, however, set a tone or guide for conduct not specifically mentioned in these standards.

(b) Professional courtesy standards

These standards have been codified to make the level of professionalism reflected in them the standard for practice within Contra Costa County, with the hope that their dissemination will educate new attorneys and others who may be unfamiliar with the customary local practices. These Standards have received the approval of the Board of Directors of the Contra Costa County Bar Association. They have also been endorsed by the Judges of the Superior Court of Contra Costa County, who expect professional conduct by all attorneys who appear and practice before them. They will be considered by those judges in their rulings pursuant to California Code of Civil Procedure Sections 128, 128.7, 177, and 177.5, as provided for in Local Court Rule 2.90.

All attorneys conducting any practice of law in Contra Costa County are encouraged to comply with the spirit of these standards and not simply blindly adhere to the strict letter of them. The goals stated and inherent herein are equally applicable to all attorneys regardless of area of practice.

(c) Conformity with other statutes or rules

This Code is, of course, not a substitute for the statutes and rules, and no provision of this Code is intended to be a method to extend time limitations of statutes and rules, including fast track time limitations, without appropriate court order.

(Rule 2.91 revised effective 1/1/15)

Rule 2.120. Scheduling

(a) Advance notice of scheduling activities

(1) Attorneys should communicate with opposing counsel before scheduling depositions, hearings, meetings and other proceedings and make reasonable efforts to schedule such meetings, hearings, depositions, and other proceedings by agreement whenever possible, at all times attempting to provide opposing counsel, parties, witnesses and other affected persons, sufficient notice.

(2) Where such advanced efforts at scheduling are not feasible (for example, in an emergency, or in other circumstances compelling more expedited scheduling, or upon agreement of counsel) an attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations that do not prejudice their clients or unduly delay a proceeding.

(b) Sufficient time to complete proceedings

In all cases an attorney should attempt to reserve sufficient time for the completion of the proceeding to permit a complete presentation by counsel for all parties.

(c) Avoid continuances or undue delays in scheduling

An attorney should not engage in delay tactics in scheduling meetings, hearings and discovery. An attorney should not seek extensions or continuances for the purpose of harassment or solely to extend litigation.

(d) Notice of scheduling conflicts

Attorneys should notify opposing counsel, the Court and others affected, of scheduling conflicts as soon as they become apparent and shall cooperate in canceling or rescheduling. An attorney should notify opposing counsel and, if appropriate, the Court or other tribunal, as early as possible of any resolutions between the parties that renders a scheduled hearing, position or meeting unnecessary or otherwise moot.

(e) Requests for time extensions

Consistent with existing law and court orders, attorneys should grant reasonable requests by opposing counsel for extensions of time within which to respond to pleadings, Discovery and other matters when such an extension will not prejudice their client or unduly delay a proceeding.

(f) Disclosure of identity of witnesses

Attorneys should cooperate with opposing counsel during trials and evidentiary hearings by disclosing the identities of all witnesses reasonably expected to be called and the length of time needed to present their entire case, except when a client's material rights would be adversely affected. They should also cooperate with the calling of witnesses out of turn when the circumstances justify it.

(g) Time and manner of service of papers

The timing and manner of service of papers should not be calculated to disadvantage, overwhelm or embarrass the party receiving the papers. An attorney should not serve papers simply to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience the adversary, such as late in the day (after normal business hours), or so close to a court appearance that it inhibits the ability of opposing counsel to prepare for that appearance or to respond to the papers (if permitted by law), or in such other way as would unfairly limit the other party's opportunity to respond to those papers or other matters pending in the action.

(Rule 2.120 revised effective 1/1/16)

Rule 2.121. Discovery

(a) Purpose of discovery

Attorneys should pursue discovery requests that are reasonably related to the matter at issue. Attorneys should not use Discovery for the purpose of harassing, embarrassing or causing the adversary to incur unnecessary expenses, as a means of delaying the timely, efficient and cost effective resolution of a dispute, or to obtain unfair advantage.

(b) Response to requests for discovery

Attorneys should ensure that responses to reasonable discovery requests are timely, organized, complete and consistent with the obvious intent of the request. Attorneys responding to document demands and interrogatories should not do so in an artificial manner designed to assure that answers and responses are not truly responsive or solely to attempt to avoid disclosure.

(c) Discovery questions

Attorneys should avoid repetitive or argumentative questions, questions asked solely for purposes of harassment, or questions which are known to the questioner to be an invasion of the rights of privacy of third parties not present or represented at the deposition.

(d) Conduct of deposition proceedings

Attorneys should bear in mind that depositions are to be taken as if the testimony was being given in court, and they should therefore not engage in any conduct during the deposition that would not be allowed in the presence of a judicial officer. An attorney

should avoid, through objections or otherwise, improper coaching of the deponent or suggesting answers.

(e) Requirement to meet and confer on discovery

Attorneys should meet and confer on Discovery requests in a timely manner and make good faith attempts to actually resolve as many issues as can possibly be resolved before proceeding with motions concerning the discovery. Before filing a motion concerning discovery, or otherwise, an attorney should engage in more than a mere pro forma effort to resolve the issue(s).

(Rule 2.121 revised effective 1/1/15)

Rule 2.122. Conduct Towards Other Attorneys, the Court and Participants

(a) Professional conduct

Attorneys must remember that conflicts with opposing counsel are professional and not personal, that vigorous advocacy is not inconsistent with professional courtesy, and that they should not be influenced by ill feelings or anger between clients in their conduct, attitude, or demeanor toward opposing attorneys.

(b) Service of papers

An attorney should never use the mode, timing or place of serving papers primarily to embarrass a party or witness.

(c) Filing of motions

Motions should be filed sparingly, in good faith and when the issue(s) cannot be otherwise resolved. An attorney should not engage in conduct which forces opposing counsel to file a motion and then not oppose the motion, or provide information called for in the motion only after the motion is filed.

(d) Professional demeanor

Attorneys should refrain from disparaging or denigrating the Court, opposing counsel, parties or witnesses before their clients, the public or the media.

(e) Conduct of clients and witnesses

Attorneys should be, and should impress upon their clients and witnesses, the need to be courteous and respectful and not rude or disruptive with the Court, court personnel, opposing counsel, parties and witnesses.

(f) Instructions to attorneys on witnesses

Attorneys should make an effort to explain to witnesses the purpose of their required attendance at depositions, hearing or trial. They should further attempt to accommodate the schedules of witnesses when setting or resetting their appearance, and promptly notify them of any cancellations. Dealings with nonparty witnesses should always be courteous

and designed to leave them with an appropriately good impression of the legal system. Attorneys should instruct their clients and witnesses that they are not to communicate with the Court on the pending case except with all counsel or parties present in a reported proceeding.

(g) Notification to opposing party regarding ex parte

Where applicable laws or rules permit an ex parte application or communication to the Court, before making such an application or communication, an attorney should make diligent efforts to notify opposing party or opposing counsel known to represent or likely to represent the opposing party, should make reasonable efforts to accommodate the schedule of such attorney or party to permit the opposing party to be represented, and should avoid taking advantage of an opponent's known absence from the office.

(h) Drafting court documents

Attorneys should draft agreements and other documents promptly and so as to fairly reflect the true intent of the parties.

(i) Prohibiting bias

No attorney shall engage in any act of age, gender, sexual orientation, physical or mental impairment, religion, or race bias while engaging in the practice of law in Contra Costa County.

(Rule 2.122 revised effective 1/1/15)

Rule 2.123. Candor to the Court and Opposing Counsel

(a) Accuracy of written and oral statements

Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the Court or to the opposing counsel, and shall not mislead by inaction or silence. Written materials and oral argument to the Court should accurately state current law and fairly represent the party's position without unfairly attacking the opposing counsel or opposing party.

(b) Manner to present new information

If, after all briefing allowed by law or the Court has been submitted, an attorney locates new authority that s/he desires to bring to the Court's attention at a hearing on the matter, a copy of such new authority shall be provided to both the Court and to all opposing counsel in the case at or before the hearing.

(c) Proposed orders

Attorneys should draft proposed orders promptly, and the orders should fairly and adequately represent the ruling of the Court. When proposed orders are submitted to counsel for approval, attorneys should promptly communicate any objections to the party

preparing the proposed order so that good faith discussions can be had concerning the language of the proposed order.

(d) Court rulings

Attorneys should respect and abide by the spirit and letter of all rulings of the Court.

(e) Opposing letters to counsel

An attorney should not draft letters assigning to an opposing party or opposing counsel a position that party or counsel has not taken or to create a "record" of events that have not occurred.

(Rule 2.123 revised effective 1/1/16)

Rule 2.124. Efficient Administration

(a) Avoid unnecessary action

Attorneys should refrain from actions which cause unnecessary expense, or delay the efficient and cost-effective resolution of a dispute.

(b) Stipulate to facts and legal authority

Attorneys should, whenever appropriate, stipulate to all facts and legal authority not reasonably in dispute.

(c) Encourage negotiation and resolution

Attorneys should encourage principled negotiations and efficient resolution of disputes on their merits.

(d) Punctuality and preparedness

Attorneys should be punctual in communications with others, and punctual and prepared for all scheduled appearances.

(e) Consider Alternative Dispute Resolution (ADR)

In every case, and as soon as the case can be reasonably evaluated, an attorney should consider whether the client's interest could be adequately served and the case more expeditiously and economically disposed of by settlement, arbitration, mediation or other form of alternative dispute resolution.

(f) Make legitimate objections during deposition or trial

An attorney in making objections during a deposition, trial or hearing should do so for legitimate and good faith reasons and should not make such objections only for the purpose of making a speech, harassment or delay. All remarks, argument, objections and requests by counsel during trial shall be addressed to the Court rather than directly to adversaries. Objections should be in legal form and without argument, unless directed to make argument by the Court.

(g) Arrange witness appearance to eliminate delay

An attorney shall arrange for the appearance of witnesses during presentation of their case so as to eliminate delay caused by waiting for witnesses who have been placed on call.

APPROVED BY THE BOARD OF DIRECTORS OF THE CONTRA COSTA COUNTY BAR ASSOCIATION JUNE 1993.

(Rules 2.124 revised effective 1/1/16)

Rule 2.150. Committee on Bias

The Superior Court, in cooperation with the Contra County Bar Association, re-establishes a Committee on Bias, and adopts the procedures and stated purpose that are in these Local Rules of Court (see Title 10, Standard 10.20, Standards of Judicial Administration).

(Rule 2.150 new effective 1/1/15)

(a) Informal complaint process defined

The Judges of the Superior Court and the Contra Costa County Bar Association, have agreed upon an informal complaint procedure addressing issues of age, gender, sexual orientation, disability, socioeconomic status, religion, national origin and race bias in the Courts (see Title 10, Standard 10.20, Standards of Judicial Administration).

(b) Intent of procedure

The intent of this procedure is not to discipline, but to educate with the purpose of improving the problem and preserving the integrity and impartiality of the judicial system.

(c) Complaint procedure

(1) Notify Committee on Bias. If a participant (participant includes, but is not limited to counsel, witnesses, parties or jurors) believes a bench officer has engaged in an act of bias or otherwise failed to ensure that proceedings are conducted in a manner that is fair and impartial to all participants, such person may forward a letter addressed to the Committee on Bias, 2300 Clayton Rd, Suite 520, Concord, CA 94520. Anonymous complaints will not be considered. Complaints are limited to behavior or conduct occurring in courtroom proceedings.

(2) Review of Committee on Bias. The Committee on Bias will review the letter. The Committee's focus will be on incidents that do not warrant discipline but that should be corrected. If the Committee believes the letter raises the appearance of bias, the Committee will forward the substance of the letter, without disclosing the identity of the complainant, to the Presiding Judge. The Presiding Judge will meet with the bench officer who is the subject of the letter and take appropriate corrective action.

(3) Conduct of Committee on Bias. In determining whether a complaint raises an appearance of bias, the Committee may conduct its own investigation which may include contacting the complainant for additional information.

(4) Investigation of Committee on Bias. Any investigation conducted shall be undertaken, with the utmost care not to violate the confidentiality of the complainant.

(5) Resolution of Complaint. It is hoped that making the bench officer aware of the complaint will resolve the issue if one exists. If both the bench officer and the complainant wish to confer about the matter, or try to further resolve any outstanding problems, they may do so. However, this would be subject to the agreement of both and to the complainant's decision to waive any confidentiality.

(6) Return of letter to Committee. After the Presiding Judge informs the Committee that the bench officer who is the source of the complaint has been contacted, the letter will be returned to the Committee for destruction. However, for educational purposes, the Committee may maintain data as to the types of complaints received.

(7) No referral of and to Commission on Judicial Performance. Those matters referred in this manner will not be used as a basis for a referral to the Commission on Judicial Performance by the Committee.

(8) Notification to Complainant. With respect to those incidents that, if substantiated, would warrant discipline, the Committee will advise the complainant of the appropriate disciplinary authority.

(d) Committee membership and length of service

(1) Composition of Committee. The Committee on Bias is to be composed of representative members of the court community, including but not limited to, judges, lawyers, court administrators, representatives and individuals from minority, women's and gay and lesbian bar associations and from organizations that represent persons with disabilities.

(2) Number of members on Committee. The Committee on Bias will consist of five members, appointed by the President of the Contra Costa Bar Association. The Presiding Judge can also appoint a judge and/or a court administrator to the committee. However, if the judge appointed to the committee is the subject of the complaint, the judge is precluded from participating in the review of the complaint.

(3) Term of Committee members. Committee members will serve for staggered terms. A quorum will be necessary for meetings and a majority vote of those in attendance will be required before any action can be taken.

(Rule 2.150, revised effective 1/1/16)

Chapter 10. Communication of Concerns

Rule 2.170. Concerns

Concerns regarding court services or personnel, other than those related to a particular court case, must be submitted in writing. Each concern will be considered carefully, and a written response will be issued. Written concerns must be signed, include an address where the court's response can be sent, and addressed to the Court Executive Officer at:

Email: mediainfo@contracosta.courts.ca.gov

Or

Mail: P.O. Box 431, Martinez, CA 94553

(Rule 2.170 new effective 1/1/15)

Title Three. Civil Rules

Chapter 1. Administration of Civil Litigation

Rule 3.1. Applicability

Unless otherwise specified, this rule applies to all civil cases except Juvenile, Probate and Family Law cases, extraordinary writs, Asset Forfeiture cases under Health and Safety Code Section 11470 et seq., and Limited Jurisdiction Collections Cases under provisions of California Rules of Court, Rule 3.740. Special provisions are made for expediting Unlawful Detainer cases (see Rule 3.12).

(Rule 3.1 revised effective 1/1/15)

Rule 3.2. Definitions as Used in Title Three

As used in Title 3:

(1) The term "counsel" includes parties representing themselves.

(2) The term "plaintiff" also includes cross-complainant.

(3) The term "defendant" also includes cross-defendant.

(Rule 3.2 revised effective 1/1/15)

Rule 3.3. Transferred Cases

Unless excluded under Rule 3.8(c), all cases transferred from another jurisdiction are subject to this Rule.

(Rule 3.3 revised effective 1/1/15)

Rule 3.4. Policy

(a) Civil case management

It is the policy of the Superior Court of Contra Costa County to track and manage all cases from the moment the complaint is filed until disposition and to conclude all civil cases as expeditiously as possible within the limits of available funding and staffing.

(Rule 3.4(a) revised effective 1/1/13)

(b) Disposition goals

(1) It is the goal of the Court to conclude 75% of all Unlimited Jurisdiction Civil cases and 90% of Limited Jurisdiction Civil cases filed within 12 months of the filing of the complaint, 85% of all Unlimited Jurisdiction Civil cases and 98% of all Limited Jurisdiction Civil cases filed within 18 months of the filing of the complaint, and 100% of all civil litigation cases within 24 months of the filing of the complaint.

(Rule 3.4(b)(1) revised effective 1/1/13)

(2) It is the policy of the Court that all civil cases, not court-designated as “complex”, are presumed to be appropriate for a disposition goal of 12 months. The Court may modify this disposition goal at any time upon the showing of good cause or insufficient staffing due to lack of funding.

(Rule 3.4(b)(2) revised effective 1/1/13)

(c) Hearings

It is the policy of the Court that unnecessary hearings, which tend to delay the progress of litigation, be avoided. The Court urges counsel to meet and confer on disputed issues before motions are filed.

(Rule 3.4(c) revised effective 1/1/01)

(d) Assignment of Unlimited Jurisdiction Civil cases

All Unlimited Jurisdiction Civil cases subject to this rule will be assigned to one judge for all purposes unless otherwise determined by the Presiding Judge for good cause.

(Rule 3.4(d) revised effective 1/1/13)

(e) Uninsured motorists

The following policy applies to uninsured motorist cases:

(1) Promptly upon learning that an action is to proceed as an uninsured motorist case, plaintiff's counsel shall file a declaration setting forth the information upon which such a determination has been made. The declaration shall include: A statement that coverage exists under an uninsured motorist's insurance policy; the name of the carrier and limits of coverage. It shall also include a statement that counsel believes that the limits of coverage are adequate to compensate for known loss or damage; that plaintiff(s) will promptly pursue such remedy and that it is counsel's

present intention to assign the claim or dismiss the pending action upon receipt of a recovery by settlement or award.

(2) The declaration shall be captioned "Request for Temporary Exemption - Uninsured Motorist Case."

(3) Upon review of the declaration, the Court may designate the action as an uninsured motorist case in which event the time requirements under this Rule will be suspended for up to 270 days from the date the complaint was filed or from such other date the Court, in its discretion, shall fix. The case will be monitored by the setting of a review hearing at the end of the suspension period. If a dismissal has not been filed, plaintiff's counsel must file a further declaration five (5) court days before the review hearing date and provide a status report and, if necessary, a request with supporting justification for additional time to conclude the case.

(Rule 3.4(e) revised effective 1/1/16)

(f) Dismissal of "DOES" upon disposition

It is the policy of the Court that each case be completely disposed. At the time of adjudication of the case, by request for dismissal or request for entry of judgment, all remaining parties including DOES, will be dismissed by the Court unless otherwise specified.

(Rule 3.4(f) revised effective 1/1/16)

(g) Exception order

Nothing in this Rule shall be interpreted to prevent the Court in an individual case from issuing an Exception Order based on a specific finding that the interest of justice requires a modification of the routine procedures as prescribed by this Local Court Rule.

(Rule 3.4(g) revised effective 1/1/13)

(h) Alternative Dispute Resolution (ADR)

It is the policy of the Court to encourage the parties in all cases to consider the use of appropriate alternative dispute resolution options as a means of resolving their disputes without trial. The Court encourages parties who can agree to use ADR before the first Case Management Conference to use the appropriate local court form:

(1) CV-655b – ADR Case Management Stipulation and Order (Unlimited Jurisdiction Civil Cases)

(2) CV-659d – ADR Case Management Stipulation (Limited Jurisdiction Civil Cases)

(Rule 3.4(h) revised effective 1/1/13)

(i) Notice to court upon disposition

It is the policy of the Court that proper notice be given to the Court of the disposition of cases. (Refer to Rule 3.100 for settlements).

(Rule 3.4(i) revised effective 1/1/13)

(Rule 3.4 revised effective 1/1/16)

Rule 3.5. Venue, Filing and Form of Papers

(a) Unlimited and Limited Jurisdiction Civil cases:

All new Unlimited and Limited Jurisdiction Civil cases (excluding Limited Jurisdiction Unlawful Detainer and Small Claims cases), and any subsequent papers shall be filed in Martinez (see California Rules of Court, Rule 2.100 for form of papers.

(Rule 3.5(a) revised effective 1/1/16)

(b) Limited Jurisdiction Civil cases filed before January 1, 2006:

(1) All Limited Jurisdiction Civil cases filed before January 1, 2006, in Richmond or Pittsburg Branch Courts shall remain in the branch court where the complaint was filed and any subsequent papers filed in such matters shall only be filed in the originating branch court.

(2) All Limited Jurisdiction Civil cases filed before January 1, 2006 in Concord or Walnut Creek are transferred to Martinez effective January 1, 2013, and any subsequent papers filed in such matters shall only be filed in Martinez. All hearings that are scheduled to occur in Limited Jurisdiction cases after January 1, 2006, will be held in Martinez.

(Rule 3.5(b) revised effective 1/1/16)

(c) Limited Jurisdiction Unlawful Detainer cases

(1) All Limited Jurisdiction Unlawful Detainer cases, and all subsequent filings in these cases, must be filed in the appropriate court location based upon the location of the property in question with the exception of those that currently fall under the jurisdiction of the Concord/Mt. Diablo and Walnut Creek branch courts.

(2) Effective January 1, 2013, Limited Jurisdiction Unlawful Detainer cases where the property is located in the following cities and adjacent unincorporated areas must be filed in the Martinez Clerk's Office at 725 Court Street, Martinez, CA:

Avon, Alamo, Blackhawk, Camino Tassajara, Canyon, Clayton, Clyde, Concord, Danville, Lafayette, Martinez, Moraga, Orinda, Pacheco, Pleasant Hill, Rheem, Rossmoor, San Ramon, St. Mary's College, Walnut Creek, Ygnacio Valley and adjacent unincorporated areas.

(Rule 3.5(c)(2) revised effective 1/1/13)

(d) Small Claims cases

(1) All Small Claims cases must be filed in one of the following locations. All subsequent filings must be filed in that same location.

(A) The locality where one or more of the defendants resides; or

(B) If the action arises from operation of a business by one or more defendants, the location where such a defendant has his, her, or its principal place of business; or

(C) The locality where a substantial part of the events in question occurred; or

(D) If there is no appropriate locality under any of the preceding provisions, in any locality.

(2) The geographic territory for filing in the appropriate court location effective January 1, 2013 is as follows

(A) **Martinez:** Avon, Alamo, Blackhawk, Camino Tassajara, Canyon, Clayton, Clyde, Concord, Danville, Lafayette, Martinez, Moraga, Orinda, Pacheco, Pleasant Hill, Rheem, Rossmoor, San Ramon, St. Mary's College, Walnut Creek, Ygnacio Valley and adjacent unincorporated areas.

(B) **Pittsburg:** Antioch, Bay Point, Bethel Island, Brentwood, Byron, Discovery Bay, Knightsen, Oakley, Pittsburg and adjacent unincorporated areas.

(C) **Richmond:** Crockett, El Cerrito, El Sobrante, Hercules, Kensington, North Richmond, Pinole, Point Richmond, Port Costa, Richmond, Rodeo, Rollingwood, San Pablo, Tilden Park North and adjacent unincorporated areas.

(Rule 3.5(d)(2) revised effective 1/1/13)

(Rule 3.5 revised effective 1/1/16)

Rule 3.6. Challenge to assigned Judge

In both Unlimited and Limited Jurisdiction Civil cases (which are assigned to one judge for all purposes), a challenge to the assigned judge pursuant to Code of Civil Procedure Section 170.6 must be made in accordance with the time requirements set forth in that section. Upon acceptance of a proper challenge under Code of Civil Procedure Section 170.6, the case will be reassigned.

(Rule 3.6 revised effective 1/1/15)

Rule 3.7. Service of Summons, Complaint, Cross-Complaint, Responsive Pleadings and Default Judgments

(1) Counsel are to be familiar with and follow with particularity the rules set forth in California Rules of Court, Rule 3.110 as to service and filing of pleadings and proofs of service and the notice of default judgments.

(2) Upon failure to serve the complaint and file a proof of service as required, an Order to Show Cause shall issue as to why counsel shall not be sanctioned for failure to comply with California Rules of Court, Rule 3.110.

(3) Responsive papers to the Order to Show Cause must be filed and served no less than five (5) court days in advance of the hearing.

(Rule 3.7 revised effective 7/1/15)

Rule 3.8. Case Management Conference Procedure (Formerly Referred to as a Status Conference)

(a) Filing of complaint

Upon filing a complaint, which includes a completed Civil Case Cover Sheet (Judicial Council Form CM-010), the plaintiff will receive the following from the Clerk or Court support staff:

(1) Summons and Complaint and notification of the assigned department for Superior Court cases;

(2) Notice and date of the First Case Management Conference. (This court-generated notice includes the assigned date, time, and department);

(3) Notice to Defendants (Local Court Form CV-655(d) for Unlimited Civil Jurisdiction cases and Form CV-659(b) for Limited Jurisdiction Civil cases);

(4) A blank Case Management Statement (Judicial Council Form CM-110) and an Alternative Dispute Resolution Information Sheet (Local Court Form CV-655(c) for Unlimited Civil Jurisdiction cases and Form CV-659(e) for Limited Jurisdiction Civil cases);

(5) In Limited Jurisdiction Civil cases only, the Case Questionnaire for Limited Civil Cases (Judicial Council form DISC-010) and a blank Issue Conference Statement (Local Court Form CV-659(c));

(6) Plaintiffs in Unlimited Civil Jurisdiction cases will also receive a ADR Case Management Stipulation and Order (Local Court Form CV-655(b) for Unlimited Jurisdiction Civil cases and plaintiffs in Limited Jurisdiction Civil cases will receive an ADR Case Management Stipulation (Local Court Form CV-659(d)).

Rule 3.8(a) revised effective 1/1/17)

(b) Case questionnaire for Limited Jurisdiction Civil cases

Any cross-complainant naming any new party in a Limited Jurisdiction Civil case will also be served with a blank Case Questionnaire for Limited Civil Cases (Judicial Council Form DISC-010).

(c) Setting the Case Management Conference for transfer-ins

If a case is transferred from another jurisdiction after a responsive pleading has been filed, the First Case Management Conference will be set within forty-five (45) calendar days from the Order of Transfer. If no responsive pleading has been filed, the First Case Management Conference will be set within ninety (90) calendar days from the Order of Transfer. In all other particulars, the plaintiff in a transfer case will receive the same information and items as described above.

(d) Notice of first CMC

At the time of serving the Summons and Complaint (and a cross-complaint upon a new party), the responding party shall be served with the Notice of the First Case Management Conference and an ADR Case Management Stipulation and Order (Local Court Form CV-655(b)) for Unlimited Jurisdiction Civil cases, and the ADR Case Management Stipulation. The responding party in Unlimited Jurisdiction Civil cases and plaintiffs in Limited Jurisdiction Civil cases will receive an ADR Case Management Stipulation (Local Court Form CV-659(d)) for Limited Jurisdiction Civil cases. The responding party in Limited Jurisdiction Civil Cases will also receive a blank Case Questionnaire for Limited Civil Cases (Judicial Council form DISC-010).

(e) File and serve Case Management Statement

Each appearing party shall file and serve the completed Case Management Statement, (Judicial Council Form CM-110), at least fifteen (15) calendar days before the First Case Management Conference as provided by California Rules of Court, Rule 3.725.

Rule 3.8(e) revised effective 7/1/02)

(f) Request for early Case Management Conference

One or more parties to a civil action may request that the assigned department advance the date of the first case management conference in the action, subject to the following:

(Rule 3.8(f) revised effective 1/1/09)

(1) Requests must be in writing, but may be informal, such as in letter format. They should be lodged (rather than filed) with the department assigned the matter.

(2) Such requests must be served upon all parties that have appeared in the action.

(3) The request shall either recite that all parties join in the request or, if not, must provide a brief but clear explanation of the benefits of advancing the conference date.

(4) Any party opposing a request shall lodge and serve an informal statement of opposition, with reasons, within five (5) calendar days of receiving the request.

(5) The Court reserves the discretion to determine whether such an early conference would be beneficial and whether the department's calendar can accommodate the request.

(g) First Case Management Conference

The First Case Management Conference shall be conducted in accordance with California Rules of Court, Rule 3.721. Counsel are required to be thoroughly familiar with and abide by that Rule.

(Rule 3.8(g) revised effective 7/1/02)

(h) Subsequent Case Management Conference

Unless otherwise ordered by the Court, a party need not file a Case Management Statement (Judicial Council Form CM-110) for subsequent conferences unless that party has not previously filed that form. Parties are welcome to file narrative status conference statements with proper material that they believe would be helpful to the Court.

(Rule 3.8(h) revised effective 9/1/04)

(Rule 3.8 revised effective 1/1/17)

Rule 3.9. Telephone Appearances

The Unlimited Jurisdiction Civil departments (fast track departments) generally use the CourtCall® system. If a department does not use CourtCall®, the CourtCall® operator will so advise and the parties wishing to appear by telephone should then contact the department involved for telephone appearance instructions.

The Court reserves the right in any matter to require a personal appearance (see California Rules of Court, Rule 3.670(e)(2)).

(Rule 3.9 revised effective 1/1/16)

Rule 3.10. Sanctions

If the Court finds that any party has not proceeded with due diligence or has otherwise failed to comply with this Rule, sanctions may be imposed.

(Rule 3.10 revised effective 1/1/15)

Rule 3.11. Issue Conference

(a) Time and purpose of Issue Conference

Within fourteen (14) calendar days before the trial date, unless otherwise ordered, an Issue Conference will be held during which all matters necessary to be resolved before

trial will be before the Court. All trial counsel must be present, along with all principals or clients and claims representatives with settlement authority.

(Rule 3.11(a) revised effective 1/1/16)

(b) Motions in limine

All motions in limine must be in writing and are to be filed and served at least ten (10) calendar days before the conference. Motions in limine should be numbered consecutively and if a party files more than five (5) motions an index must be provided. Any objections to motions in limine must be filed and served five (5) calendar days before the conference, with a copy lodged with the chambers of the department to which the case is assigned. Parties should not submit motions in limine upon the following topics as each fast track trial department will issue orders sua sponte as follows:

(Rule 3.11(b) revised effective 1/1/16)

(1) No witness may be called, except with Court permission in exceptional circumstances, unless notice has been given to all parties of the date when the witness will testify. Such notice shall be given no later than at the end of the court day preceding the court day when the witness is to testify.

(2) All witnesses will be excluded from the courtroom, unless otherwise ordered, excepting those for whom an exception exists at law (e.g. parties and corporate representatives).

(3) Evidence of, or reference to, settlement negotiations, mediation, and materials which are privileged under the evidence code or by agreement of the parties shall not be allowed.

(Rule 3.11(b)(3) revised effective 1/1/16)

(4) Evidence of, or reference to, insurance, or the fact that an attorney is employed by, or has been compensated by, an insurance company, shall not be allowed.

(5) Evidence of, or reference to, other claims or actions against any party to the litigation shall not be allowed without permission from the Court.

(6) Evidence of, or reference to, the financial position or wealth, or lack thereof, of any party to the litigation, shall not be allowed without permission from the Court.

(Rule 3.11(b)(6) revised effective 9/1/04)

(c) Issue Conference Statement

Parties must file with the court and serve on all parties an Issue Conference Statement (Local Court Form CV-659(c)) of not more than ten (10) pages at least five (5) court days before the Issue Conference. In Limited Civil Cases only, use of the local Issue Conference Statement form (Local Court Form CV-659(c)) is mandatory. The following shall be included in the Issue Conference Statement and will be considered at the Issue Conference:

(1) A statement of the facts, law and respective contentions of the parties regarding liability, damages (with specific dollar details), nature and extent of injuries, any unusual evidentiary or legal issues anticipated at trial, and all matters of fact believed by any party to be appropriate for stipulation;

(2) A witness list, including only those witnesses that each party actually expects to have testify, with a brief statement of anticipated testimony, and exhibit list;

(3) A trial length estimate and a proposed statement of the case to be read to the jury, and proposed voir dire questions; and

(4) A list (index) of proposed CACI jury instructions, as required by California Rules of Court, 2.1055, and copies of any proposed special instructions [note: copies of CACI instructions should not be submitted with the Issue Conference Statement.

(Rule 3.11(c) revised effective 1/1/17)

(d) Settlement statement

Each party shall lodge with the assigned department, at the time of filing of the Issue Conference Statement, a settlement statement in the form and content described in Local Rule 3.101.

(Rule 3.11(d) revised effective 1/1/08)

(e) Jury questionnaires

(1) If any party intends to request that a specific written questionnaire be submitted to the jury, said party shall, no later than twenty (20) court days before the Issue Conference, serve a proposed questionnaire on the other parties;

(2) Any party objecting to any question or proposing additional questions, shall serve said objections or proposals on all other parties no later than fifteen (15) court days before the Issue Conference;

(3) All parties shall meet and confer to attempt resolution of objections and proposals no later than ten (10) court days before the Issue Conference;

(4) The questionnaire shall be submitted with the Issue Conference Statement with any unresolved questions requiring a ruling by the Court clearly identified;

(5) If the Court approves a questionnaire, it shall be the responsibility of the party submitting a questionnaire to have an adequate number of copies delivered to the office of the Jury Commissioner no later than two (2) court days before the scheduled commencement of trial, and to arrange and pay for prompt copying and distribution of the completed questionnaire to the Court and other parties in the order in which jurors will be called; and

(6) Failure to comply with the requirements of Local Rule 3.11(e)(4) and (5) may result in an order that the case be tried without the use of a written questionnaire.

(Rule 3.11(e) revised effective 1/1/16)

(Rule 3.11 revised effective 1/1/17)

Rule 3.12. Reporting of Court Proceedings in Civil Fast Track Departments

(1) Official court reporters employed by the court are unavailable in the Unlimited/Limited Civil Fast Track Departments effective January 1, 2013, until further notice. Consult the Notice of Availability on the court's website for current status and any changes.

(2) Any party who desires a verbatim record of the proceedings from which a transcript can later be prepared, may procure the services of an outside private certified court reporter pro tempore to report any scheduled hearing or trial (see Government Code 70044 and California Rules of Court, Rule 2.956).

(3) Parties electing to procure the services of an outside reporter must comply with Local Rule 2.51.

(4) Pursuant to California Rules of Court, Rule 2.956(d), if a party arranges and pays for the attendance of a certified shorthand reporter at a hearing in a civil case because of the unavailability of the services of an official court reporter, none of the parties will be charged the reporter's attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(5) If court reporters become available and in the court's discretion are provided by the court for any civil hearings, the parties will be required to pay the applicable reporter attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(6) Parties shall be responsible for all transcript costs pursuant to Government Code Section 69953.

(Rule 3.12(6) revised effective 1/1/13)

(Rule 3.12 revised effective 1/1/16)

Rule 3.13. Unlawful Detainer Cases

(1) Unlawful Detainer cases entitled to expedited handling shall be adjudicated or a memo to set or conditional settlement shall be filed within forty-five (45) calendar days from the filing of the complaint unless the time limit is authorized to be stayed or extended by a judge. The plaintiff shall be issued an OSC re: sanctions or dismissal if the case has not been adjudicated or a memo to set or conditional settlement has not been filed within forty-five (45) calendar days from the filing of the complaint or within any extended time limit authorized by a judge. Responsive papers to the Order to Show Cause must be filed at least five (5) court days in advance of the hearing.

(2) The plaintiff will file a memo to set when the case is ready for trial.

(Rule 3.13 revised effective 1/1/16)

Rule 3.14. Relief Following Breach of a Settlement Agreement in Limited Jurisdiction Cases

(a) Unlawful Detainer cases

A settlement agreement may provide that, in the event of default, the non-defaulting party may seek additional relief from the Court by filing an ex parte application. If it does, then:

(1) An ex parte application filed pursuant to this provision must either:

(A) Contain a Proof of Service showing that the application was served on the defaulting party, or

(B) Include a declaration stating either:

(i) Notice of the filing of the application was given to the defaulting party, specifying how and when that notice was given, or

(ii) Notice should be excused pursuant to California Rules of Court, Rule 3.1204.

(2) Such an application may be heard no sooner than forty-eight (48) hours after the later of:

(A) Filing the application, or

(B) Notice to the allegedly defaulting party unless notice is excused pursuant to California Rules of Court, Rule 3.1204. If notice is given by mail, the time for hearing the ex parte application will be extended by three (3) calendar days.

(3) A statement that the non-defaulting party told the defaulting party that it "would be applying" for further relief is not adequate. The non-defaulting party must give notice that it "has applied" for relief, describing the relief requested and the time at which the relief will be sought.

(4) If the ex parte application is accompanied by a declaration proving that the defaulting party has been given notice of default and does not then object to the granting of the additional relief sought, the ex parte application may be heard before the expiration of the time required by paragraph (a)(2).

(5) If the allegedly defaulting party wishes to contest the application, it must file a written objection, stating the reasons for the objection. Any such objection must be filed within forty-eight (48) hours of the notice given pursuant to paragraph (a)(2).

(6) If objection is made, the Court may consider the ex parte application on the papers submitted or may set the matter for expedited hearing.

(7) If a settlement agreement does not contain a provision such as is described in paragraph (a), then the non-defaulting party seeking additional relief must file a motion to obtain that relief. Applications for Orders Shortening Time will be viewed

with presumptive favor in unlawful detainer cases seeking possession and other cases in which time is of the essence.

(b) Non-Unlawful Detainer cases

(1) A settlement agreement may provide that, in the event of default, the non-defaulting party may seek additional relief from the Court. However, the non-defaulting party will not be granted additional relief without notice to the defaulting party.

(2) The proper form for seeking additional relief is a noticed motion. The parties may agree, in advance, to an Order Shortening Time for the hearing of such a motion, provided that (except in exceptional cases, for good cause shown) the time for noticing the motion shall not be less than ten (10) court days.

(3) If the settlement agreement does not provide for shortened time, as described in paragraph (b)(2), then a party may file an ex parte application to have the motion heard on shortened time. Any such application must comply with the California Rules of Court, Rule 3.1200 and, where applicable, Rule 3.46 of the Local Court Rules.

(4) If, at the time of the default, the defaulting party stipulates in writing to further relief, the Court will entertain an application for entry of an order upon stipulation without need for formal motion. Nothing in this rule shall preclude a party from seeking to enforce the terms of a settlement agreement (as opposed to seeking additional relief for breach) by an appropriate motion pursuant to Code of Civil Procedure Section 664.6 or other controlling authority.

(Rule 3.14(b)(4) revised effective 1/1/05)

(Rule 3.14 revised effective 1/1/15)

Rule 3.15. Complex Litigation Cases

(1) There shall be designated a Complex Civil Litigation Department to which cases covered by California Rules of Court, Rule 3.400 shall be assigned, unless otherwise ordered by the Court.

(2) Counsel for plaintiffs shall use the most current form of civil cover sheet to indicate whether a matter is or is not deemed complex. Other parties may counter-designate at or before the time for the filing of a first appearance (see California Rules of Court, Rule 3.402).

(Rule 3.15(2) revised effective 1/1/16)

(Rule 3.15 revised effective 1/1/16)

Rule 3.16. CEQA Claims

The title of any pleading seeking relief under the California Environmental Quality Act, whether by petition or complaint, shall clearly identify that the matter is a CEQA action. [e.g. "CEQA claim: Complaint for Damages"].

(Rule 3.16 revised effective 1/1/15)

Rule 3.17. Conforming Copies

The Superior Court Clerk will conform a maximum of two copies of any document at the time of filing. Additional copies will be provided by photocopying and the standard Superior Court Clerk fee for copies will be charged.

(Rule 3.17 revised effective 1/1/15)

Chapter 2. Civil Law and Motion

Rule 3.40. Law and Motion Calendar

There shall be a Civil Litigation Division (which includes a Discovery Commissioner when available funding permits) which will handle civil law and motion matters except as follows:

(1) All law and motion matters relating to Family Law shall be heard in the Family Law Departments;

(2) Motions in Unlawful Detainer cases shall be heard in the appropriate court or department scheduled;

(Rule 3.40(2) revised effective 1/1/13)

(3) As provided in Local Rule 7.1, most law and motion regarding probate matters shall be heard in the Probate Department.

(A) Each judge in the Civil Litigation Division shall designate one day of the week for his or her Law and Motion matters.

(B) Each judge in the Civil Litigation Division shall designate the day(s) of the week and time(s) that discovery matters and ex parte applications will be heard in their department.

(Rule 3.40(3)(B) revised effective 1/1/13)

(Rule 3.40 revised effective 1/1/16)

Rule 3.41. Hearing Dates

(1) With the exception of motions brought pursuant to Code of Civil Procedure section 128.7, all other motion hearing dates will be assigned by the Clerk's Office at the time the motion is filed unless otherwise ordered by the Court. Dates cannot be reserved or given over the telephone.

(Rule 3.41(1) revised effective 1/1/16)

(2) No hearing will be set by the Clerk's Office for a Discovery Motion unless no discovery responses have been provided or recommendations from a Discovery Facilitator are attached as the first exhibit.

(Rule 3.41(2) revised effective 1/1/15)

(Rule 3.41 revised effective 1/1/16)

Rule 3.42. Papers to Comply with State Rules

(1) Moving, opposing and reply papers must be filed and served with the Court and parties within the time prescribed by law. The Court will not consider late filed papers unless good cause is shown at the hearing.

(2) All memoranda and other papers filed in support of, and in opposition to, motions shall comply with the requirements of the California Rules of Court.

(3) Despite rule 3.1110 of the California Rules of Court, subdivision (f), a large number of documents filed with the Court include exhibits that are not properly tabbed. The majority of these non-compliant documents are fax-filed through an attorney service. The attorney service prints out the documents and files them without tabbing the exhibits. The purpose of this rule is to discourage such rule violations, which impose a substantial burden on judges and staff.

(A) Every fax-filed document shall be stamped on the first page with the name, address, and telephone number of the attorney service that prepared the document for filing.

(B) Every fax-filed document or set of fax-filed documents shall include, as a separately filed document, a certification by an employee of the attorney service that the document or documents have been reviewed for compliance with rule 3.1110 of the California Rules of Court, subdivision (f), and that all exhibits have been properly tabbed.

(C) If a particular attorney service repeatedly files documents with untabbed or improperly tabbed exhibits, the matter will be referred to the presiding judge for appropriate action.

(D) Counsel of record should take note the Court has and will continue to impose monetary sanctions on attorneys who file documents with untabbed or improperly tabbed exhibits, regardless of whether such documents were fax-filed through an

attorney service, and in some instances will disregard those documents or drop a hearing from calendar based on the rule violation.

(Rule 3.42(3) new effective 1/1/17)

(Rule 3.42 revised effective 1/1/17)

Rule 3.43. Tentative Ruling

(1) The Civil Litigation Division shall operate a tentative ruling system for Unlimited Civil law and motion. The tentative rulings can be obtained beginning at 1:30 p.m. the court day preceding the hearing. Phone numbers and tentative rulings for Martinez are available on the court website www.cc-courts.org. If the website is down, or for some reason cannot be accessed by the litigant or counsel, the number to call, during business hours is (925) 608-1000.

(Rule 3.43(1) revised effective 1/1/17)

(2) The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify what issues are to be argued.

Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter.

(Rule 3.43(2) revised effective1/1/15)

(3) The prevailing party must prepare an order after hearing in accordance with the requirements of California Rules of Court, Rule 3.1312.

(Rule 3.43(3) revised effective 1/1/01)

(Rule 3.43 revised effective 1/1/17)

Rule 3.44. Telephone Appearances for Law and Motion

If the judge hearing a matter determines on an individual case that a personal appearance is necessary (i.e. that a telephone appearance will not be allowed), the tentative ruling will so indicate unless the Court has previously been advised.

(Rule 3.44 revised effective 1/1/16)

Rule 3.45. Reporting of Law and Motion

Law and motion oral arguments are not reported in Civil Fast Track Departments until further notice. Parties may procure the services of an outside reporter as set forth in Local Rule 2.51.

(Rule 3.45 revised effective 1/1/15)

Rule 3.46. Time to Plead or Respond Following Hearing (Subject to Preemption by the California Rules of Court)

(1) If the hearing involved a demurrer, motion to strike, motion to quash service of process, motion for a change of venue, or motion to stay or dismiss for "Forum Non Conveniens," and the demurrer is overruled or the motion is denied; the moving party shall have ten (10) calendar days after notice (see Paragraph 3 below) to file an Answer or further responsive pleading.

(2) If a demurrer is sustained or motion to strike is granted with leave to amend, the party granted leave to amend shall have ten (10) calendar days after notice to amend, and the initial moving party shall have ten (10) calendar days after service of the amendment to file a further responsive pleading.

(3) Parties shall be deemed to have notice of the Court's ruling as of the date of the hearing, or in the case of a matter submitted for decision, as of five (5) calendar days after the date the Clerk mails notice of the Court's ruling.

(4) Except as allowed by statute or California Rules of Court, the parties may not extend the stated times in the absence of an approval by the Court. Such a request must be made before the final day to respond or answer.

(Rule 3.46 revised effective 1/1/16)

Rule 3.47. Civil Ex Parte Orders

Ex Parte applications for Orders to Shorten Time will be considered only when accompanied by the proposed moving papers. Orders to Shorten Time will be filed only when the motion has been previously filed or is simultaneously filed.

(1) Martinez Civil Fast Track ex parte motions, except in emergency situations, will be heard in each department at times designated by the assigned judge. Consult the court's website for designated times. Ex parte motions include applications for restraining orders, writs of mandate and prohibition (see ex parte process for writs of mandate below), other extraordinary writs, and appointment of receivers. Applications for such orders must comply with California Rules of Court, Rule 3.1203 (except temporary restraining orders under Code of Civil Procedure Section 527.6).

(Rule 3.47(1) revised effective 1/1/13)

(A) Ex Parte Applications for Orders to Shorten Time will be considered only when accompanied by the proposed moving papers, unless, in its discretion, the Court otherwise orders. Orders to Shorten Time will be filed and calendared for hearing only when the motion has been previously filed or is simultaneously filed (see signed order for compliance).

(Rule 3.47(1)(A) revised effective 1/1/10)

(B) Status Conference and Briefing Schedules for Writs of Mandate. The following rule applies to all writs of mandate except those in which the Department of Motor

Vehicles is named as respondent. After the Petition is filed in the Clerk's Office and a department is assigned, the filing party shall take a copy of the petition along with a proposed order to the assigned department during ex parte hours. A status conference for the establishment of a hearing date and briefing schedule for writs of mandate will be set by the assigned judge during the designated ex parte hours. The petitioner must comply with California Rules of Court, Rule 3.1203 concerning notice to opposing counsel or unrepresented party of the intent to present an ex parte application to the Court. The petitioning party need not notify the Court before presenting the application to set hearing date and briefing schedule. Once the order is signed and a briefing schedule assigned, the party shall present the order to the clerk's office for filing.

(Rule 3.47(1)(B) revised effective 1/1/16)

(C) A copy of the resulting order concerning the writ is to be delivered to the department in which the writ will be heard as well as to the research attorney's office.

(Rule 3.47(1)(C) revised effective 1/1/06)

(2) Sufficient notice should be given to all parties in the time and manner provided by California Rules of Court, Rule 3.1203.

(3) Ex parte applications will be heard only after each party with papers to present has given them to the Court and other counsel who appear, and after both Court and counsel have had adequate time to review them. Therefore, whenever practicable, moving papers should be served on the affected party or that party's attorney by personal delivery, telecopy (fax), express mail, messenger, or similar means before the hearing.

(Rule 3.47(3) revised effective 1/1/16)

(4) Guardian ad litem. Requests in cases of Unlimited Jurisdiction, for appointment of a Guardian ad litem should normally not seek appointment of a person that has a claim arising from the same event or conduct. The proposed appointee normally should not be a person that has a possible adverse or conflicting interest with that of the minor.

(Rule 3.47(4) revised effective 7/1/08)

(Rule 3.47 revised effective 1/1/16)

Rule 3.48. Original Orders to Show Cause

When an Order to Show Cause has been signed, the original shall be filed immediately in the office of the Court Clerk and service shall be effected by a certified copy, for which no charge shall be made.

(Rule 3.48 revised effective 1/1/15)

Rule 3.49. Continuances

Requests for continuance of Law and Motion matters may be by written motion or stipulation. Moving papers must be filed and submitted by 12:00 noon of the court day before the scheduled hearing.

(Rule 3.49 revised effective 1/1/16)

Rule 3.50. Calendar Matters Heard in Law and Motion Department

All motions to consolidate cases, bifurcate issues of liability or other issues, such as statute of limitations or other special defense, or sever consolidated cases or causes of action for trial may be heard in Law and Motion, or may be reserved for the trial department. Motions to consolidate must be noticed for hearing in the department which is assigned to the lowest numbered case of those cases proposed for consolidation.

(Rule 3.50 revised effective 1/1/15)

Rule 3.51. Name Change Applications

(1) Name change applications are submitted on the Petition for Change of Name (Judicial Council Form NC-100) and Attachment to Petition for Change of Name (Judicial Council Forms NC-110).

(2) The petition must be presented personally by the applicant to the clerk at the Probate window in the civil division's clerk's office and shall be accompanied by the following:

(Rule 3.51(2) revised effective 1/1/16)

(A) A completed Order to Show Cause for Change of Name (Judicial Council Form NC-120) that will be signed by the judge.

(B) Photographic proof of identification (California Driver's License or ID, or similar).

(C) Proof of residency in Contra Costa County (e.g. recent utility bill or tax bill); and

(D) For minors, a birth certificate.

(Rule 3.51 revised effective 1/1/16)

Rule 3.52. Motions

(a) Proof of Service

Unless otherwise ordered, all returns of Proof of Service of Notice of Motions and Orders to Show Cause shall be filed in the office of the Clerk of the Court not less than two (2) calendar days preceding the time set for hearings.

(Rule 3.52(a) revised effective 1/1/16)

(b) Failure to appear

Failure of counsel to appear at the time set in the department to which the matter is assigned, unless excused by the judge, shall be deemed cause for placing such matter off calendar, for proceeding to hear the matter in the absence of counsel, or for assessment of costs and sanctions as the Court in its discretion may determine.

(Rule 3.52(b) revised effective 1/1/00)

(c) Motions after trial

All motions after trial until judgment is final shall be heard before the judge who presided over the trial, unless such judge is absent, unavailable or unable to act, in which case the Presiding Judge shall assign an alternate judge; this includes such matters as motions to reopen, motions for new trial, motions for judgment notwithstanding a verdict and hearings on statements of decision.

(Rule 3.52(c) revised effective 1/1/13)

(d) Papers on file

All supporting affidavits, declarations, memoranda of points and authorities, and similar documents shall be attached to the notice of motion, or order to show cause, or other moving papers, when filed. Failure to comply with this requirement shall be deemed cause for taking the matter off calendar. All responsive and opposing documents shall be filed by respondents at least five (5) court days before the day set for hearing. Failure to comply with this requirement shall be deemed cause for acting on the matter without the consideration of documents not so filed. The application of this rule shall not apply to responsive and opposing documents where the moving party has obtained an order shortening time for hearing. This rule shall not be applicable where other time limits are required or provided by law, as in Code of Civil Procedure Section 659(a).

(Rule 3.52(d) revised effective 1/1/00)

(Rule 3.52 revised effective 1/1/16)

Rule 3.53. Uncontested Calendars

(a) Request for hearing

Applications for Default Prove Up Hearings, Minor's Compromises, Adoptions and other uncontested matters requiring hearing shall be made in writing to the Clerk of the Court not less than five (5) calendar days before the hearing.

(Rule 3.53(a) revised effective 1/1/16)

(b) Completion of file

No hearing will be set on an uncontested matter until all requisite pleadings and documents have been filed and the Clerk has entered the default, unless it is a matter

requiring court entry of default, in which case the Return of Service must be filed before the request for hearing.

(Rule 3.53(b) revised effective 1/1/09)

(Rule 3.53 revised effective 1/1/16)

Rule 3.54. Written Orders

(a) Preparation of order

Whenever a Judge rules upon a motion, order to show cause, or similar matter, and the matter is uncontested, within ten (10) calendar days, a written order shall be prepared, presented to the Judge for signature, and filed. In any contested matter, where opposing counsel appears, a written order shall be prepared and served by the prevailing party and reviewed by the opposing party, in accordance with California Rules of Court, Rule 3.1312. The order shall be prepared whether or not specifically requested by the Court.

(Rule 3.54(a) revised effective 1/1/16)

(b) Judge's signature

Counsel shall not approach the Bench for the purpose of obtaining a Judge's signature, during a hearing or trial; documents requiring a Judge's signature shall be presented during recess or given to the Bailiff while the Judge is on the bench.

(Rule 3.54(b) revised effective 1/1/00)

(c) Subsequent applications for orders

When an application for an order has been made to the Court or a Judge and has been refused in whole or in part, any subsequent application for the same character of relief, although made upon an alleged different state of facts, shall be made before the Judge making the original order in the case, unless the Judge is absent or unable to act, or shall request the Judge of another department to entertain such application; in all such instances, a full disclosure shall be made to such Judge of any and all such prior applications. See Code of Civil Procedure Section 1008.

(Rule 3.54(c) revised effective 1/1/16)

(Rule 3.54 revised effective 1/1/16)

Rule 3.55. Number of Attorneys Examining a Witness

Except by stipulation of opposing counsel or by express permission of the Court, only one lawyer representing the same party may examine or cross-examine a witness.

(Rule 3.55 revised effective 1/1/15)

Chapter 3. Receivers

Rule 3.80. Receivers

Appointment of receivers:

(1) In proper cases for the appointment of a receiver or a commissioner, and the Court determines that the appointment of an independent third party is unnecessary and no active management is necessary, court clerks may be appointed to such a position.

(2) Court clerks may not be appointed as a receiver or commissioner by stipulation of counsel.

(3) Attention is invited to California Rules of Court, 3.1175-3.1184 for provisions relating to appointment of receivers.

(Rule 3.80 revised effective 1/1/16)

Chapter 4. Settlements and Settlement Conferences (Not Applicable To Family Law and Probate Matters)

Rule 3.100. Settlements

Whenever a civil case has settled, counsel shall immediately notify the Court in writing. If a hearing, conference, or trial is imminent, notice must be given orally to the assigned department followed by a confirmation in writing. The writing must specify when all closing papers will be filed with the Court. If a case settles within five (5) calendar days of the trial date, counsel shall have on file a dismissal, stipulated judgment, or conditional settlement or make an appearance at the time and place designated for trial to place the settlement terms on the record. If a case settles before that time, counsel shall:

(1) Immediately give written notice to the Court, and;

(2) File a request for dismissal, stipulated judgment, or conditional settlement within forty-five (45) calendar days of the written notice of settlement.

If a request for dismissal, stipulated judgment, or conditional settlement is not filed within forty-five (45) calendar days, an Order to Show Cause shall issue as to why sanctions should not be imposed. Responsive papers to the Order to Show Cause must be filed five (5) court days in advance of the hearing. See California Rules of Court, Rule 3.1385.

(Rule 3.100(2) revised effective 1/1/16)

(Rule 3.100 revised effective 1/1/16)

Rule 3.101. Settlement Conferences

On the Court's own motion, all cases, other than short causes, may be calendared for mandatory settlement conferences, upon written or oral notice to all parties involved. At this conference, all parties shall:

(1) Have endorsed by the Clerk of the Court and served on all parties five (5) court days before the conference, a written statement of the facts, law and respective contentions of the parties to prove or disprove the right of recovery, items and amount of special damages, nature and extent of injuries incurred and claimed residuals documented by medical report when possible, any wage loss claim showing methods of computation, and any claim for future medical expenses and earnings loss;

(2) Have in attendance all principals or clients. Claims representatives shall be in attendance, unless excused in writing, by the Presiding Judge before the Settlement Conference;

(3) Be prepared to make a bona fide offer of settlement; and

(4) Participate in good faith in the settlement conference. Failure by any such person or entity to file the required written statements, to prepare for, appear at, or participate in a settlement conference, unless good cause is shown for any such failure, may be considered as an unlawful interference with the proceedings of the court and the Court may impose appropriate sanctions including, but not limited to, costs, actual expenses and counsel fees; and further, the Court may vacate the trial date, or order the case to proceed to trial on the date assigned.

(Rule 3.101(4) revised effective 1/1/08)

(Rule 3.101 revised effective 1/1/16)

Rule 3.102. Special Needs Trusts

Proposed Orders for the placing of the proceeds of a court judgment or settlement into a special needs trust must provide a place for the Court to assign a date in the Probate Department for the first annual review of the operation of the trust. A review date will be assigned in all cases of the approval of such a trust.

(Rule 3.102 revised effective 1/1/15)

Rule 3.103. Special Bench Bar Settlement Conferences (BBSC)

Specialized BBSC settlement proceedings may be held at such times as are designated by the Presiding Judge.

(Rule 3.103 revised effective 1/1/15)

Chapter 5. ADR (Not Applicable to Family Law Matters and Probate Matters)

Rule 3.200. Alternative Dispute Resolution Programs

(a) Availability of Alternative Dispute Resolution (ADR) programs

Judges in the Contra Costa County Superior Court encourage parties involved in lawsuits to use ADR to resolve their disputes without trial. The Court offers several ADR programs

in general civil and probate cases. The Court also provides mediation services in juvenile dependency and child custody and visitation cases and collaborates with community ADR providers to offer mediation in small claims, guardianship, civil harassment, and unlawful detainer cases.

(b) Application of these rules

These rules apply to all court–administered ADR programs except Child Custody Recommending Counseling (mediation) sessions available from family court services (which is governed separately by the California Family Code, related rules of court, and case law), community mediation services (provided in some small claims, civil harassment, guardianship, juvenile dependency, and unlawful detainer cases), and assignment of temporary judges to hear regular court calendars.

(c) Duty to meet and confer

In the event parties to a civil action agree to use ADR before their first Case Management Conference, they are encouraged to use the appropriate local court form:

(1) CV-655b – Stipulation and Order to Attend ADR and Delay First Case Management Conference 90 Days (Unlimited Jurisdiction Civil Cases)

(2) CV-659d – Stipulation to Attend ADR and Delay First Case Management Conference 90 Days (Limited Jurisdiction Civil Cases)

(d) Voluntary participation

Participation in any of the Court's ADR programs is strongly encouraged and voluntary unless otherwise provided by law, Judge or Local Rule. Parties may choose an ADR option on the Case Management Form (Judicial Council Form CM-110), or by filing one of two local court forms included in the plaintiff's packet:

(1) (For Limited Jurisdiction cases) - a Stipulation to Attend ADR and Delay First Case Management Conference 90 Days (Local Court Form CV-659d), or

(2) (For Unlimited Jurisdiction cases) – a Stipulation and Order to Attend ADR and Delay First Case Management Conference 90 Days (Local Court Form CV-655b).

Parties may also agree (stipulate) orally or in writing to use ADR at any time.

(e) Opening an ADR case

To open a civil or probate ADR case, parties must contact the ADR Programs office. Once a case is opened, the parties will receive a list of panel members with expertise in their type of case. The parties must make their own decision about whether a panel member has the needed expertise, and can help the parties to complete ADR before the Court deadline. All parties must agree on the panel member who will handle the ADR portion of their court case. Parties with child custody and visitation, guardianship, juvenile dependency, small claims, civil harassment and unlawful detainer cases will get separate instructions from the judge assigned to hear their case.

(f) Standard ADR case management timelines

Unless the judge makes different arrangements to accommodate circumstances in individual cases, parties can expect that they must choose their mediator, arbitrator, or neutral case evaluator within fourteen (14) calendar days of the matter being referred to ADR. The Court and ADR department will tell the parties how long they have to finish ADR.

ADR sessions may be scheduled at the parties' and panel members' convenience, as long as they meet the court–ordered ADR completion deadlines.

(g) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case, as well as to change between most ADR processes only if:

(1) All parties notify both the Judicial and ADR Department as soon as is practicable of their intent to change processes,

(2) All parties and the ADR panel member ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(h) Changing or abandoning ADR

Some ADR processes are confidential (private) and others are not. Once the Court has made an ADR order, the parties must have permission from the judge to change the ADR process, or to cancel ADR altogether.

(i) ADR panel member requirements

All ADR panel members must meet the training, education, and experience requirements for the mediation, arbitration, neutral case evaluation, and settlement mentor panels. People interested in serving on the Court's ADR panel must complete and update their panel member information as changes occur. If selected to serve on a particular case, panel members must complete and submit all forms and follow all of the Court's Ethical and Practice Standards listed in section seven of these rules.

(j) Complaints

ADR program participants are encouraged to discuss any concerns they have about the ADR process or a panel member's conduct with the panel member first. Consistent with California Rules of Court, Rule 3.865, the Court will address party complaints as follows:

(1) The party must make a written complaint to the ADR program director. If the ADR program director cannot resolve the complaint informally,

(2) The written complaint will be forwarded to the Supervising Civil Judge. The panel member must answer the complaint in writing, and a copy of that answer will be given to the person or people making the complaint. If the complaint remains unresolved,

(3) The Supervising Civil Judge and ADR program director will convene a review panel to consider the complaint. If the Supervising Judge finds the complaint to be valid, he or she may reprimand the panel member, suspend the panel member until he or she has completed additional training, or remove the panel member from one or all of the Court's ADR program panels.

(k) Service of ADR member

Service as an ADR panel member, and the appearance of a panel member's name on panel lists is at the sole discretion of the Supervising Civil Judge and/or his or her designee. Panel members' services can be terminated without cause, reason, or notice at any time. The Court is under no obligation to use any panel member's services now or in the future.

(l) Panel member evaluation

The Court will periodically evaluate each panel member's performance. In the event performance issues are identified, the Court may:

(1) Contact the panel member informally or formally to address and resolve any identified issues;

(2) Suggest or require the panel member attend additional training, or establish a mentoring relationship with an experienced practitioner;

(3) Issue a formal or information reprimand, suspend the panel member, or remove him or her from the panel.

(Rule 3.200 revised effective 1/1/16)

Rule 3.201. Mediation

(a) Mediation

Mediation allows people to focus on the issues at the heart of their dispute. Mediation conferences are informal. Most mediators start out talking with all the parties together. Later, the mediator may meet with each party separately. Mediators often ask each party to list the issues in dispute, and to offer their ideas for settlement. People often discuss and exchange documents or other information before or during mediation, but do not present evidence as they would in court. Mediators have different ways of handling the mediation process. For example, some mediators are more evaluative and are willing to tell the parties what they think a case is worth or how they think the case might turn out if it went to trial. Other mediators are more facilitative and tend to focus on helping the parties to negotiate and reach agreements of their own design. Parties are free to decide which mediation style they prefer. No matter what approach a mediator takes, he or she is not the decision maker. Agreements can only be reached if all the mediating parties accept the proposed solution.

(b) Mediator selection

All mediating parties must agree on a mediator and complete a Selection of ADR Panel Member (Local Court Form ADR-201) within fourteen (14) calendar days of the matter being referred to Mediation, unless the judge sets a different selection deadline. Parties must forward the Selection form to the ADR Programs office. If the parties cannot agree on a mediator, the Court or ADR department may appoint one. Once a mediator has been chosen, the ADR Programs office will then file and serve a Notice of Assignment on all parties and the Mediator.

(c) Mediator qualifications

Although most of the Court's mediators are also attorneys, some panel members are professionals and experts from other fields such as: accounting, business, construction, finance, psychology, and real estate.

(1) Mediators appointed to the panel after January 1, 2006 must:

(A) Have completed an initial 40-hour comprehensive mediation training program that encompasses commonly recognized mediation principles and practices including: confidentiality, voluntary participation, communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner;

(B) Have mediated five (5) cases or co-mediated at least ten (10) cases. Each mediation counted for this purpose must have lasted two or more hours; and,

(C) Be familiar with ethical standards as adopted by state and national professional organizations, and with the Uniform Mediation Act.

(2) Alternative qualifications:

A person who does not meet all of the requirements of (c)(1)(a) and (c)(1)(b) may still qualify to be a mediator for the Court if he or she provides the Court ADR Committee or its designee with satisfactory evidence of sufficient alternative education, training, skills and experience. Acceptance of alternative qualifications is at the discretion of the Court ADR Committee and/or its designee. The Court is under no obligation to accept alternative qualifications.

(3) All mediation panel members must:

(A) Attend at least four (4) hours of continuing education or training related to the practice of mediation every three years. At least 2 hour(s) of that education or training must address ethics, fairness, and bias issues in the mediation context. At least 1 hour of that education or training must address practice and ethical issues that arise when parties are not represented by an attorney.

(B) Certify that they meet the requirements of this rule every three years following their appointment as a mediator to the Court ADR panel.

(C) Agree to abide by the ethical principles established by California Rules of Court, Rules 3.850 et seq. and comply with the competence standards established by California Rules of Court, Rule 3.856.

(d) Mediation fees

The Court's mediation panel members shall not charge fees for the first 30 minutes of case scheduling and preparation time, or for the first two hours of mediation conference time. If more time is needed, the parties must pay that mediator's hourly fee for the time used. Parties who have had their court filing fees waived, (cancelled), may ask the ADR Programs Department to contact the mediator and find out if that party's mediation fees may also be waived (cancelled). Parties are encouraged to have a written agreement with the panel member regarding fees and the management of their ADR case.

(e) Attendance at mediation

Unless excused by the assigned judge before mediation starts, all trial lawyers, principals, clients, claims representatives, and other appropriate decision–makers must attend mediation in person. Telephone standby is not allowed unless approved by the assigned judge before mediation starts.

(f) Confidentiality

Court–connected mediations are confidential (private) per California Evidence Code Sections 1115–1128. The mediator cannot be called to testify in court about what happened or what was said in mediation. Except as otherwise provided by law or these rules, court staff, the mediator, all parties, all attorneys, and any other people facilitating or participating in the mediation process must treat all written and oral communications made in or during mediation, as confidential. The only exceptions to confidentiality in mediation are:

(1) The law or any other mandate requires the information to be reported; or

(2) The ADR panel member thinks there might be a danger of serious physical harm either to a party or to another person.

(g) Mediation statements

Parties must prepare and give information about their case to the mediator and other parties at least five (5) court days before the mediation hearing. Parties may use the Mediation Statement (Local Court Form ADR-304), or write this information on their own paper. This form is available online at www.cc-courts.org/adrforms. Mediation statements must not be longer than five (5) pages and must contain the following information:

(1) The name and title (or relationship to the case) of all people who will attend mediation;

(2) A list of people connected with other parties who, if present at mediation, might improve the chances of settlement;

(3) A brief statement of the important issues, and the party's views on liability and damages;

(4) A list of legal or factual issues that, if narrowed or resolved early, would promote settlement;

(5) A brief description of the history and status of any settlement negotiations; and,

(6) Copies of any court or other documents that will help the mediator understand the issues in dispute.

(h) Mediator's report

The mediator must forward a copy of the completed Mediator's Report (Local Court Form ADR-305) to the ADR Programs office, counsel, and all self-represented parties. This form is available online at www.cc-courts.org/adrforms.

(i) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case as well as to change between most ADR processes only if:

(1) All parties notify both the judicial and ADR Department as soon as is practicable of their intent to change processes, and

(2) The parties and the ADR panel member must ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(Rule 3.201 revised effective 1/1/16)

Rule 3.202. Judicial Arbitration

(a) Judicial Arbitration

Judicial Arbitration is less formal than a court hearing. It allows the parties under oath, to present their case, offer witness testimony, and get a decision. California Code of Civil Procedure Section 1141.10 et seq., allows the Court to require all cases where the amount in dispute is $50,000 or less to be submitted either to judicial arbitration or to mediation if the judge finds it to be appropriate in a particular case. Cases may also go to judicial arbitration if the person who made the complaint agrees to limit his or her recovery to $50,000, or if the parties all agree to use arbitration. The award (arbitrator's decision) must be filed with the Court within ten (10) calendar days of the last hearing. If either party disagrees with the arbitration award, he or she may ask the Court to review the case by filing a request for a new court hearing (called a Trial De Novo). The arbitration award becomes a court order unless one of the parties file for a Trial De Novo within sixty (60) calendar days or another time limit set by the judge.

(b) Arbitrator selection

All parties must agree on an arbitrator and complete a Selection of ADR Panel Member (Local Court Form ADR-201) fourteen (14) calendar days of the matter being referred to Arbitration, unless the judge sets a different selection deadline. Parties must forward this form to the ADR Programs office. If the parties cannot agree on an arbitrator, the assigned judge may appoint one. The ADR Programs office will then file and serve on all parties and the Arbitrator a "Notice of Assignment".

(c) Arbitrator qualifications

Arbitrators must be licensed California attorneys and have an oath of office on file with the ADR Programs office unless the parties jointly agree by stipulation to appoint an arbitrator with other qualifications.

(d) Arbitration fees

Under California Code of Civil Procedure Section 1141.18, arbitrators in judicial arbitration cases are paid $150 per case or $150 per day if the arbitration takes more than one day. All of the arbitrators on the Court's panel have agreed either to donate their services, or to be paid by the parties at the rate described in this section.

(e) Attendance at arbitration

As long as all trial attorneys, parties, and other people needed to present the case and answer the arbitrator's questions are included, the parties may choose who will attend arbitration.

(f) Arbitration statements

Parties must prepare and give information about their case to the judicial arbitrator and other parties at least five (5) court days before the arbitration hearing. Parties may use the Arbitration Statement (Local Court Form ADR-404) or write this information on their own paper. This form is available online at www.cc-courts.org/adrforms. This information must not be longer than five (5) pages and must include:

(1) The name and title (or relationship to the case) of all people who will attend arbitration;

(2) A brief statement of the legal and factual issues in the case, and the party's views on liability and damages; and,

(3) Copies of any documents that will help the arbitrator understand the issues in dispute.

(g) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case, as well as to convert most ADR processes only if:

(1) All parties notify both the Judicial and ADR Department as soon as is practicable of their intent to change processes, and

(2) The parties and the ADR panel member ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(Rule 3.202 revised effective 1/1/16)

Rule 3.203. Settlement Mentors

(a) Settlement Mentor conferences

The assigned judge may refer, or the parties may ask for a conference with a settlement mentor either on the morning of trial, or earlier in the case. These informal conferences usually last about two hours. These processes are not the same as mediation, and are **not confidential** per Evidence Code Sections 1115-1128. Parties meet with an attorney who has significant litigation experience with similar cases (called a settlement mentor) to review the issues, analyze the case, and consider settlement recommendations. The parties do not present evidence, and witnesses are not called. Although information may be shared with the settlement mentor and not shared with the other party, **any information given to the settlement mentor may be shared with the judge**. When appropriate, the settlement mentor may involve the judge in the settlement discussions.

(b) Selection of Settlement Mentors

Settlement mentors are assigned by the ADR Programs Department based on their stated areas of expertise, and in consultation with the assigned judge.

(c) Settlement Mentor qualifications

Settlement mentors are attorneys who have background experience in the issues involved in the case.

(d) Settlement Mentor fees

Settlement mentors may not charge any fees for their services unless the parties agree to continue settlement discussions with the settlement mentor at his/her usual fee.

(Rule 3.203(d) revised effective 1/1/17)

(e) Attendance at the Settlement Mentor conference

All trial attorneys, principals, clients, claims representatives, and other decision makers must attend the settlement mentor conference. Telephone standby is not allowed unless approved by the assigned judge before the conference begins.

(f) Confidentiality

Although information given during the settlement mentor conference may be shared with the judge, everyone attending, (including court staff, the settlement mentor, all parties and

all attorneys), must treat all written and oral communications made in or during the settlement conference as confidential.

When the judge will not be trier of fact, the mentor may report to the judge the settlement positions of the parties to help the parties reach an agreement.

(g) Blending, changing, or converting ADR processes

Although the Court allows parties to engage in more than one ADR process over the life of their case, they may not convert settlement mentor conferences into any other ADR process unless they have first asked for and received permission from the Judge scheduled to hear that case.

(Rule 3.203 revised effective 1/1/17)

Rule 3.204. Neutral Case Evaluation

(a) Neutral Case Evaluation

This program allows litigants and their lawyers to meet with an experienced trial attorney to get an independent opinion about their case, and about likely outcomes if their case were to go to trial (to the extent this is possible in a jury trial system). Evaluators can also help the parties develop a cost–effective plan for exchanging information (or managing discovery) and handling their cases. While commercial, business, real estate, personal injury, and contract matters often benefit from this program; any case might gain from this process if there are only two or three parties, and if there are more than just legal questions to resolve. Because this program does not involve negotiation or other settlement discussions, some parties use the evaluator's recommendations to negotiate their own agreement. Others choose another ADR program (such as mediation or arbitration) to settle their cases.

(b) Selection and assignment of Neutral Case Evaluators

All parties must agree on an evaluator and complete a Selection of ADR Panel Member (Local Court Form ADR-201) within fourteen (14) calendar days of the matter being referred to Neutral Case Evaluation, unless the judge sets a different selection deadline. Parties must forward this form to the ADR Programs office. If the parties cannot agree on an evaluator, the assigned judge may appoint one. The ADR Programs office will then file and serve a Notice of Assignment on all parties and the evaluator.

(c) Neutral Case Evaluator qualifications

Evaluators are attorneys who have significant litigation experience and background in the issues involved in the case.

(d) Neutral Case Evaluation fees

The Court's neutral case evaluators shall not charge fees for the first 30 minutes of case scheduling and preparation time, or for the first two hours of evaluation conference time. If more time is needed, the parties must pay that evaluator's hourly fee for the time used.

Parties who have had their court filing fees cancelled, (waived), may ask whether the neutral case evaluator is willing to waive that party's fees. Parties are encouraged to have a written agreement with the panel member regarding fees and the management of their ADR case.

(e) Attendance at the Neutral Case Evaluation Conference

All trial lawyers, principals, clients, claims representatives, and other decision–makers shall attend the evaluation conference. Telephone standby is not permitted unless approved in advance by the assigned judge.

(f) Admissibility of Neutral Case Evaluation findings

Neutral case evaluation is not confidential unless the parties and evaluator agree otherwise, and sign an agreement to that effect.

(g) Neutral Case Evaluation statements

Parties must prepare and give information about their case to the neutral case evaluator and other parties at least five (5) court days before the evaluation hearing. Parties may use the Neutral Case Evaluator Statement (Local Court Form ADR-504) or write this information on their own paper. This form is available online at www.cc-courts.org/adrforms. This information must not be longer than five (5) pages and must include:

(1) The name and title (or relationship to the case) of all people who will attend the neutral case evaluation conference;

(2) A brief statement of the important issues in the case, and the party's views on liability and damages;

(3) The legal or factual issues to be resolved; and,

(4) Copies of any court or other documents that will help the evaluator understand the issues in dispute.

(h) Blending or changing ADR processes

The Court allows parties to engage in more than one ADR process over the life of their case, as well as to convert most ADR processes only if:

(1) All parties notify both the judicial and ADR Department as soon as is practicable of their intent to change processes, and

(2) The parties and the ADR panel member ensure there are clear distinctions made and an agreement signed regarding which ADR processes and associated rules apply to their discussions, court deadlines, and work product.

(Rule 3.204 revised effective 1/1/16)

Rule 3.205. Temporary Judge Trial - Civil Division

Applicable to Civil Cases

(not including juvenile or family law cases)

(a) Temporary Judge trials

Some parties with civil cases want to choose when their case will be tried, and so will agree to have the Court appoint a temporary judge to hear their case. (This is permitted by Article 6, Section 21 of the State Constitution and Rule 2.831 of the California Rules of Court). Except for appeals in small claims cases (may also be heard by temporary judges), or court appearances where a temporary judge has been appointed to call a particular calendar, these trials are held at a time and location that is convenient for the parties and the temporary judge. Temporary judges have nearly the same authority as a superior court judge. Except for small claims appeal cases or times when the Court appoints a temporary judge to call a particular calendar, parties choose the temporary judge from a list maintained by the ADR Programs office. Temporary judge trials are handled in the same way as other civil trials, except that the trial may not take more than five (5) court days, there is no option for a jury trial, and the temporary judge might not have assistance from a court clerk or other support staff. The parties must provide their own court reporter. The parties in a temporary judge trial can appeal the temporary judge's decision in the same way as following a trial by an assigned sitting judge. Whenever possible, each party must also:

(1) Pre–mark all exhibits; and

(2) Give the temporary judge an exhibit list, witness list, and opening statement.

(b) Qualification of Temporary Judges

Consistent with California Rules of Court, Rules 2.810 et seq., all attorneys who act as temporary judges must have been active members of the State Bar for a minimum of ten (10) years, must be active members of the State Bar at the time of appointment, must meet the initial and ongoing training requirements established by California Rules of Court, 2.812 – 15 and established court policy, and must not be the subject of any pending State Bar disciplinary proceeding. Further, all attorneys who act as temporary judges must certify that he or she has not pled guilty or no contest to a felony, or has not been convicted of a felony that has not been reversed. Retired judges need not be active members of the bar as long as they are in compliance with all requirements of the assigned judge's rules and obligations as established by the Judicial Council of California. Retired commissioners must be active members in good standing with the State Bar of California, but are exempt from the requirement to have been active with the State Bar and free of any State Bar Discipline for ten (10) years before their service as a temporary judge.

(Rule 3.205 revised effective 1/1/16)

Rule 3.206. Ethical and Practice Standards for ADR Panel Members

(a) General responsibilities

People serving on the Court's ADR Panel must be familiar with and follow all state or federal laws, California Rules of Court, Local Court Rules, and relevant professional or ADR–specific standards of practice. Further, panel members have a duty to the parties, the Court and themselves to be honest and diligent, to act in good faith, and to not advance their own interests at the parties' expense.

ADR panel members must be reasonably available to schedule ADR conferences, and must make an effort to expedite the ADR process.

(b) Neutrality

ADR panel members must be neutral and act fairly in dealing with the parties. In these rules, neutrality is defined as "freedom from favoritism or bias by appearance, word, or action, and a commitment to serve all parties as opposed to a single party." Further, the mediator may not have a personal interest in the case, and cannot show bias toward individuals and institutions involved in the dispute.

(c) Conflict of interest – definition

Conflicts of interest include (but are not limited to) personal or professional relationships with a party such as: legal representation by the panel member or his or her law firm; representation in business, real property, tax preparation, or other transactions; and, service as a consultant, advisor, therapist, or other expert. All parties should ask panel members whether there would be a conflict of interest if he or she accepted the case. All panel members must disclose any personal or professional relationships that might create a conflict of interest before accepting a case assignment. If there is an actual or perceived conflict of interest, the parties may jointly decide to continue working with that panel member, or contact the ADR Programs office to choose another panel member.

(d) Conflict of interest – duty to disclose

Per California Rules of Court, Rule 3.855, panel members have an ongoing duty to disclose actual or potential conflicts of interest. Panel members must disclose personal or professional relationships with a party including (but not limited to): legal representation by the panel member or his or her law firm; representation in business, real property, tax preparation, or other transactions; and, service as a consultant, advisor, therapist, or other expert. If there is an actual or perceived conflict of interest, the parties may jointly decide to keep working with that panel member, or contact the ADR Programs office to choose another panel member.

(e) Solicitation by panel members

Panel members must accurately state their qualifications, and must not make misleading claims about any ADR process, its costs and benefits, or its outcome. Panel members must not ask for or accept business from an ADR participant (either as a neutral,

consultant, or representative in any other professional capacity) while that ADR proceeding is pending.

(f) Confidentiality

Except as otherwise provided, panel members must treat all written and oral communications made in or during an ADR process as confidential to the extent provided by the California Evidence Code and relevant case law.

(g) Role of the panel member in settlement

Panel members should help the parties to discuss the issues in dispute, and to carefully consider any proposed settlement options. Further, the panel member must try to identify and limit inappropriate pressures to settle the case. In order to protect the neutrality of his or her role, the panel member may find it advisable, for example, to encourage parties to seek independent advice from legal or other professionals.

(h) Unrepresented interests

Panel members must consider the possibility that people not attending an ADR conference may be affected by the results. The panel member has a duty to encourage the parties to fully consider such interests, when, in his or her judgment, it is appropriate to do so.

(i) Informed consent

Panel members have an ongoing duty to ensure that all parties understand the process and procedures associated with their ADR case. Further, the panel member must make every effort to ensure that the parties understand the panel member's role, and the limits to that role, in managing the ADR process, getting expert advice, and making decisions. Panel members should always have written agreements with the parties in a particular case regarding hourly fees and the management of the ADR case.

(j) Knowledge of ADR process

A panel member must only accept responsibility for delivering ADR services when reasonably certain that he or she has sufficient knowledge, training, or other expertise to administer that process appropriately, and in a way that helps the parties to participate effectively.

(k) Pro bono contributions and fees for service

Panel members must follow the Court's policies regarding ADR services that will be provided at no cost to the parties, and ADR services that may be compensated at the panel member's normal rate. Panel members must prepare billing or invoice statements to the parties that clearly state the purpose for all fees, and reflect the required pro bono service contribution. Specifically:

(1) Panel members will provide their services at no cost to the parties or the Court when serving as a settlement mentor or as a temporary judge.

(2) Panel members will limit their fees for judicial arbitration to $150 per day or per case, and will look to the parties for payment of these fees.

(3) Panel members will provide the first thirty minutes of case preparation and scheduling, and the first two hours of mediation and neutral case evaluation conference time at no charge. If the parties request additional time, or additional time is required to provide the requested mediation or evaluation services, the panel member may, with the parties' agreement, charge their normal rates for actual time spent.

(l) Advance deposits for Mediation or Neutral Case Evaluation services

Mediators and evaluators may require the parties to pay a deposit against anticipated mediation or evaluation fees. If the panel member requests a deposit against anticipated fees, he or she may only charge the parties for actual time spent or services provided, and refund any balance due. Mediators and evaluators may not require parties to pay a non-refundable fee for a "minimum" number of mediation or evaluation hours.

(m) Complete and return all ADR forms

Panel members must complete and return, as appropriate, all local and state forms as directed by the Court or the ADR Programs office.

(Rule 3.206 revised effective 1/1/16)

Chapter 6. Discovery Motions and the Discovery Facilitator Program

Rule 3.300. Discovery Facilitator program

In an attempt to avoid protracted, costly and unnecessary discovery disputes, Civil and Probate Departments listed on the Court's website require parties to participate in the Discovery Facilitator Program ("Program") before filing all motions in Court to compel discovery, except as set forth below, or unless the Court specifically orders otherwise. This includes motions pursuant to CCP Section 1987.1.

Cases exempt from the Discovery Facilitator program

The following discovery disputes are exempt from the Program:

(a) Cases in which there has been no response to discovery requests. Motions to compel under Code of Civil Procedure, Sections 2030.290(b) or 2031.300(b) shall be filed directly with the Court. The moving party should include, "Exempt from Discovery Facilitator Program" on the Notice of Motion.

(b) Cases in which trial is less than sixty (60) days away.

(c) Motions necessitated solely by a third party's refusal to comply with a subpoena.

(d) Those disputes specifically exempted by the trial judge.

(Rule 3.300 revised effective 1/1/15)

Rule 3.301. Discovery Motions and the Discovery Facilitator Program

(a) Mandatory referral to Discovery Facilitator program

(1) Unless exempt as set forth above, any party wishing to file a Discovery Motion, must first serve a Request for Assignment of Discovery Facilitator (Local Court Form ADR-610) by fax or email on the Martinez Civil Clerk's Office of the Contra Costa County Superior Court ("Martinez Civil Clerk's Office"), Fax 925-608-2109; email: ADRdiscoveryfacilitator@contracosta.courts.ca.gov

A copy of the Request for Assignment of Discovery Facilitator shall also be served on all parties to the action.

The Request for Assignment of Discovery Facilitator (Local Court Form ADR-610) shall provide the name and the fax number and email address of the party who intends to file the Discovery Motion, of all other parties against whom the motion will be filed, and of all other parties in the action.

(2) The Request for Assignment of Discovery Facilitator (Local Court Form ADR-610) must be served on or before the last date for filing the Discovery Motion. Service of the Request for Assignment of Discovery Facilitator shall be deemed the proper filing of a Discovery Motion for purposes of the rule requiring that Discovery Motions must be filed within forty-five (45) days of service of the discovery responses.

(3) Discovery Facilitators are experienced attorneys who are volunteering their time to assist the Court in resolving these disputes. There is no cost for participation in the Program. The Court does not expect any Discovery Facilitator to spend more than 4 hours on a case. If the Discovery Facilitator estimates that a case may take more than 4 hours, he or she may decline the case by sending a completed "Notice of Termination of Appointment of Discovery Facilitator" (Local Court Form ADR-615) stating that the matter is expected to take longer than 4 hours to the Martinez Civil Clerk's Office.

(4) Cases that are exempt from the Discovery Facilitator program pursuant to Local Rule 3.301(a)(3) will be set for OSC or a Discovery Conference within sixty (60) days. The Court will preview the issues with the parties, give guidance on alternatives, encourage meaningful "meet and confer" sessions and discussion of the need to appoint a Discovery Referee. The Court may set a date for hearing on a Discovery motion, or impose issue or monetary sanctions, as appropriate.

(Rule 3.301(a) revised effective 1/1/17)

(b) Discovery Facilitators

(1) The Martinez Civil Clerk's Office shall maintain a list of Discovery Facilitators. Cases shall be assigned to Discovery Facilitators in the order in which they appear on the list.

(2) Before notifying the parties of the assignment of a Discovery Facilitator, the Martinez Civil Clerk's Office shall contact the proposed Discovery Facilitator to confirm availability and willingness to serve.

(3) Within three (3) calendar days of being contacted, the proposed Discovery Facilitator shall perform a conflict of interest check. A Discovery Facilitator shall decline the assignment if he or she knows of facts that would serve as grounds for disqualification under CCP § 170.1 if the Discovery Facilitator were a Judicial Officer. The Discovery Facilitator shall also inform the Martinez Civil Clerk's Office of any disclosures he or she deems appropriate to be forwarded to the parties.

(4) Discovery Facilitators shall have the following minimum requirements: 10 years of experience in Civil or Probate Litigation.

(c) Assignment of Discovery Facilitator

(1) The Martinez Civil Clerk's Office shall serve a Notice of Assignment of Discovery Facilitator (Local Court Form ADR-612) within ten (10) calendar days of receipt of a Request for Assignment of Discovery Facilitator.

(2) Rejection of Assigned Discovery Facilitator.

(A) Parties to the proposed motion shall have ten (10) calendar days after service of the Notice of Assignment to serve on the Martinez Civil Clerk's Office and the parties in the action a Rejection of Assigned Discovery Facilitator (Local Court Form ADR-617). If the Discovery Facilitator is rejected, a second Discovery Facilitator will be appointed. Objections to the second, or succeeding, Discovery Facilitators may only be made by ex parte application to the Court setting forth good cause for the objection. Failure to set forth good cause, may result in the imposition of monetary sanctions.

(B) If no Rejection of Assigned Discovery Facilitator is served within ten (10) calendar days of service of the original Notice of Assignment of Discovery Facilitator, the Notice of Assignment of Discovery Facilitator is confirmed.

(d) Hearing of discovery dispute

(1) The Discovery Facilitator shall hold a hearing on the discovery dispute no later than thirty (30) days after confirmation of the assignment of the Discovery Facilitator. Parties may stipulate in writing to extend the 30 day deadline or it may be extended by the Facilitator for good cause that supersedes the policy of the Program for expedited resolution.

(2) One of the purposes of this Discovery Facilitator program is to narrow the number of discovery disputes, should a hearing ever be required before a judicial officer. Another purpose is to allow for informal resolution of discovery disputes at a lower cost to the parties than they would otherwise incur. Therefore, the format of briefing done for a hearing before a Discovery Facilitator should be brief, practical, and informal. Within these guidelines, the Discovery Facilitator has the discretion to determine the format of briefing required or whether any briefing will be required, and the schedule for service of such briefing. The Discovery Facilitator shall also have discretion to determine the structure of the hearing, including appearances by telephone or video.

(3) If the Discovery Facilitator determines that the hearing cannot be scheduled or completed within thirty (30) days of the date of confirmation of the assignment of the Discovery Facilitator because of conduct of one of the parties, the Discovery Facilitator shall issue a Finding of Non-Compliance, specifying the party and/or attorney responsible. In the event a formal Discovery Motion is subsequently filed, the moving party shall attach a copy of the Finding of Noncompliance to its papers as an exhibit and may submit a brief, factual, non-argumentative recitation of the facts regarding the non-compliance. The policy of the court will be to award monetary sanctions against the party responsible for the Discovery Facilitator's inability to schedule or complete the hearing within thirty (30) days, regardless of the outcome on the merits of the motion. In the case of represented parties, the monetary sanction shall be assessed against the attorney and/or the party.

(4) The Discovery Facilitator program is not a mediation program. The Discovery Facilitators are not mediators, and the proceedings under this Program are not subject to mediation confidentiality rules. While the Facilitator may encourage compromises in discussion at or before the hearing in order to narrow or settle disputes, Discovery Facilitators should not simply try to produce a compromise at any cost. In making his or her recommendations, the Discovery Facilitator will give an opinion on the merits of the dispute in a manner that he or she believes is consistent with applicable law.

(5) If the discovery dispute is completely resolved at or before the hearing, the parties will confirm the terms of the resolution in writing, and the appointment of the Discovery Facilitator will terminate automatically, unless the Discovery Facilitator and the parties agree that the Facilitator will continue to serve.

(6) If the discovery dispute is not completely resolved at the hearing, the Discovery Facilitator shall, within ten (10) days of the completion of the hearing, serve a document on the parties entitled “Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator” (Local Court Form ADR-616). The Recommendation may be on the merits of the motion, may be a recommendation that the matter be referred to the assigned judge for decision, may be that the parties are ordered to meet and confer and to provide a report to the Court of the results of such meeting and the matters that remain in dispute, or that a formal Discovery Referee be appointed. The Discovery Facilitator may

require the substantially prevailing party to do the initial draft of the recommendations. If so, this initial draft shall not be required to be sent to the opposing party for approval as to form, but rather will be sent directly to the Discovery Facilitator.

(7) If service of the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator does not resolve the dispute, the moving party shall have thirty (30) days from the service of the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator to file with the clerk of the court and serve on the parties a formal Discovery Motion. Those moving papers shall include, as the first exhibit, a declaration that the parties have completed the Discovery Facilitator Program and shall attach the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator as part of the exhibit.

(8) If for any reason the Discovery Facilitator fails to serve the Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator, the moving party shall have forty (40) days from the completion of the discovery hearing to file formal Discovery Motion papers regarding the discovery dispute, which papers shall include, as the first exhibit, a declaration regarding the failure of the Facilitator to serve the Notice.

(9) The court will consider the Recommendations of the Discovery Facilitator in deciding the merits of the motion. The purpose of this Discovery Facilitator program is to facilitate discovery and the resolution of discovery disputes without, or with minimal, court supervision, given current budgetary restraints on the court.

The policy of the court will be to award monetary sanctions in favor of any party who substantially prevails on a Discovery Motion that is subject to the Discovery Facilitator program.

(e) Urgent discovery motions

(1) A party may present an ex parte application to the Court to shorten all time frames set forth in this Rule, or to exempt the dispute from the Program, upon a showing of good cause.

(f) Compensation of Discovery Facilitators

(1) Recognizing the importance of the principle of maintaining access to justice, and the fact that there is only a nominal fee for filing a Discovery Motion to be heard before a judicial officer, Discovery Facilitators shall serve without any monetary compensation. The parties to the discovery dispute are counseled to bear in mind that the Discovery Facilitators are donating their time and grant them the courtesy and respect the parties would grant to a judicial officer, and minimize the paperwork that they serve on the Discovery Facilitators.

(2) If the parties choose to use the services of the Discovery Facilitator after completion of the assignment, compensation shall be pursuant to agreement of the Facilitator and the parties, which agreement should be confirmed in writing.

(3) The policy of the Program is that a Discovery Facilitator will handle only one Assignment per case without compensation. If there is more than one Request for Assignment of Discovery Facilitator in a case, the parties may use the Facilitator for the second Assignment if an agreement is reached for compensation of the Facilitator. Otherwise, the second Request for Assignment of Discovery Facilitator will be assigned to a different Discovery Facilitator.

(g) Forms used in Discovery Facilitator program

Request for Assignment of Discovery Facilitator
Local Court Form (ADR-610)

Notice of Assignment of Discovery Facilitator
(Local Court Form ADR-612)

Finding of Non-Compliance
Local Court Form (ADR-614)

Notice of Termination of Appointment of Discovery Facilitator
Local Court Form (ADR-615)

Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator
Local Court Form (ADR-616)

Rejection of Assigned Discovery Facilitator
Local Court Form (ADR-617)

Notice to Deponent and Deposition Officer of Assignment to Discovery Facilitator Program and Stay of Records Production Date
Local Court Form (ADR-618)

(Rule 3.301 revised effective 1/1/17)

Title Four. Criminal Rules

Division I. Criminal

Chapter 1. Criminal Department

Rule 4.1. Motions

(a) Motions procedures

(1) Length

(A) A memorandum of points and authorities filed in support of or opposition to a motion and produced on a computer must not exceed 4,200 words, including footnotes. Such a memorandum must include a certificate by submitting counsel or an unrepresented party stating the number of words in the memorandum. The person certifying may rely on the word count of the program used to prepare the memorandum.

(B) A memorandum of points and authorities prepared on a typewriter must not exceed 15 pages.

(C) The limitations above do not include the caption of the case, the signature block, the word count certification, or any exhibits.

(D) On application, a judge may authorize filing of a longer memorandum. Except as otherwise ordered, any memorandum submitted in violation of this rule will not be considered.

(2) Consequences for Failure to Comply with Motions rules.

(A) The failure to comply with the rules governing motions may result in the imposition of monetary sanctions.

(B) If any motion subject to this rule is not made or heard within the time limits and pursuant to the requirements of this rule, the failure to do so shall constitute a waiver of the right to make the motion. The Court, for good cause shown, may grant relief from the waiver.

(C) The failure to file any response within the time limits and pursuant to this rule shall constitute a waiver of the right to make a response, but the Court, for good cause shown, may grant relief from the waiver.

(b) Pre-trial motions.

(1) The following motions shall be filed and heard before trial:

(A) Demurrer to the complaint, indictment or information where the Court authorizes filing after the entry of plea or where a demurrer is filed before entry of plea;

(B) Motion to dismiss complaint, indictment or information (e.g. Penal Code Section 995 or non-statutory motions to dismiss);

(C) Motion under Penal Code Section 1538.5 and other motions to suppress evidence or for return of property unlawfully seized;

(D) Motion for discovery, including discovery relating to informants claimed to be material witnesses;

(E) Motion to compel lineup;

(F) Motion to sever or consolidate cases, counts or defendants, if the parties stipulate that the ruling shall be binding on the trial department;

(G) Any speedy trial motion where grounds exist at the time set herein for notice;

(H) Motion to challenge the jury selection system;

(I) Motion to reinstate complaint;

(J) Motion to strike or attack the constitutional validity of prior convictions, enhancements or probation;

(K) Motion to dismiss or for other relief for vindictive prosecution or outrageous government conduct;

(L) Motion to recuse;

(M) Faretta motion;

(N) Motion to appoint advisory counsel;

(O) Motion to appoint second counsel in capital case;

(P) Motion to disclose surveillance action; and

(Q) Any other motion that does not require for its resolution a ruling on admissibility of evidence at trial or is not otherwise a common law in limine trial motion.

(c) Time and place for notice and hearing of pre-trial motions, and rules for filing and service.

(1) Unless otherwise ordered, all motions and proofs of service shall be filed and served in accordance with the time limitations set forth in California Rules of Court, Rule 4.111 and Penal Code Section 1538.5, and shall be set for hearing in the Criminal Department of the appropriate court.

(2) The Court, for good cause or upon the stipulation of the parties with court approval, may permit motions to be heard at the time of trial.

(3) All pleadings filed in connection with Pre-Trial motions shall be filed in the courthouse where the case is pending at the time the motion is filed. All pleadings shall be served on opposing counsel in his or her regularly assigned office by the most expeditious means available. If the identity of opposing counsel is not known when the pleading is filed, the following service rules shall apply: (1) if the case is being handled by a special unit, the pleading shall be served on the office of the special unit assigned to the case; (2) in all other cases, the pleading shall be served on the office of the opposing party closest to the courthouse in which the case is pending.

(4) In felony cases, any party filing a pleading in connection with a substantive Pre-Trial motion shall simultaneously serve the Court's Research Attorneys. Pleadings and exhibits in connection with felony motions shall be served on the Research Attorneys by email at the following address: ratts@contracosta.courts.ca.gov.

(5) If a felony motion is to be continued or dropped from calendar, counsel for the moving party shall promptly notify the Court's Research Attorneys by email and the Research Attorneys will notify the Judge. If the party opposing a motion is unable to file pleadings at least five (5) court days before the time scheduled for the hearing as required by California Rules of Court, Rule 4.111, or as otherwise required by law, counsel shall notify the Court's Research Attorneys by email.

(6) All papers shall contain in the upper right-hand corner of the first page, the filing party's estimate of the overall time required for the hearing of the matter, date and department number of the hearing, and a request for a removal order if a defendant or necessary witness is in custody outside the Contra Costa County Jail.

(d) General procedures for pre-trial motions:

(1) A failure of the moving party to appear when the matter is called may, in the Court's discretion, cause the matter to be ordered off calendar. In the event of an unavoidable schedule conflict, the attorney with the conflict can avoid having the matter dropped by calling the Court and also notifying opposing counsel before the scheduled hearing and reporting the conflict.

(2) A motion that has been duly filed may be dropped from calendar up to forty-eight (48) hours before the appearance date by notifying opposing counsel and the Court. Within forty-eight (48) hours of the date set for hearing, the moving party shall appear unless excused by the Court.

(3) No matters will be continued, even by stipulation of the parties, except with the approval of the Court for good cause shown. Compliance with Penal Code Section 1050 is required unless excused by the Court.

(4) Motions and opposition to such motions shall specifically set forth any evidence, theories of law and authorities relied on in support or opposition to said motions. Checklist or "boilerplate" motions will not be considered and may, in the discretion of the court, cause the matter to be dropped from the calendar.

(e) Motions to be heard by the trial judge.

Except as otherwise ordered, motions not enumerated above as Pre-Trial motions shall be heard by the Trial Judge. Counsel in cases pre-assigned to a trial department shall submit to the Trial Judge all such motions within three (3) court days before the date set for trial.

(f) Ex parte applications.

(1) All ex parte applications for orders shortening or extending time shall be presented in the Criminal Department to which the motion has or will be assigned, with at least twenty-four (24) hours' notice to the opposing party or counsel. Such applications shall include a written or oral supporting declaration, stating whether that party has been contacted and has agreed to the requested order or why the ex parte order should be issued.

(2) Except by order of the Court, upon a showing of good cause, all ex parte applications seeking to set a matter on shortened time shall provide for moving papers to be filed and personally served at least five (5) calendar days and for opposing papers to be filed and served at least two (2) calendar days before the hearing date. All papers, including opposition and reply papers, filed in motions brought on an order shortening time, shall be accompanied by a copy of the proposed order.

(3) Any request for relief from operation of these rules shall be made to the Court, with a showing of good cause, before the papers are filed.

(g) Motion to withdraw as counsel

An attorney who is appointed or retained to represent a client in a criminal proceeding shall not withdraw from such representation except by filing a substitution of attorney bearing the written consent of the defendant or upon a timely motion and order of the court.

(Rule 4.1 revised effective 1/1/16)

Rule 4.2. Discovery.

Any party asserting a work product or other privilege exception pursuant to Penal Code Section 1054.6 or asserting a discovery exception based upon a showing of good cause pursuant to Penal Code Section 1054.7 shall proceed by noticed motion which shall be heard before the first readiness conference.

(Rule 4.2 revised effective 1/1/16)

Rule 4.3. Applications on Behalf of Inmates.

(a) Application to the Sheriff

Except as otherwise stated in this rule, applications by or on behalf of inmates confined in the county jail, for temporary release from custody, for medical, family emergency, education, employment, and related purposes (i.e. requests for "passes") shall be made to the Sheriff and not to the Court.

(b) Application to the judge of the felony calendar

The following applications shall be made to the judge of the Felony Calendar Department: those made pursuant to Sections 4011, 4011.6 and 4011.8 of the Penal Code.

(c) The Court's power to determine condition of confinement

Nothing in this rule shall affect the Court's power and duty to make proper determinations and orders with respect to allegedly unlawful conditions of confinement in the county jail in a justiciable controversy properly before the Court in connection with a proper petition for writ of habeas corpus, application for modification of probation, or other similar pleading.

(Rule 4.3 revised effective 1/1/15)

Rule 4.4. Violations of Probation.

(a) Notification by Probation Officer

In all cases involving persons on probation, the Probation Officer shall promptly notify the Criminal Calendar Department responsible for monitoring that probationer of every violation of law (other than minor traffic offenses) that the Probation Officer reasonably believes the probationer has committed.

(b) Where probation violations are heard

Probation violation hearings in felony cases shall be held in the Criminal Department that presides over the felony probation calendar. Probation violation hearings in misdemeanor cases that originally arose in the Richmond and Pittsburg branch courts shall be held in the branch court in which the underlying case arose, in a department designated by that branch court's Supervising Judge. Probation violation hearings of misdemeanor cases that originally arose in the Walnut Creek or Concord/Mt. Diablo branch courts shall be held in Martinez in a department designated by the Presiding Judge.

(Rule 4.4 revised effective 1/1/15)

Rule 4.5. Disposition of Cases Other than by Trial or Hearing.

The disposition of cases other than by trial or hearing may be discussed only with the judge to whom the Pre-Trial, readiness conference, or probation revocation matter, has been assigned.

(Rule 4.5 revised effective 1/1/15)

Rule 4.6. Relief from Forfeiture of Bail in Misdemeanor and Felony Cases.

(a) Bench warrants upon forfeiture of bail

(1) When a bailed defendant fails to appear, unless personal appearance has been excused under Penal Code Section 977, or unless the Court grants a continuance under Penal Code Section 1305.1, bail shall immediately be forfeited and a bench warrant shall be issued. The bench warrant shall require bail in an amount not less than the amount of the forfeited bond, and not less than the minimum amount required for entry into automated warrant index systems. Each warrant shall contain a notice to the following effect: “Do Not Cite Release -- Bail in Forfeiture”.

(2) If counsel appears for a bailed defendant whose personal appearance is desired by the Court, and asserts that the defendant’s personal appearance is excused under Penal Code Section 977, the Court shall order the defendant to personally appear at a specific date, time and place, pursuant to Penal Code Section 978.5(a)(1). If the defendant does not then appear, bail forfeiture and bench warrant shall be ordered.

(3) If counsel or the defendant provides the Court with sufficient grounds for a finding that the non-appearance may be excused under Penal Code Section 1305.1, the Court shall enter in the record any such finding and may order a reasonable continuance without immediate forfeiture of bail.

(b) Setting aside forfeiture upon appearance of defendant

(1) An order of bail forfeiture shall be vacated on the Court‘s motion if the defendant personally appears before the end of the 180-day period defined in Penal Code Section 1305. Appearance may be by means of arrest on the bench warrant, “voluntary” or “add-on” appearance, surrender by the bail agent, or other means (e.g., a dismissal of the case).

(2) If the defendant appears on a new or separate matter and the defendant or bail agent advised the Court of the forfeited bond, the Court may, in its discretion, address the bail forfeiture issue on the case in which a bench warrant remains outstanding. The Court does not assume responsibility for identifying a defendant’s pending cases involving forfeiture or initiating service of warrants.

(3) Relief from bail forfeiture without the personal appearance of the defendant will be considered only upon a timely written motion by the bail agent or surety, stating the specific grounds upon which relief is sought, with not less than ten (10) calendar days’ notice to both the District Attorney and the County Counsel. A motion for exoneration of forfeited bail will be treated as a motion for a tolling of the 180-day period if the grounds asserted are those of temporary disability, as described in Penal Code Section 1305(e). Repetitive, groundless or otherwise frivolous motions may result in the imposition of sanctions.

(4) When the People request dismissal of a case in which bail is in forfeiture, the Court may, on its own motion, waive the defendant's personal appearance and may order forfeiture relief and bail exoneration.

(c) Reinstatement and continuance of bail

After Notice of Forfeiture has been mailed by the clerk, a defendant may be continued on a reinstated bond only with the consent of the bail agent. Consent to reinstatement and continuation of a forfeited bond may be given through personal appearance by the bail agent or in writing, or to a member of the court's staff by telephone. The Clerk's Minute Order shall identify the person giving consent to continuation of the bond, and the method of communicating it.

(d) Exoneration of bail after forfeiture

When an order of bail forfeiture has been vacated on a bond that is not to be continued, the Court may, on its own motion and in its discretion, order bail exoneration without the necessity of a motion or appearance by the bail agent.

(e) Cost assessment as condition of forfeiture relief

(1) Unless the Court orders otherwise, in its discretion in the interests of justice, any order setting aside a bail bond forfeiture shall be conditioned on the timely payment by the bail agent or surety of an assessment of costs. Written notice of the cost assessment shall be mailed by the clerk to the parties to whom the Notice of Forfeiture was sent, as required by Penal Code Section 1305.2.

(2) For bail posted after the effective date of this Rule, the following levels of cost assessment shall be "just terms" under Penal Code Section 1306(b): When the defendant's appearance is a result of arrest on the bench warrant issued upon bail forfeiture, the assessment is $100.00 per bond; when the defendant's appearance is not a result of bench warrant arrest, the assessment is $75.00 per bond.

(3) The Court may, in its discretion, order larger assessments, following notice, in cases where criminal justice agencies have incurred extraordinary expenses in returning a defendant to court jurisdiction.

(4) The Court may, in its discretion, waive imposition of assessments in cases in which the defendant appears and shows the Court that the defendant was, at the time of the order of forfeiture, either in custody in this county or personally appearing in another court.

(5) The Court may, in its discretion, waive the imposition of cost assessments on a case-by-case basis in the interest of justice.

(e) Cost assessment as condition of forfeiture relief

(1) Unless the Court orders otherwise, in its discretion in the interests of justice, any order setting aside a bail bond forfeiture shall be conditioned on the timely payment by the bail agent or surety of an assessment of costs. Written notice of the cost

assessment shall be mailed by the clerk to the parties to whom the Notice of Forfeiture was sent, as required by Penal Code Section 1305.2.

(2) For bail posted after the effective date of this Rule, the following levels of cost assessment shall be "just terms" under Penal Code Section 1306(b): When the defendant's appearance is a result of arrest on the bench warrant issued upon bail forfeiture, the assessment is $100.00 per bond; when the defendant's appearance is not a result of bench warrant arrest, the assessment is $75.00 per bond.

(3) The Court may, in its discretion, order larger assessments, following notice, in cases where criminal justice agencies have incurred extraordinary expenses in returning a defendant to court jurisdiction.

(4) The Court may, in its discretion, waive imposition of assessments in cases in which the defendant appears and shows the Court that the defendant was, at the time of the order of forfeiture, either in custody in this county or personally appearing in another court.

(5) The Court may, in its discretion, waive the imposition of cost assessments on a case-by-case basis in the interest of justice.

(Rule 4.6 revised effective 1/1/16)

Rule 4.7. Submitting Sensitive Exhibits.

All controlled substances, guns, money, valuables, and other sensitive exhibits shall be packaged and stored separately from other exhibits. Sharp objects such as knives, needles and glass shall be specially wrapped and labeled for the handler's protection. (For instance, a syringe shall be packaged by the police agency in a plastic tube). Any party submitting such items, and anyone arranging transfer of such items, shall notify the exhibits clerk or the courtroom clerk of these objects and about any dangers associated with them.

(Rule 4.7 revised effective 1/1/15)

Division 2. Infractions

Chapter 1. Infraction Rules

Rule 4.40. Filing.

The Clerk's Office of the Contra Costa County Superior Court, Traffic Division shall be responsible for processing all adult and juvenile traffic infractions and non-traffic infractions. No misdemeanors shall be filed in the Traffic Division in the Pittsburg, Richmond, and Walnut Creek courthouses.

(Rule 4.40 revised effective 1/1/15)

Rule 4.41. Court Sessions.

Regular court sessions for citations and complaints filed in the Traffic Division for both adult and juvenile matters shall be scheduled as required by the Presiding Judge and published by the Court Executive Officer.

(Rule 4.41 revised effective 1/1/15)

Rule 4.42. Arraignments.

Except for offenses mandating a court appearance, a defendant may waive his/her right to be arraigned on the violation and enter a plea of not guilty at the court counter. The Clerk will assign a trial date within the statutory time requirements of Penal Code §1382, unless the defendant waives that right on the form provided by the Clerk.

(Rule 4.42 revised effective 1/1/15)

Rule 4.43. Continuances.

Except for continuance of a trial date, on or before the date set or required in any matter, the Clerk shall have the authority to grant the defendant one extension of not more than thirty (30) calendar days.

(Rule 4.43 revised effective 1/1/15)

Rule 4.44. Trial Continuances.

When a case has been set for a contested court trial, each side shall be entitled to one continuance of the trial date provided the request is received by the Traffic Division not fewer than twenty (20) calendar days before the assigned date of trial. This request must be received in writing.

(Rule 4.44 revised effective 1/1/16)

Rule 4.45. Juvenile Traffic Infraction Matters.

All juvenile traffic citation matters will be required for a mandatory appearance pursuant to W&I Code 853.6 and 853.6(a). These citation will not be subject to civil assessment pursuant to Penal Code § 1214.1.

(Rule 4.45 revised effective 1/1/15)

Chapter 2. Adjudication of Infraction Matters

Rule 4.60. Trial by Declaration for Traffic Infractions.

(a) Trial by Declaration in traffic infractions

The Court adopts the trial by declaration process defined in Vehicle Code § 40902.

(b) Failure to appear or untimely request for action

Additionally, pursuant to Vehicle Code § 40903, any person who fails to appear as provided by law may be deemed to have elected to have a trial by written declaration upon any alleged infraction, as charged by the citing officer, involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the vehicle code. If there is no timely request for action and the fines and fees are not paid by the due date, the case will proceed to civil assessment pursuant to Penal Code § 1214.1. Additionally, the Department of Motor Vehicles (DMV) may be notified of the failure to appear pursuant to Vehicle Code § 40509.5(b), which can result in a suspension of the defendant's driver's license pursuant to Vehicle Code § 13365(a)(2) until all obligations to the Court are satisfied.

(c) Adjudication pursuant to CVC 40500

In eligible cases the Court will conduct the trial by declaration and it will be adjudicated on the basis of the notice to appear issued pursuant to Vehicle Code § 40500. Once adjudicated, the suspension of the defendant's license will be lifted by the Court to DMV.

(d) Disposition with guilty finding or untimely request for a trial de novo

If there is a guilty finding, the conviction shall be reported to the DMV and the defendant notified of the disposition of the case, the amount of imposed fines, and fees, and the defendant's right to request a trial de novo within a specified period of time. If there is no timely request for a trial de novo and the fines and fees are not paid by the due date, the case will proceed to civil assessment pursuant to Penal Code § 1214.1. Additionally, the DMV will be notified of the failure to pay pursuant to Vehicle Code § 40509.5(b), which can result in a suspension of the defendant's driver's license pursuant to Vehicle Code § 13365(a)(2) until all obligations to the Court are satisfied.

(Rule 4.60 revised effective 1/1/15)

Rule 4.61. Clerks' Authority in Infraction Cases.

For cases that have not been transferred to court collections, deputy clerks are granted the authority to take the following actions at the request of defendants charged with infraction violations:

(1) Accept not guilty plea and schedule court trial.

(2) Accept the posting and forfeiting of bail on infraction cases.

(3) Set trial de novo (must post full bail with cash or certified funds only).

(4) Accept cash, check, credit payment, certified fund if case is in court control.

(5) Accept cash payment if case is with AllianceOne of at least 10 percent of the total bail amount for each infraction violation of the vehicle code.

(6) Accept not guilty plea forms and set cases for hearing (also see Local Rule 4.80, below).

(7) Schedule same day arraignment calendar.

(8) Accept proof of correction for correctable violations with a $25 proof fee.

(9) Give one time 30 traffic school extension.

(10) Give one time 30 day first appearance extension.

(11) Issue subpoenas for case that have a court trial set.

(Rule 4.61 revised effective 1/1/15)

Rule 4.62. Prohibited Requests in Traffic Matters.

The Court will not grant, or authorize deputy clerks to grant, any of the following requests from defendants or their counsel:

(1) For the scheduling of a court arraignment or trial after the finding defined in Vehicle Code § 40902.

(2) Reset of court trial that is not within twenty (20) calendar days before the hearing date.

(3) Reduction in bail, fines and fees, or community service work hours.

(4) Remand to county jail in lieu of payment of bail or fines and fees.

(5) To grant subsequent extension, following an initial 30-day extension, of time to pay or to provide proof of completion of community service work or traffic violator school or to provide proof of correction of correctable offense(s).

(6) To grant community service work following defendant's failure to appear for a contested traffic trial, where the case has been sentenced in absentia.

(7) To grant community services for civil assessments.

(8) To grant out of state community service work.

(Rule 4.62 revised effective 1/1/16)

Rule 4.63. Civil Assessments in Traffic Matters.

(a) Imposition of Civil Assessment

A Civil Assessment in the statutorily accepted amount is imposed against anyone who does not appear (Failure To Appear - FTA) in court and/or pay a court-ordered fine by the due date (Failure To Pay - FTP). The Civil Assessment is added to and is separate from, any fine and fees connected with your case. You must pay the Civil Assessment even if you are not found guilty on the traffic citation.

(b) Procedure to request removal of Civil Assessment

Complete the Defendant's Request and Declaration to Vacate Civil Assessment form (Local Court Form TR-121) which can be found at www.cc-courts.org/forms. Provide a written explanation of the reason you did not appear in court and did not pay and attach

supporting documentation. If you do not attach documentation, your application will not be processed and all documentation will be returned.

(Rule 4.63 revised effective 1/1/16)

Rule 4.64. Appeals.

(a) The process for filing an appeal in an Infraction case

An appeal is taken by filing with the Clerk in the Traffic Division a written notice of appeal signed by appellant or appellant's attorney. The notice shall be filed within thirty (30) calendar days of pronouncement of judgment or mailing by the clerk of the Notice of Judgment. Any Notice received after the expiration of the time prescribed shall be marked by the Clerk "received (date) but not filed," and the Clerk shall advise the party seeking to file the notice that it was received but not filed because the period for filing had elapsed.

(b) The record on appeal for Infraction cases

The Appellate Division elects to authorize the use of the original court file in lieu of a clerk's transcript as the record on appeal, pursuant to California Rules of Court, Rules 8.910(a)(1)(B) and 8.914.

(c) Authorization to use official electronic recording where available in Infraction cases

The Appellate Division elects to authorize the use of an official electronic recording, where available, as the record of the oral proceeding instead of obtaining a corrected statement on appeal from the judicial officer who presided over the proceeding before the Appellate Division, pursuant to California Rules of Court, Rule 8.916(d)(6)(A).

(Rule 4.64 revised effective 1/1/16)

Chapter 3. Collections Program for Traffic Infraction Cases

Rule 4.80. Enhanced Court Collections Program.

(a) Collection fee when defendant pleads guilty before Failure to Appear

If the Defendant would like to plead guilty to the citation during the sixty (60) calendar days before the scheduled court hearing, the defendant will be referred to AllianceOne. The defendant must pay a $30 non-refundable administration fee, and must pay imposed fines and fees within sixty (60) days. Should the defendant require longer than sixty (60) days to pay, they must pay an additional $20 non-refundable accounts receivable fee.

(b) Collection efforts for delinquent cases

At the time the Court determines that a defendant is delinquent in making payments for fines, fees, penalty assessments and surcharges, the Court will deem the case delinquent. Upon such determination, AllianceOne will contact the defendant to determine how the

unpaid court-ordered debt will be paid. The Court will utilize all available collection methods to resolve these unpaid debts, including skip tracing, referral to the Franchise Tax Board Court Ordered Debt Program for possible wage garnishment, and levy of personal property.

(Rule 4.80 revised effective 1/1/16)

Rule 4.81. Application of Overpayment.

Whenever the Court receives an overpayment for an infraction case and the Court determines that the defendant is delinquent on another felony, misdemeanor or infraction case, the Court will apply the overpayment to that case.

(Rule 4.81 revised effective 1/1/15)

Title Five. Family and Juvenile Rules

Division 1. Family Law Matters

Chapter 1. Family Law Department

Rule 5.0. Definitions and Self-Represented Litigants

(a) Definitions

(1) California Rules of Court (Family Rules) may be referred to as “CRC’s”.

(2) Local Rules shall be referred to as “Local Rule”.

(3) Department of Child Support Services shall be referred to as “DCSS”.

(4) Family Court Services shall be referred to as “FCS”.

(5) Income and Expense Declaration (Judicial Council Form FL-150) may be referred to as “I&E”.

(b) Self-represented litigants

Attorneys and self-represented litigants (also known as pro per litigants) shall comply with all applicable statutes in addition to these local family law rules and the California Rules of Court. Where these rules refer to Superior Court forms, the equivalent Judicial Council forms shall also be accepted.

Self-represented litigants shall be treated in the same manner as if represented by counsel and shall be held to the same standards. All references to counsel in these rules apply equally to self-represented litigants.

(Rule 5.0 revised effective 1/1/15)

Rule 5.1. Assignment of Departments and Matters

(a) Assignment of departments

(1) The Court designates four or more full-time departments and additional part-time departments (as resources allow) to serve as the Family Law Division of the Court. The Presiding Judge shall make the assignment of departments to the Family Law Division and the designation of one of the judges as the Supervising Judge of the division.

(Rule 5.1(a)(1) revised effective 1/1/14)

(2) One of the designated departments will operate under the authority of AB 1058 (Stat. 1996, ch. 957). This department will hear all issues described in Family Code Section 14700, whether or not the action was initially filed by the Department of Child Support Services (DCSS). Absent stipulation or other court order providing that this department will also hear any other issues arising in such case (whether or not filed by DCSS) such other issues will be heard in the department to which such action would be assigned if DCSS were not involved in the case.

(3) The remaining departments will hear all matters filed pursuant to the California Family Code under a direct calendar system. Cases will be assigned to departments, utilizing a plan of assignment which the Supervising Judge of the Family Law Division devises from time to time. These case assignments are deemed "all-purpose" assignments under Code of Civil Procedure Section 170.6(a)(2).

All matters shall be initially calendared in the appropriate department based on the "all purpose" assignment. Except in the case of a matter that has shortened time, the initial hearing date shall be assigned by the Clerk's Office at the time the matter is filed.

(Rule 5.1(a)(3) revised effective 1/1/15)

(4) When there is more than one case filed with respect to a given family, the bench officer hearing a matter in one of those cases may order the cases consolidated or coordinated.

(Rule 5.1(a)(4) revised effective 1/1/17)

(5) Applications for Temporary Restraining Orders and for Restraining Orders After Hearing filed pursuant to the Domestic Violence Prevention Act (Family Code Division 10) may be heard in departments located in designated branch courts. Applications for Temporary Restraining Orders and for Restraining Orders After Hearing shall be filed as set forth in Local Rule 5.2.

(Rule 5.1(a)(5) revised effective 1/1/17)

(6) All Custody Order-Juvenile-Final Judgment-Visitation Order-Juvenile" (Judicial Council Form JV-200/JV-205) containing custody and visitation orders, shall be filed in existing family law cases or, if no case exists, a new file will be opened. If

a new file is opened and either parent files a Request for Order to modify custody or visitation, the initial moving party shall be designated the Petitioner and the responding party shall be designated the Respondent thereafter. If the "Custody Order-Juvenile-Final Judgment/Visitation Order-Juvenile" of the Juvenile Court contains an order described in Local Rule 5.66, then any Request for Order to modify custody or visitation filed within one year of the Juvenile Court's "Custody Order-Juvenile-Final Judgment/Visitation Order-Juvenile" shall be heard as provided in Local Rule 5.65(c).

(Rule 5.1(a)(6) revised effective 1/1/17)

(b) Assignment of matters

(1) The following matters shall be heard in the Family Law Division:

(A) All matters filed under the Family Code except (unless assigned by the Presiding Judge) those actions filed under:

i. Family Code Division 11

ii. Family Code Division 12, Parts 4, 5, and 6, and

iii. Division 13

(B) All other matters assigned by the Presiding Judge.

(C) All other matters which are properly brought before a Family Law bench officer pursuant to an order of the Court.

(Rule 5.1(b) revised effective 1/1/00)

(c) Collaborative law

(1) Collaborative Law Defined

(A) The Court recognizes the unique nature of family law disputes and the fact that family law issues are best resolved by the parties reaching an agreement or agreements over critical matters including child custody, support and property, without engaging in the traditional adversarial litigation process. The Contra Costa County Superior Court strongly supports the use of the collaborative law process as well as other alternate dispute resolution tools for the purpose of developing both short-term and long-term agreements that meet the best interests of the entire family, particularly the children.

(2) Standards of Collaborative Law Cases

(A) No case will be entitled to a designation as a "collaborative law" case unless the parties have signed and filed a collaborative law stipulation.

(B) When a case is designated as a "collaborative law" case, the Court shall vacate all matters previously set on the Court's calendar and shall set the

matter for a Case Management Conference no later than one year from the date of the designation.

(C) The term "Collaborative Law Case" is to be included in the caption of any document filed with the Court from and after the filing of the collaborative law stipulation and order.

(D) As to any case designated as a collaborative law case:

(i) The Court will consider collaborative law counsel to be advisory and not attorneys of record.

(ii) The Court will not impose discovery deadlines or enter scheduling orders.

(E) The designation of a case as a collaborative law case is voluntary and requires the agreement of all parties. The collaborative law case designation will be removed by stipulation or upon the filing and service of a termination election as provided in the collaborative law stipulation and order. The filing by any party of a Request for Case Management, Request for Order, or other pleading requiring judicial adjudication shall automatically terminate the collaborative law case designation and a Case Management Conference will be set.

(Rule 5.1(c)(2)(E) revised effective 1/1/17)

(F) Collaborative law cases are governed by the Family Code, the California Rules of Court and other applicable California law.

(Rule 5.1 revised effective 1/1/17)

Rule 5.2. Obtaining Temporary Restraining Orders /Ex Parte Orders

(a) Application

Requests for Temporary Restraining Orders, Ex Parte Orders, and Emergency Orders shall be presented to the family law Legal Technician's Unit. The Legal Technician's Unit will assign the matter utilizing a plan of assignment as determined by the Supervising Judge of the Family Law Division.

With the exception of applications for restraining orders filed under the Domestic Violence Prevention Act (DVPA), all applications must be submitted with the appropriate fee or fee waiver, and the original and two (2) copies of the application. The Court will file all applications submitted (including applications pertaining to domestic violence) whether or not temporary orders are issued.

Applications for a Domestic Violence Restraining Order and Responses to an Application for a Domestic Violence Restraining Order may be saved and submitted electronically by completing the questionnaire found on the Court's website. When submitting an electronic Application or Response, parties shall comply with California Rule of Court 2.257

regarding statements under penalty of perjury and shall print and sign a copy of their Application or Response prior to submitting this document to the Court. Parties shall bring the original, signed, Application or Response with all attachments to the first hearing on the case, at which time they shall produce it for inspection by the Court and all parties upon request.

(Rule 5.2(a) revised effective 1/1/17)

(b) Notice

Except as provided in Family Code Section 6300, unless notice of the application for an ex parte order (including an application for an order shortening time) or a Temporary Restraining Order would result in great or irreparable injury to the applicant before the matter can be heard on notice, the other party must be given the notice required by the California Rules of Court. Parties and attorneys shall use the Declaration Re Notice Upon Ex Parte Application for Orders (Local Form FamLaw-107).

(Rule 5.2(b) revised effective 1/1/17)

(c) Requirements

Applications for ex parte orders must comply with California Rules of Court (Family Law Rules).

(Rule 5.2(c) revised effective 1/1/13)

(d) Minor applicants

If the applicant for Temporary Restraining Orders is a minor under 12 years of age an application for appointment of Guardian Ad Litem and order appointing a Guardian Ad Litem shall accompany the application.

(Rule 5.2(d) revised effective 1/1/14)

(Rule 5.2 revised effective 1/1/17)

Rule 5.3. Orders Shortening Time (OST)

All applications for Orders Shortening Time (OST) for service or for hearing shall be presented as ex parte applications to the family law Legal Technician's Unit. The Legal Technician's Unit will assign the matter utilizing a plan of assignment which the Supervising Judge of the Family Law Division will determine.

All ex parte applications for an OST shall be submitted in compliance with the application and notice requirements for ex parte applications as set forth in Local Court Rule 5.2. Before submitting an application for an OST, the applicant shall contact the opposing counsel or party and request a list of dates counsel or party is unavailable and include that information with his/her own unavailability on the declaration of notice.

(Rule 5.3 revised effective 1/1/17)

Rule 5.4. Hearings

(a) Duty to meet and confer

Except in cases involving domestic violence, and consistent with the California Rules of Court, **BEFORE** the hearing relating to a Request for Order (Judicial Council Form FL-300), parties shall meet to discuss the issues in the case and make a good faith attempt to settle all issues;. and to exchange all relevant documents and information.

(Rule 5.4(a) revised effective 1/1/17)

(b) Initial hearing

When an initial hearing is set pursuant to a Request for Order or other pleading seeking relief, the initial hearing shall be set on the assigned judicial officer's short cause calendar. The clerk shall provide the date and time for all initial hearings. All matters set on a short cause calendar are limited to 20 minutes of hearing time.

(Rule 5.4(b) revised effective 1/1/17)

(c) Transfer of a matter in which a hearing will exceed 20 minutes

If, at any time after a Request for Order is filed, the Court determines that the hearing in the matter will exceed 20 minutes in length, the matter may be continued to another court date which is designed to accommodate long-cause hearings, trials and settlement conferences.

(Rule 5.4(c) revised effective 1/1/15)

(d) Continuances

(1) All requests for continuances shall be in writing, except as may be authorized by the bench officer hearing the case.

(2) Each written request for a continuance must be accompanied by payment of the applicable fee or a fee waiver.

(Rule 5.4(d)(2) revised effective 1/1/17)

(3) A request for a continuance shall be made by ex parte application or by stipulation and shall not be granted unless specifically authorized by the judicial officer to whom the case is assigned or (in that bench officer's absence) by the Supervising Judge. Any such stipulation must be signed by counsel for both sides or, if either side is unrepresented, by that party. Any request or stipulation to continue must contain facts showing good cause for the continuance.

(Rule 5.4(d)(3) revised effective 1/1/15)

(e) Pleadings

(1) All pleadings in family law matters shall be in the form prescribed in the California Rules of Court.

(2) A fully completed, current Income and Expense Declaration (I&E) (or Simplified Financial Statement, when appropriate) shall be filed and served with moving and responsive papers in all hearings involving requests for support, attorney's fees, costs, or other financial relief. (Not required if there is an I&E that is no more than ninety (90) calendar days old on file, unless there have been significant changes).

(Rule 5.4(e)(2) revised effective 1/1/16)

(3) On a Request for Order to modify a prior order, the moving party shall attach a copy of the prior order to the moving papers.

(Rule 5.4(e)(3) revised effective 1/1/16)

(4) Moving and responsive pleadings shall be timely filed and served in compliance with the provisions of Code of Civil Procedure Section 1005.

(Rule 5.4(e)(4) revised effective 1/1/15)

(5) Pursuant to Family Code Section 217, a party seeking to present live testimony from all witnesses other than the parties must file and serve all parties with their witness list with a brief description of the anticipated testimony. This list shall be filed and served no less than fourteen (14) calendar days before hearing.

(Rule 5.4(e)(5) revised effective 1/1/16)

(f) Motions to be relieved as counsel

Motions to be relieved as counsel must be made in conformity with California Rules of Court, Rule 3.1362 using Judicial Council Forms MC-051, MC-052 and MC-053.

(Rule 5.4(f) revised effective 1/1/00)

(g) Interpreter services

The Court provides interpreters to help non-English speaking parties in family law court proceedings. To ask for an interpreter in your case, consult the Court's website regarding Court Interpreters at www.cc-courts.org/interpreter or ask the clerk. A hearing may be delayed or continued to a different date if an interpreter was not requested in advance of the hearing and no interpreter is available at the time of the hearing.

(Rule 5.4(g) new effective 1/1/17)

(Rule 5.4 revised effective 1/1/17)

Rule 5.5. Procedures to Complete Dissolution/Legal Separation

(a) Default or uncontested proceeding

Follow the checklist set forth by the Judicial Council in the Judgment Checklist – Dissolution/Legal Separation (Judicial Council Form FL-182) to complete the steps and pleadings necessary to submit your Judgment.

(b) Contested proceeding

Once a Response has been filed and both parties have served their Preliminary Declarations of Disclosure and filed a Declaration re: Service of Declaration of Disclosure (Judicial Council Form FL-141), either party may file and serve a Request for Case Management Conference (Local Court Form FamLaw-112) with the Court to set the matter for a Case Management Conference. The Request for Case Management Conference will not be accepted for filing until all parties have served their Preliminary Declarations of Disclosure and filed Declaration re: Service of Declaration of Disclosure, or obtained a court order waiving this requirement per Family Code Section 2107. The Court may also set a Case Management Conference at its own discretion.

(Rule 5.5(b) revised effective 1/1/17)

(c) Self-represented parties

Self-represented parties who need assistance in determining the next steps in their cases, including getting custody orders, support orders, finishing their divorce or other some other action, can speak with the Family Law Facilitators during help desk hours.

(Rule 5.5 revised effective 1/1/17)

Rule 5.6. Case Management Conference / Family Centered Case Resolution Conference (FCCRC)

(a) Case Management Conference statement

No less than seven (7) calendar days before the date set for the Case Management Conference (CMC) each party shall file and serve a Case Management Conference Statement (Local Court Form FamLaw-113).

(Rule 5.6(a) revised effective 1/1/16)

(b) Attendance at conference

Parties shall be present at the Case Management Conference or Family Centered Case Resolution Conference (FCCRC) unless represented by counsel, in which case, counsel shall appear. Appearance may be in person or by CourtCall® if timely arranged. The parties or the attorneys shall be fully prepared to discuss identification of disputed issues, the timetable for disposition of the case by settlement or trial, and be sufficiently familiar with the facts of the case so that the Court may make necessary orders.

(Rule 5.6(b) revised effective 1/1/16)

(c) Orders at Case Management Conference/FCCRC

The parties must address, if applicable, and the Court may take appropriate action with respect to, the following:

(1) Whether any matters (e.g., the bankruptcy of a party, pending criminal matters impacting issues in the case, or custody orders from another jurisdiction) may affect the Court's jurisdiction or processing of the case.

(2) Whether discovery has been completed and, if not, the date by which it will be completed.

(3) What discovery issues are anticipated.

(4) Whether the case should be bifurcated or a hearing should be set for a motion to bifurcate.

(5) A date or dates by which Final Declarations of Disclosure are to be exchanged and the Declaration of Service of Declaration of Disclosure and Income and Expense Declarations filed.

(6) The utility of referring the parties to Family Court Services (FCS) in cases in which custody or visitation (or both) is at issue and no evaluation or private mediation is pending.

(7) The need for selection and compensation of joint experts by stipulation or motion.

(8) The need for, selection, and compensation of a Special Master by stipulation or appointment pursuant to Code of Civil Procedure Sections 638 and 639.

(9) The need for an order for attorney fees and costs by stipulation or motion.

(10) A date for Mandatory Settlement Conference (MSC).

(11) Whether to set a Recommendation Conference in cases involving child custody and visitation in cases that have a child custody evaluation pending.

(12) If a trial date has not been previously set, the date by which the case will be ready for trial. Each side must have available at the conference all necessary information as to unavailable dates as to the parties, their attorneys, and any retained experts.

(13) The estimated length of trial.

(14) Setting a trial date.

(15) Any other matters that should be considered by the Court or addressed in its case management order.

(16) Whether to set a further Case Management Conference.

(17) Whether to tailor or modify the requirements of Local Rule 5.7(b) as it relates to the case.

(18) The stipulation of the parties and consent of the Court to place the matter in further case management pursuant to Family Code Sections 2450 and 2451.

(Rule 5.6(c) revised effective 1/1/17)

(Rule 5.6 revised effective 1/1/17)

Rule 5.7. Mandatory Settlement Conference

(a) Calendaring and attendance

The Court may require the parties to participate in a Mandatory Settlement Conference before a long cause matter or trial is set or heard. Absent a written court order allowing a party to appear by telephone, both parties and their counsel of record must personally attend the Mandatory Settlement Conference. Failure to comply may result in monetary sanctions, issues sanctions, or both. A Mandatory Settlement Conference may be continued by the Court for good cause, either sua sponte or upon a timely, properly noticed motion.

(Rule 5.7(a) revised effective 1/1/16)

(b) Mandatory Settlement Conference requirements

Unless excused by the trial court, the parties shall comply with the following requirements.

(1) No later than fourteen (14) calendar days before the Mandatory Settlement Conference, the parties shall:

(A) Exchange good faith settlement demands.

(B) Exchange Final Declarations of Disclosure (if not already done).

(2) No later than seven (7) calendar days before the Mandatory Settlement conference, the parties shall:

(A) File with the Court a Declaration re: Service of Final Declarations of Disclosure, or alternatively, file a stipulation to waive service of final declarations of disclosure.

(Rule 5.7(b)(2)(A) revised effective 1/1/16)

(B) If support or attorney's fees and costs or other financial relief is at issue, the parties shall exchange and file updated I&E. (Not required if there is an I&E that is no more than ninety (90) calendar days old on file, unless there have been significant changes).

(Rule 5.7(b)(2)(B) revised effective 1/1/16)

(C) File a Joint Statement of Contested Issues describing all issues that remain in dispute. That statement must include, where it is an issue, a proposal regarding the division of property and debts. If late or missing payments are claimed, a calculation spreadsheet shall also be attached. If the parties are unable to agree upon a Joint Statement of Contested Issues, then each party must file and serve a Separate Statement of Contested Issue which includes all of the information contained in a Joint Statement of Contested Issues.

(Rule 5.7(b)(2)(C) revised effective 1/1/16)

(D) File a Mandatory Settlement Conference Statement or other such filings as may be required by the Court.

(Rule 5.7(b)(2)(D) revised effective 1/1/15)

(3) If both parties fail to comply with this Order, then the trial date may be vacated. If only one party fails to comply and the other does, the Court may impose sanctions at the Mandatory Settlement Conference, including but not limited to issue sanctions and monetary sanctions.

(Rule 5.7(b)(3) revised effective 1/1/14)

(c) Trial judge as settlement judge

The Mandatory Settlement Conference will be conducted by the trial judge. If any party objects to that, written objections must be filed no later than thirty (30) calendar days before the Mandatory Settlement Conference so the Court can attempt to make alternate arrangements.

(Rule 5.7(c) revised effective 1/1/16)

(d) Meet and confer requirement

Counsel and any unrepresented party shall meet and confer either in person or by phone at least five (5) calendar days before the day of the Mandatory Settlement Conference to resolve as many issues as possible and to specify those matters to be litigated.

(Rule 5.7(d) revised effective 1/1/16)

(Rule 5.7 revised effective 1/1/16)

Rule 5.8. Recommendation Conference

(a) Purpose and attendance

The purpose of the Recommendation Conference is to receive the report of a custody evaluator and attempt to resolve custody and visitation issues without trial. Absent a written Court Order allowing a party to appear by telephone, both parties and their counsel of record must personally attend the Recommendation Conference and be prepared to discuss the recommendations of the Evaluator. Failure to comply may result in monetary sanctions, issues sanctions, or both. If the parties are unable to resolve custody and visitation issues without trial, the Court may, at the Recommendation Conference, make interim orders pending trial.

(Rule 5.8(a) revised effective 1/1/17)

(b) Timing

Recommendation Conferences are set based on the expectation that the evaluation will be prepared and submitted to the parties and counsel at least ten (10) calendar days before the Recommendation Conference. Should the Evaluator determine that it will not be possible to prepare his/her report by that time, said Evaluator shall forthwith notify both

counsel, and provide to counsel a date by which the Evaluator expects the report will be done. Counsel shall notify the Court promptly, either in writing or by telephone conference call. Based on the Evaluator's notice of inability to conclude the report timely, the Court will re-set the date of the Recommendation Conference.

(Rule 5.8(b) revised effective 1/1/16)

(Rule 5.8 revised effective 1/1/17)

Rule 5.9. Trials

(a) Long cause matters

These rules apply to any trial set on the long cause trial calendar and, as determined by the Court, to any long cause hearings.

(Rule 5.9(a) revised effective 1/1/13)

(b) Trial setting

(1) Matters will generally be set for trial at a Case Management Conference/Family-Centered Case Resolution Conference, a hearing on a Request for Order, at a Settlement Conference, or at a Recommendation Conference.

(Rule 5.9(b)(1) revised effective 1/1/15)

(2) If no hearings are scheduled, a party may initiate the trial setting process by filing a Request for Case Management Conference (Local Court Form FamLaw-112). The Request for Case Management Conference may only be filed after a response has been filed, and will not be accepted for filing until all parties have served their Preliminary Declarations of Disclosure and filed the Declaration Re Service of Declaration of Disclosure, or obtained a court order waiving this requirement per Family Code Section 2107. The filing of the Request for Case Management Conference will result in the setting of a Case Management Conference/Family-Centered Case Resolution Conference.

(Rule 5.9(b)(2) revised effective 1/1/17)

(c) Continuances

Trials may only be continued by the trial judge. Any motion for a continuance must be made in a timely manner, and for good cause.

(Rule 5.9(c) revised effective 1/1/15)

(d) Case Management Order / Family Centered Case Resolution Conference Order

The Court may issue, and amend from time to time, an appropriate Case Management/Family-Centered Case Resolution Conference Order to regulate pre-trial and trial proceedings and to set forth a schedule for the submission of papers such as briefs, documents, forms, and exhibits.

(Rule 5.9(d) revised effective 1/1/14)

(e) Evidence Code section 730 experts

(1) The Court encourages mutually agreed upon experts, especially for such issues as custody evaluations, business valuations, business cash flows (when relevant to support), real estate valuations, stock option calculations and tax consequences. In the absence of a mutually agreed upon expert, the Court may appoint its own expert under Evidence Code Section 730.

(2) If one or more written reports are issued by such an expert, copies of all such reports shall be transmitted to each counsel or unrepresented party no later than thirty (30) calendar days before trial.

(3) If either counsel or an unrepresented party demands the right to cross-examine the 730 expert at trial, that party shall be responsible for arranging for the attendance of the expert at trial. Said arrangements shall be made no later than five (5) calendar days after being served with a copy of the report or forty-five (45) calendar days before trial, whichever event occurs later. If there is no written report of the expert (the Court encourages the use of reports at trial), the party offering the expert shall be responsible for making the witness available.

(Rule 5.9(e) revised effective 1/1/16)

(f) Reporter's fees

(1) There are currently no court reporters employed by the Court in Family Law Departments. Consult the "Court Reporters: Notice of Availability on the Court's website for the current status and any changes. There will be no official record of the proceedings unless a party who desires an official record makes arrangements for a private certified court reporter as set forth in Local Rule 2.51.

(2) Any party who desires an official record or transcript of the proceedings, may hire a private certified court reporter to report any scheduled hearing or trial pursuant to Government Code 70044 and California Rules of Court, Rule 2.956.

(3) Parties electing to hire a private certified court reporter must comply with Local Rule 2.51.

(4) Pursuant to California Rules of Court, Rule 2.956(d), if a party arranges and pays for the attendance of private certified court reporter at a hearing in a civil case because of the unavailability of the services of an official court reporter, none of the parties will be charged the court reporter's attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(5) In the event court reporters become available and at the court's discretion are provided by the court for any family law hearings, the party will be required to pay the applicable reporting attendance fees pursuant to Government Code Sections 68086(a)(1)(A) or (B).

(6) Parties shall be responsible for all transcript costs pursuant to Government Code Section 69953.

(Rule 5.9(f) revised effective 1/1/16)

(Rule 5.9 revised effective 1/1/17)

Rule 5.10. Preparation and Presentation of Orders

(a) Proposed orders entered at hearing

The Court may consider signing, at the time of hearing, proposed orders attached to the moving or responsive papers or those orders prepared by either party in court immediately following the hearing. Parties are therefore encouraged to submit proposed orders with their moving or responsive papers.

(Rule 5.10(a) revised effective 1/1/15)

(b) Orders submitted after hearing

All orders after hearing shall be submitted in compliance with California Rules of Court, Rule 5.125. If a court reporter was present at the hearing, and the parties require a transcript of the proceedings to resolve disputes over the form of order, the judge is to be advised that the transcript has been ordered and the expected date of availability of the transcript. Failure to submit Orders After Hearing in accordance with California Rules of Court, Rule 5.125 may result in the imposition of sanctions.

(Rule 5.10(b) revised effective 1/1/16)

(c) Stipulations

All agreements, stipulations, or agreed upon orders, reached before hearing shall be in writing, signed by all parties and counsel (where applicable) and submitted to the Court for signature before the hearing on the matter begins. Stipulations shall not be recited in open court, except at the discretion of the bench officer.

(Rule 5.10(c) revised effective 1/1/17)

(d) Submission of earning assignment orders

A copy of the judgment or order for child, partner, spousal or family support must be submitted with any proposed earning assignment order.

(Rule 5.10(d) new effective 1/1/17)

(Rule 5.10 revised effective 1/1/17)

Rule 5.11. Judgments

(a) Judgment requirements

Pursuant to California Rules of Court, Rules 5.401(c) and 5.411(b), Judgments must include all matters subject to the court's jurisdiction for which a party seeks adjudication,

or an explicit reservation of jurisdiction over any matter not proposed for disposition at that time.

(b) Use of judgment checklist form

For Dissolution of Marriage and Legal Separation cases, parties are directed to use, Judgment Checklist-Dissolution/Legal Separation (Judicial Council Form FL-182). For Parentage cases, parties may refer to the Paternity Judgment checklist (Local Court Form FamLaw-013b).

(Rule 5.11(b) revised effective 1/1/17)

(c) Notarized signatures of self-represented parties to judgment

If the parties submit a signed default Judgment ("default with Agreement"), the signature of the defaulting party must be notarized.

(d) Approval of Department of Child Support Services (DCSS)

DCSS must approve the child support provisions of the Judgment if DCSS is providing services in the case.

(Rule 5.11(d) revised effective 1/1/17)

(e) Relief Requested in True Default

In a True Default, relief may not exceed that requested in the operative Petition.

(Rule 5.11 revised effective 1/1/17)

Rule 5.12. Confidentiality

(a) Placement of confidential documents

Certain documents are required to be kept confidential. They shall be placed in the confidential portion of the court file and may not be disclosed to anyone except in accordance with law. (See for example Local Rule 5.58).

(Rule 5.12(a) revised effective 1/1/17)

(b) Substance abuse assessment reports

Substance abuse assessment reports shall be placed in the confidential portion of the court file.

(Rule 5.12(b) revised effective 1/1/15)

(c) Confidentiality of social security number

If any document filed with the Court or offered as evidence contains a social security number, that number must be redacted by the party offering the document before it is filed with the Court or marked as an exhibit.

(Rule 5.12(c) revised effective 1/1/16)

(Rule 5.12 revised effective 1/1/17)

Rule 5.13. Family Law Facilitator

(a) Facilitator services pursuant to Family Code Section 10004-10005

In addition to other services and duties, the Family Law Facilitator must comply with the requirements of state law and perform the services set out in Family Code Section 10005, consistent with funding restrictions and priorities for service that are periodically set by the Court.

(Rule 5.13(a) revised effective 1/1/15)

(b) Additional duties

If the foregoing has been accomplished, the Family Law Facilitator may also:

(1) Assist the Court with research and any other responsibilities which will enable the Court to be responsive to the litigants' needs; and

(2) Develop programs, assist with, work in conjunction with and/or coordinate with the a State or Local Bar Association and community outreach through day and evening programs, videotapes, and other innovative means that will assist unrepresented and financially-limited litigants in gaining meaningful access to family court. These programs may specifically include, but not be limited to, providing information concerning under-utilized legislation, such as expedited child support orders, and pre-existing court-sponsored programs such as Family Court Services, supervised visitation and appointment of attorneys for children.

(Rule 5.13(b) revised effective 1/1/16)

(Rule 5.13 revised effective 1/1/16)

Rule 5.14. Temporary Spousal or Partner Support

(a) Discretionary guideline

The Court will use the formula contained in the Local Rules of the Superior Court of Alameda County (Alameda Superior Court, Local Rule 5.70) as its discretionary guideline for temporary spousal support or partner support in marital and domestic partnership dissolution cases.

(Rule 5.14(a) revised effective 1/1/17)

(b) Adjustment for tax consequences

In domestic partnership cases, the Court will adjust the formula to account for tax treatment under state and federal laws if necessary.

(Rule 5.14(b) revised effective 1/1/15)

(Rule 5.14 revised effective 1/1/17)

Rule 5.15. Presence of Children in Courtroom

(1) Unless a child whose custody or visitation is at issue has been given court permission to address the court or testify per Family Code Section 3042, that child shall not be present in the assigned courtroom while the matter is being heard, unless the judicial officer has specifically given permission for the child to be present.

(2) Parents disputing custody/visitation shall participate in child custody recommending counseling services or private recommending mediation before a decision by the court as to whether or not a child will address the court.

(Rule 5.15 new effective 1/1/16)

Rule 5.16. Child Custody Recommending Counseling (Formerly "Mediation")

(a) Good faith effort to reach agreement

Except in those cases where domestic violence or other restraining orders have been issued or are pending hearing, all parties shall make a good faith effort to arrive at an agreement regarding child custody and visitation before contacting FCS to schedule appointments and before the court hearing.

(Rule 5.16(a) revised effective 1/1/16)

(b) Conduct of orientation

All parties with disagreements regarding custody and visitation must complete orientation as well as child custody recommending counseling (hereafter "Custody Counseling") at FCS. Parties are to complete the online Family Court Services orientation class at www.cc-courts.org/onlineorientation (English) or www.cc-courts.org/orientacionenlinea (Spanish) at least five (5) days prior to their custody counseling appointment. The purpose of orientation is to provide the parties with information about the Court process, with knowledge of collaborative parenting plan development, child rearing in multiple homes, the impacts of domestic violence and children's developmental needs as related to post-separation parenting arrangements. If it is necessary for a party to complete orientation in a language other than English or Spanish, the party may call the Family Court Services office to make alternate arrangements.

(Rule 5.16(b) revised effective 1/1/17)

(c) Custody Counseling (formerly "Mediation")

(1) Upon the filing of the Request for Order, or before a trial which will litigate a custody/visitation dispute, the parties shall complete the online orientation program located on the court's website and shall arrange for a Custody Counseling appointment with Family Court Services. Sanctions and/or fees may be imposed for failure to arrange for, or appear at, those appointments and for failure to complete the online orientation.

(2) If parties have participated in a custody counseling appointment within the previous six months, Family Court Services will direct the parties to first attend their court hearing to review the requested modifications to the current court ordered parenting plan before a custody counseling appointment will be scheduled. In their discretion, Judges may direct Family Court Services to not schedule custody counseling appointments if parties have completed counseling within twelve (12) months prior to a court hearing.

(3) If a party is requesting a "move-away" order, the moving party is strongly encouraged to specifically state that request in the moving papers. Family Court Services' ability to address a "move-away" request in custody counseling may be significantly limited unless a request for a "move-away" order is specifically stated in a party's moving papers.

(4) If the custody or visitation hearing is scheduled before the Counseling appointment, and the case does not involve current domestic violence, criminal or other protective order, the parties may agree to request a continuance of the hearing by completing and filing a "Stipulation and Order re: Continuance of Court Hearing to a Date After the Custody Counseling Appointment" (Local Form FamLaw-230). No fee is due with the filing of this form.

(Rule 5.16(c) revised effective 1/1/17)

(d) Agreements

If the parties reach a complete agreement regarding custody and visitation before scheduling a custody counseling appointment, they do not need to contact FCS. If they are self-represented, they may obtain assistance at the Help Desk in the Spinetta Family Law Building to prepare a stipulation, so a court hearing can be avoided. If the parties reach a complete agreement regarding custody and visitation after they have scheduled their Custody Counseling appointment, both parties must contact FCS to cancel existing appointments at least 24 hours in advance. Sanctions and/or fees may be imposed on any party that fails to contact FCS at least 24 hours before the scheduled appointment.

(Rule 5.16(d) revised effective 1/1/17)

(e) Communication in Custody Counseling

All Custody Counseling proceedings shall be held in private, and all communications from the parties to the child custody recommending counselor (hereafter "Custody Counselor") shall be deemed official information within the meaning of Evidence Code Section 1040. The Custody Counselor may exclude attorneys from the Custody Counseling proceeding in the sole discretion of the Custody Counselor.

(Rule 5.16(e) revised effective 1/1/16)

(f) Ex parte communication with Family Court Services Custody Counselors

All communication between Family Court Services Custody Counselors and the parties/attorneys must be by telephone conference or in writing, with copies sent to the

other party/attorney, even where the Custody Counselor initiates the communication. If the communication is in writing, the party submitting the writing must send it to the parties/attorneys simultaneously and by the same method (i.e., fax, mail or email). Email and faxes must also be copied to all parties/attorneys. In urgent circumstances or when the Custody Counselor is unable to set up a telephone conference with the parties/attorneys and there is insufficient time to correspond in writing with both parties/attorneys, the Custody Counselor may initiate contact with one party/attorney for the purpose of clarifying information or obtaining additional information for a status report. The Custody Counselor will disclose such ex parte communication to the other party/attorney if this occurs. Questions regarding scheduling or other procedural matters may be discussed with the Family Court Services clerical staff.

(Rule 5.16(f) revised effective 1/1/12)

(g) Custody Counseling complaint process

Within ten (10) calendar days from the date of the Custody Counseling session, a party may file a written complaint, in the form of a declaration signed under penalty of perjury, specifying alleged misconduct of a Custody Counselor. A copy of the declaration shall be served on the other party and a proof of service shall be filed. The party shall also provide a copy of the declaration to the Manager of Family Court Services. The other party may file a written response. A copy of the response shall be served on the other party and a proof of service shall be filed before the next hearing date. The responding party shall also provide a copy of the written response to the Manager of Family Court Services, who shall investigate the complaint and respond in writing to the complainant and the responding party.

(Rule 5.16(g) revised effective 1/1/16)

(h) Custody Counselors as witnesses

In lieu of a subpoena and appropriate fee as described in California Government Code Section 68097.2, should a party wish to compel the appearance of a Family Court Services (FCS) Custody Counselor as a witness at a custody/visitation trial, the party can notify FCS in writing no less than five (5) court days before the hearing date including the morning or afternoon appearance time. A non-refundable check in the appropriate amount as described in California Government Code Section 68097.2 must accompany the written request for the Custody Counselor's appearance.

(Rule 5.16(h) revised effective 1/1/16)

(i) Return Custody Counseling

(1) Parties who return to FCS for a review or follow-up Custody Counseling may be charged a fee for such return services in the amount of $250.

(2) Where parties attend Custody Counseling, reach an agreement, subsequently rescind the agreement, and then wish to return or are ordered to return to Custody Counseling, Family Court Services may charge a fee as set forth in subsection (1) above.

(Rule 5.16(i) revised effective 1/1/17)

(j) Family Court Services reports and recommendations

(1) Where the parties do not reach an agreement during Custody Counseling, the Custody Counselor shall prepare a written Status Report that includes the Custody Counselor's recommendations. The report shall be submitted to the parties and to the Family Law department hearing the matter. The department shall file the report in a confidential portion of the Court file. Pursuant to the standing Order of the Presiding Judge of this Court, use of this document shall be limited to the pending litigation and no person who has access to the document shall disseminate or disclose its contents to any person not entitled to access, nor shall the parties attach such document to any pleading in this or any other litigation or proceeding. Substantial sanctions shall be imposed upon any party who violates this order, whether intentionally, by mistake or by accident.

(2) Persons entitled to access the report and the information contained in the report are limited to the parties, their attorneys, federal or state law enforcement, judicial officers, necessary court employees, and minor's counsel, except upon order of the Court.

(Rule 5.16(j) revised effective 1/1/16)

(Rule 5.16 revised effective 1/1/17)

Rule 5.17. Child Custody Evaluations

(a) Court ordered evaluations

All evaluators appointed by the Court to conduct child custody and visitation evaluations, whether by stipulation or otherwise, shall be appointed under Evidence Code Section 730.

(Rule 5.17(a) revised effective 1/1/16)

(b) Evaluator selection

Where the parties are unable to agree on an evaluator to conduct the custody evaluation, the Court shall select an evaluator for the parties in a manner as determined by the Court. If the Evaluator appointed by the Court does not accept the appointment, the parties or their attorneys must contact the Department and request the appointment of a different evaluator.

FCS will maintain a list of private child custody evaluators who have represented that they meet the training and education requirements of California Rules of Court, Rules 5.225 and 5.230. This list will be kept in a binder for public viewing in the department of the Supervising Family Law Judge and at FCS.

(Rule 5.17(b) revised effective 1/1/15)

(c) Custody evaluation requirements

An Order Appointing Child Custody Evaluator (Judicial Council Form FL-327) shall be filed and given to the Evaluator before the evaluation begins. The Evaluator must file a

Declaration of Private Child Custody Evaluator Regarding Qualifications (Judicial Council Form FL-326). Each party and each party's counsel shall follow the procedures set forth in the Order Appointing Child Custody Evaluator. The Evaluator shall comply with the requirements of California Rules of Court, Rule 5.220.

(Rule 5.17(c) new effective 1/1/15)

(d) Scope of the evaluation

When appropriate, in the interest of saving the parties' time, expense and stress, the evaluation may be limited in scope (focused evaluation) to the question or questions that the Court requires answered.

(Rule 5.17(d) revised effective 1/1/01)

(e) Challenge of the evaluator

No peremptory challenge of evaluators shall be allowed. Parties may raise objections to a specific evaluator during the selection process. Parties may object to the conclusions of the report when the report is submitted to the Court, and may bring other appropriate expert testimony to object to the conclusions. (California Rules of Court, Rule 5.220(d)(1))

(Rule 5.17(e) revised effective 1/1/16)

(f) Withdrawal from a case

A private evaluator has the right to withdraw from a case upon a showing of good cause to the trial court making the appointment.

(Rule 5.17(f) new effective 1/1/15)

(g) Information from children

The Court relies on the judgment of its experts in making decisions about when, how often, and under what circumstances children are interviewed. The expert shall be able to justify the strategy used in any particular case. Children will be informed that the information provided by the child will not be confidential before beginning the interview. (California Rules of Court, Rule 5.220(d)(2).)

(Rule 5.17(g) revised effective 1/1/17)

(h) Impartial expert

The court-appointed evaluator shall be impartial. Evaluators should include interviews of both parents or guardians. Exceptions to this may include geographically separated parents. In such instances, attorneys, parties and the expert are expected to make reasonable accommodation to assure that the expert has received adequate information about all parents, guardians, or parties.

(Rule 5.17(h) revised effective 1/1/01)

(i) Grievance procedure

If a party alleges that an unprofessional or inappropriate act has occurred on the part of the Evaluator during the course of the evaluation, he or she may discuss the complaint with the Evaluator directly in order to handle misunderstandings.

Complaints or grievances concerning the Evaluator will not be considered by the Court until after the evaluation is completed, at the Recommendation Conference. All such complaints and grievances must be submitted to the bench officer hearing the matter no later than fifteen (15) calendar days before the Recommendation Conference, with copies to the Evaluator and all other parties. The Evaluator shall submit a written response to all issues raised in the written complaint to the bench officer hearing the matter no later than two (2) calendar days before the Recommendation Conference, with copies to all parties. The bench officer will address the complaint at the time of the Recommendation Conference. If the party submitting the complaint objects to the bench officer's resolution of the complaint, the complaint or grievance shall become an issue at trial.

(Rule 5.17(i) revised effective 1/1/16)

(j) Expectation of settlement

The parties and the attorneys should make a good faith attempt to settle the custody and visitation disputes before the Recommendation Conference and any subsequent trial. Settlement efforts may include joint meet and confer conferences between the parties and counsel unless potential harm exists from this process.

(Rule 5.17(j) revised effective 1/1/16)

(k) Continuing effort

The Court may ask the Evaluator to continue to be available to the family to help resolve problems with any order made following the Evaluator's recommendations.

(Rule 5.17(k) revised effective 1/1/16)

(l) Payment of the evaluation

The Court will order payment of the Evaluator at the time of the appointment. The Evaluator may not withhold a report from the Court because of the parties' failure to pay. Either party or the appointed custody evaluator may file a Request for Order regarding unpaid custody evaluator fee(s).

(Rule 5.17(l) revised effective 1/1/15)

(m) Evaluation report

(1) The Evaluator shall prepare and submit both an evaluation report and recommendations to the parties, counsel, and the court. The Department hearing the matter shall secure the evaluation report in a confidential portion of the Court file. Pursuant to the standing Order of the Presiding Judge of this Court, use of this document shall be limited to the pending litigation and no person who has access to the document shall disseminate or disclose its contents to any person

not entitled to access, nor shall the parties attach such document to any pleading in this or any other litigation or proceeding. Substantial sanctions shall be imposed upon any party who violates this order, whether intentionally, by mistake or inadvertence.

(2) Persons entitled to access the report and**/or** the information contained in the report are limited to the parties, their attorneys, federal or state law enforcement, judicial officers, necessary court employees, and minor's counsel, except upon order of the Court.

(Rule 5.17(m) revised effective 1/1/16)

(n) Ex parte communication with evaluator

No party or attorney for a party shall initiate one-sided contact with the Evaluator, either orally or in writing before the first appointment of the initiating party except for the purpose of setting up that first appointment. Parties may initiate one-sided contact with the Evaluator after the first appointment of the party initiating the contact. The Evaluator may contact either (or both) party at any time. Attorneys may initiate contact after the first appointment of a party only by conference call or in writing copied to the other party. Contact may be made to arrange appointments without the necessity of a conference call.

(Rule 5.17(n) revised effective 1/1/16)

(Rule 5.17 revised effective 1/1/17)

Rule 5.18. Court Communication for Domestic Violence and Child Custody Orders (Adopted Pursuant to California Rules of Court, Rule 5.445)

(a) Communication between the Criminal, Family, Juvenile and Probate Courts

(1) Before requesting a Criminal Protective Order involving a defendant and a victim or witness who have a relationship as defined in Family Code Section 6211, the District Attorney shall make reasonable efforts to determine whether there are any children of the relationship, whether there are any Family, Juvenile, or Probate Court orders for custody/visitation for those children, and whether there are any existing protective/restraining orders involving the defendant, the protected person, and/or the children. The District Attorney shall advise the Criminal Court of the existence of any such orders at the time the proposed Criminal Protective Order is submitted for approval and signature.

(2) The Family, Juvenile or Probate Court setting terms of custody or visitation shall make reasonable efforts to determine whether any person requesting custody or visitation is subject to a Criminal Protective Order, including inquiring of the parties whether there are any existing protective/restraining orders involving that person, another person seeking custody or visitation, and/or the children.

(3) When the Criminal Court issues a Criminal Protective Order protecting a victim or witness who has children with the defendant, the Criminal Court shall consider

whether peaceful contact with the protected person should be allowed for the purpose of allowing defendant to have visitation with the children.

(4) If any person named in a Criminal Protective Order is also before the Family, Juvenile, or Probate Court in proceedings concerning custody or visitation, a court-employed Child Custody Recommending Counselor or Court Investigator serving the Family, Juvenile or Probate Court shall have access to and review the Criminal Court file, as permitted by applicable law. Confidential information reviewed under this rule remains confidential and shall not be further released except as provided by law or court order.

(Rule 5.18(a) revised effective 1/1/17)

(b) Modification of Criminal Protective Orders

(1) A party seeking to modify a Criminal Protective Order may calendar the matter for hearing before the Criminal Court, after giving notice to the District Attorney. If the defendant and the protected person do not have any minor children in common, the motion shall be heard by the Criminal Court before which the matter is then pending.

(2) If a party seeking to modify a Criminal Protective Order also is before the Family, Juvenile or Probate Court with the protected person in proceedings concerning custody or visitation, the motion to modify the Criminal Protective Order shall be noticed and heard on the Domestic Violence Friday morning calendar in Martinez. The party seeking to modify the Criminal Protective Order must give notice of the hearing to the Family, Juvenile, or Probate Court, and to all counsel and parties in both the criminal action and the Family, Juvenile, or Probate matter.

(3) The Family, Juvenile, or Probate Court may, on its own motion or at the request of a defendant, protected person or other interested party, calendar a hearing before the Criminal Court, on the Domestic Violence Friday morning calendar, for a motion to modify a Criminal Protective Order. Notice of the hearing shall be given to all counsel and parties in both the criminal action and the Family, Juvenile, or Probate matter.

(4) When the Family, Juvenile, or Probate Court calendars a hearing on a motion to modify a Criminal Protective Order, or receives notice that a party with a pending Family, Juvenile, or Probate matter involving minor children seeks to modify a Criminal Protective Order, the Court shall provide the Criminal Court with copies of existing or proposed Orders relating to protection, custody and/or visitation in the pending Family, Juvenile, or Probate matter.

(Rule 5.18(b) revised effective 1/1/16)

(Rule 5.18 revised effective 1/1/17)

Division 2 – Juvenile Matters

Chapter 1. Juvenile Department

Rule 5.50. Adoption, Construction and Amendment of Rules

(a) Citation of Juvenile Rules

These rules for the Juvenile Court may be cited as the "Local Rules for the Juvenile Court of Contra Costa County."

(b) Supplemental authority of local Juvenile Rules

These Local Rules shall be supplementary to and subject to state statutes and any rules adopted by the Judicial Council of the State of California. These rules shall be construed and applied so as not to conflict with such statutes or with the rules adopted by the Judicial Council.

(c) Effective date of Juvenile local court rules

These rules shall, on the date they become effective, supersede rules until adopted by the Superior Court as they relate to the Juvenile Court.

(Rule 5.50 revised effective 1/1/15)

Rule 5.51. Juvenile Judge

(a) Judicial assignments

The Supervising Judge of the Juvenile Court shall be assisted by such judges and subordinate judicial officers (including commissioners, and temporary judges) as may be provided from time to time by the Superior Court. The subordinate judicial officers and temporary judges shall perform their duties under the direction of the Supervising Judge of the Juvenile Court.

(Rule 5.51(a) revised effective 1/1/16)

(b) Juvenile hearings

The business of the Juvenile Court shall be conducted at the Martinez Courthouse and Juvenile Hall, and may be conducted at Pittsburg and Richmond Courthouses, and at such other facilities of Contra Costa County, and at such times as the Juvenile Court Supervising Judge or Presiding Judge may direct. The Juvenile Court Supervising Judge shall be responsible for the distribution of court business.

(Rule 5.51(b) revised effective 1/1/13)

(c) Types of Juvenile hearings

The Juvenile Court Supervising Judge and assigned judges shall conduct fitness hearings, rehearings and other matters which he or she by order, deem appropriate. Matters to be heard by a Juvenile Court Judge shall be calendared directly by that judge's department.

(Rule 5.51(c) revised effective 1/1/16)

(d) Juvenile bench recusal

If the only Juvenile Court judge available is removed from hearing a matter because of a challenge or otherwise, then the matter shall be referred by the Supervising Juvenile Judge to the Presiding Judge of the Superior Court.

(Rule 5.51(d) revised effective 7/1/05)

(e) Assignment of Juvenile hearings

The Juvenile Court judges shall maintain separate calendars of all matters to be heard by them, which shall be published. When a case is assigned to a Juvenile Court Judge, it is assigned to that judge for all purposes.

(Rule 5.51(e) revised effective 1/1/13)

(f) Juvenile pre-hearing conference

Pre-hearing conferences shall be conducted as determined by the Juvenile Court judges. Where such conference is held, attendance is mandatory as to all persons ordered to attend. At such conferences, counsel shall be familiar with the case, shall be prepared to enter into stipulations binding their clients, and shall be prepared to discuss the facts so as to clarify and simplify issues.

(Rule 5.51(f) revised effective 1/1/13)

(g) Juvenile policy and procedure

The Juvenile Court Supervising Judge, in directing the judicial business of the Juvenile Court, may issue memoranda of policy and procedure to all parties involved in the Juvenile Court process, which shall be binding, subject to the authority of the Executive Committee and the Judges of the Superior Court of Contra Costa County.

(Rule 5.51(g) revised effective 1/1/16)

(Rule 5.51 revised effective 1/1/16)

Rule 5.52. Juvenile Court Commissioner

(a) Appointment of Juvenile Court Commissioner

Pursuant to Government Code Section 70142.11, the Judges of the Superior Court, by majority vote, may, as resources allow, appoint a Juvenile Court Commissioner. Any commissioner so appointed shall have been admitted to practice law in California for not

less than ten (10) years, shall hold office at the pleasure of the Supervising Judge of the Juvenile Court, and shall not engage in the practice of law.

(b) Authority of Juvenile Court Commissioner

The Juvenile Court Commissioner shall perform the duties and shall have the powers prescribed by Code of Civil Procedure Section 259, and the duties and powers of a juvenile court referee as specified in Welfare and Institutions Code Section 247.

(c) Juvenile court assignments as temporary judge

Unless otherwise expressly specified, the Juvenile Commissioner, without further order of the Court, shall act as a temporary judge with respect to any and all juvenile actions, causes, or proceedings and whether regularly or specially assigned to the Juvenile Commissioner or to the Department in which the Juvenile Commissioner is sitting. Such duties and powers include, but are not limited to, conducting the trial, contest or hearing assigned actions, causes or proceedings, whether or not contested.

(d) Juvenile subordinate judicial officers

Subordinate judicial officers (including commissioners and temporary judges) shall serve pursuant to the provisions of law. Subject to order of the Juvenile Court Supervising Judge, the subordinate judicial officers shall hear all matters which the law and their calendars permit them to hear.

(Rule 5.52(d) revised effective 7/1/05)

(e) Juvenile stipulation to Commissioner

Subordinate judicial officers shall hear their cases as commissioners and be identified as commissioners to all parties. Any party not objecting to the commissioner hearing the matter is deemed to have stipulated to such commissioner hearing the matter as a temporary judge.

(Rule 5.52(e) revised effective 1/1/16)

(f) Stipulation requirements for temporary judge

When an attorney is sitting as a court-appointed temporary judge and hears a contested matter, the parties whose stipulation should be obtained are: the attorney for petitioner, the attorney(s) for the minor(s), and in applicable cases brought under Welfare and Institutions Code Section 300, the attorney for the parent, guardian or de facto parent.

(Rule 5.52(f) revised effective 1/1/08)

(g) Vacation approval for subordinate judicial officers

A subordinate judicial officer's vacation time and other time away from his or her calendar shall be approved in advance by the Juvenile Court Supervising Judge. When a Juvenile subordinate judicial officer is absent, his or her calendar may be heard by:

(1) Court-appointed Temporary Judge

(2) The Juvenile Court Supervising Judge

(3) A Juvenile Court Judge or subordinate judicial officer as reassigned by the Juvenile Court Supervising Judge.

(Rule 5.52(g) revised effective 7/1/05)

(Rule 5.52 revised effective 1/1/16)

Rule 5.53. Motions

(a) Presentation of motions

Except as provided by law, all motions shall be in writing, shall be heard before the attachment of jeopardy and shall be heard five (5) or more court days after notice unless the Court orders otherwise. The moving party shall clear the hearing date with the clerk of the juvenile court before filing any such motion.

(Rule 5.53(a) revised effective 1/1/16)

(b) Motion to continue the jurisdiction hearings

A motion to continue the jurisdiction hearing in any proceeding shall be made and heard no less than two (2) court days before the jurisdiction hearing, after service of notice on the opposing party at least five (5) court days before the jurisdiction hearing. Said motion shall be in writing unless all parties to the action, with the concurrence of the Court before whom the hearing is to be held, waive the requirement of written notice. The Court, however, may continue a jurisdiction hearing on motion of any party at the proceeding for good cause without the requirements of this subdivision being fulfilled. Untimely last minute continuances, without good cause, may be subject to sanctions.

(Rule 5.53(b) revised effective 1/1/16)

(Rule 5.53 revised effective 1/1/16)

Rule 5.54. Appointment of Juvenile Court Appointed Counsel

Juvenile Court judges shall be responsible for the appointment of counsel for children or minors in matters subject to the jurisdiction of the Juvenile Court. With few exceptions, appointments for minors in Welfare and Institutions Code Section 300 dependency cases are referred to the contracted dependency counsel program. Appointments for minors in Welfare and Institutions Code Section 602 delinquency cases are referred to the Public Defender's Office.

(Rule 5.54 revised effective 1/1/16)

Rule 5.55. Minute order

Minute orders in juvenile proceedings

(1) A minute order shall be prepared by the clerk of the Juvenile Court at the conclusion of each court proceeding. Recommendations adopted by the Court may be attached and incorporated into the minute order by reference.

(2) All parties to the action are entitled to receive a copy of the minute order upon completion of that session of the judicial proceeding.

(3) Any party to the proceeding may waive receipt of the minute order.

(Rule 5.55 revised effective 1/1/15)

Rule 5.56. Juvenile Detention hearings

In Welfare and Institutions Code Section 602 delinquency cases, the Probation Department shall study and report to the Juvenile Court Judge and in Welfare and Institutions Code Section 300 dependency cases, the Department of Human Services shall study and report to the Juvenile Court Judge as to detention of a minor. The report shall set forth specific facts which pertain to the factors regarding detention under the California Rules of Court and shall recommend whether or not the minor should be detained. The Judge shall make findings as required by the California Rules of Court as to the question of detention.

(Rule 5.56 revised effective 1/1/16)

Rule 5.57. Public Hearings

(a) Closed Juvenile hearings

Unless provided otherwise by law, Juvenile Court proceedings shall be closed to the public; provided, however, that the Juvenile Court judge may admit such persons as he or she deems have a direct and legitimate interest in the particular case or the work of the Court.

(Rule 5.57(a) revised effective 1/1/13)

(b) Discretionary public hearings in Juvenile Delinquency case

The Juvenile Court judge shall permit the public, including news media representatives, to be present at juvenile court delinquency proceedings, pursuant to Welfare and Institutions Code Section 676, et seq., unless the Judge determines that in the interest of justice and in the welfare of the minor, the proceedings should be closed.

(Rule 5.57(b) revised effective 1/1/13)

(Rule 5.57 revised effective 1/1/15)

Rule 5.58. Release of Information

(a) Discovery of Juvenile records.

Except as indicated within this rule, in all cases in which a person or agency seeks access to Juvenile Court Records, including records maintained by the Juvenile Court Clerk, the Probation Department, or the Department of Human Services, the person or agency shall file a Petition for Disclosure (Judicial Council Form JV-570) with the Judge of the Juvenile Court. The Petition shall set forth with specificity the material sought and the relevance of

the materials to the underlying action. The Petition shall be supported by a declaration notice to all necessary parties, and if necessary, a Memorandum of Points and Authorities.

In all cases in which a person or agency seeks records held by law enforcement, including police reports regarding children who are the subject of Juvenile Court proceedings, the person or agency shall file a request pursuant to the Police Report Request Form (Judicial Council Form JV-575).

This section does not apply to those persons and agencies designated by Welfare and Institutions Code Section 827(a).

(b) Records access by Court Appointed Special Advocate (CASA)

For the purposes of implementing the Court Appointed Special Advocate (CASA) Program, volunteers serving in the program are considered court personnel as that term is used in Welfare and Institutions Code Section 827. They shall have access to Probation Department and Department of Family and Children's Services files in order to carry out their responsibilities as court appointed advocates.

(Rule 5.58(b) revised effective 1/1/16)

(Rule 5.58 revised effective 1/1/16)

Rule 5.59. Inter-Agency Exchange of Information

(a) Juvenile information access and exchange

The disclosure of information concerning children and their parents by staff associated with Family Court Services, the Probation Department Juvenile Division, the Department of Human Services, Case Management Council, Adult Probation Department and Probate Court Investigator's office is generally prohibited by law. Nevertheless, a limited exchange of information about children or parents between these agencies in certain circumstances will serve the best interest of the child who is before the Court. The Court hereby finds that the best interest of children and victims appearing in court and the public interest in avoiding duplication of effort by the courts and by the investigative agencies serving the juvenile and family courts, and the value of having relevant information gathered by a court agency outweighs the confidentiality interest reflected in Penal Code Sections 11167 and 11167.5 and Welfare and Institutions Code Sections 827 and 10850 et seq., and therefore, good cause exists for the following rule:

In the following types of cases before the Court:

(1) Juvenile Delinquency

(2) Custody Disputes

(3) Juvenile Dependency

(4) Probate investigation (Conservatorship and Guardianship)

(5) Criminal

The representatives of the above listed agencies who are investigating or supervising cases involving children should disclose information to each other, including the exchange of records, reports and other documentation in their files regarding minors within the jurisdiction of the family, probate or juvenile courts or subject to proceedings therein.

(Rule 5.59(a) revised effective 1/1/16)

(b) Application to release information

The Juvenile Court judge will entertain other applications for release of information on a case-by-case basis.

(c) Juvenile inter-agency sharing of information

All county agencies and agencies contracting with the county as to the treatment of juveniles are authorized to share information with each other as to juveniles within the jurisdiction of the Juvenile Court.

(Rule 5.59 revised effective 1/1/16)

Rule 5.60. Timeliness

Attorneys for parties are required to adhere to the statutory timeliness for all hearings as provided in the Welfare and Institutions Codes and California Rules of Court. (See Welfare and Institutions Code Sections: 213.5, 252, 253, 315, 321, 322, 324, 334, 352, 353, 354, 358, 359, 361.2, 361.3, 361.5, 364, 366, 366.21, 366.22, 366.26, 366.3, 367 & 387; California Rules of Court, Rules 5.542, 5.550, 5.612, 5.605, 5.664, 5.666, 5.668, 5.678, 5.680, 5.686, 5.690, 5.695, 5.710, 5.715, 5.720, 5.740).

(Rule 5.60 revised effective 1/1/15)

Rule 5.61. Experience, Training, Education

Effective July 1, 1996, all appointed attorneys appearing in juvenile dependency proceedings shall be familiar with and comply with the minimum standards of competence set forth in California Rules of Court, Rule 5.660 and any applicable Welfare and Institutions Code Sections.

(Rule 5.61 revised effective 1/1/15)

Rule 5.62. Screening for Competency

(a) Minimum competency standards for court-appointed attorneys

All court-appointed attorneys appearing in juvenile dependency proceedings must meet the minimum standards of competence set forth in these rules.

(b) Standards of education and training

(1) Each court-appointed attorney appearing in a dependency matter before the Juvenile Court shall complete the following minimum training and educational requirements: The attorney shall have either: (1) participated in at least eight (8)

hours of training or education in juvenile dependency law, or (2) have sufficient recent experience in dependency procedure. (California Rules of Court, Rule 5.660).

(2) Each court-appointed attorney who practices before the juvenile dependency court shall complete within every three (3) year period, at least eight (8) hours of continuing education related to dependency proceedings. Evidence of completion of the required number of hours of training or education shall be retained by the attorney and may include a copy of a certificate of attendance issued by a California MCLE provider or a certificate of attendance issued by a professional organization which provides training and/or education for its members, whether or not it is a MCLE provider. Attendance at a court-sponsored or approved program will also fulfill this requirement.

(c) Standards of representation

All court-appointed attorneys appearing in dependency proceedings shall meet the following minimum standards of representation:

(1) Attorneys are expected to meet regularly with clients, including clients who are children, to contact social workers and other professionals associated with the client's case, to work with other counsel and the Court to resolve disputed aspects of a case without hearing, and to adhere to the mandated time lines.

(2) If the client is a child, the attorney or the attorney's agent shall have contact with the client before each hearing. The attorney or attorney's agent shall interview all children four (4) years of age or older in person, if possible. Whenever possible, the child shall be interviewed or seen at the child's placement. The attorney or attorney's agent should also interview the child's caretaker, particularly when the child is under four (4) years of age.

(3) If the client is not the child, the attorney or the attorney's agent shall interview the client at least once before the jurisdictional hearing unless that client is unavailable. Afterward, the attorney or the attorney's agent shall contact the client at least once before every hearing unless the client is unavailable.

(Rule 5.62(c) revised effective 1/1/16)

(Rule 5.62 revised effective 1/1/16)

Rule 5.63. Mediation

(a) Mediation of contested jurisdictional hearings

Absent objection by any party or attorney and with court approval and each jurisdictional matter set for contested hearing, with the exception of cases filed under Welfare and Institutions Code Sections 300(d) or (e), should be scheduled for mediation before contested hearing.

(Rule 5.63(a) revised effective 1/1/16)

(b) Mediation of post-jurisdictional contested hearings

At the request of any party or the Court, and with consent of all parties, all post jurisdictional matters set for contested hearing may be referred to mediation.

(Rule 5.63 revised effective 1/1/16)

Rule 5.64. Reciprocal Discovery

By Order of the Supervising Judge, the discovery provisions and rules of California Rules of Court, Rule 5.546 pertaining to juvenile delinquency matters are equally applicable and reciprocal to the prosecution and defense. (Robert S., 9 Cal. App 4th 1417)

(Rule 5.64 revised effective 1/1/15)

Rule 5.65. Disclosure of Victim or Witness Contact Information

(a) Disclosure of victim or witness contact information

All attorneys participating in juvenile delinquency proceedings shall comply fully with the limitations on disclosing victim or witness contact information prescribed by California Penal Code Section 1054.2. (See Robert S. v. Superior Court (1992) 9 Cal.App.4th 1417, 1422). Attorneys may disclose victim or witness contact information, including but not limited to, addresses and telephone numbers, only in accordance with Penal Code Section 1054.2. Attorneys shall not disclose victim or witness contact information to a child who is the subject of a juvenile delinquency proceeding, or to the child's parent or guardian, unless specifically permitted to do so by the Court after a hearing and a showing of good cause. The same concerns for victim or witness safety that prompted the enactment of Penal Code Section 1054.2 applies with equal force in juvenile delinquency proceedings. (Cf., City of San Jose v. Superior Court (1993) 5 Cal.4th 47, 54).

(b) Redaction of victim or witness contact information by district attorney

The District Attorney shall fully redact all victim or witness contact information before providing police, arrest, and crime reports directly to a child, parent, or guardian, and shall simultaneously give notice that this information is being redacted. (See, California Rules of Court, Rule 5.546, subdivisions (b), (g), and (h). The District Attorney shall provide unredacted copies of such reports to the attorney for a child, parent, or guardian, and the receiving defense attorney may use such reports in a manner consistent with Penal Code Section 1054.2(a). However, the receiving defense attorney shall fully redact all victim or witness contact information before providing police, arrest, and crime reports to the attorney's clients. In situations where the child, parent or guardian is not represented by an attorney, the Court shall issue a protective order consistent with Penal Code Section 1054.2, subdivision (b).

(c) Final order determining custody – modifications in new case filings

Pursuant to California Rules of Court, Rule 5.700 and Welfare and Institutions Code Section 302(d), the Court will enter appropriate custody and visitation orders at the time

the Juvenile Court terminates jurisdiction in a dependency case. To ensure there is in fact a significant change of circumstances to warrant modification of that order, when issuing the "Custody Order-Juvenile-Final Judgment-Visitation Order-Juvenile" (Judicial Council Form JV-200/JV-205), the Court may order that any application, order to show cause or motion to change custody or visitation filed within one year of the "Custody Order-Juvenile-Final Judgment/Visitation Order-Juvenile," is to be assigned and determined by a juvenile bench officer. In such cases the juvenile bench officer shall sit as a family law bench officer when hearing such an application, order to show cause or motion, and the matter shall be heard pursuant to the provisions of the Family Code.

(Rule 5.65 revised effective 1/1/15)

Rule 5.66. Notice Regarding Change in Placement for Dependents of the Court

In order to ensure that proper notice is received by attorneys of any change in a child's placement after the jurisdiction hearing:

(1) In non-emergency situations, Children and Family Services shall give notice to the child's counsel by close of the next business day following a decision to change a child's placement, including a change in address for respite, or a 7-day caretaker notice. In no event in non-emergency situations, shall the child be moved from placement without first providing child's counsel a reasonable opportunity to put the matter on the court calendar for court review.

(2) In non-emergency situations, Children and Family Services shall give at least ten (10) calendar days' notice before separating siblings placed together.

(3) Prior to removal of a child from one county to another, Children and Family Services shall give at least fourteen (14) calendar days' notice to all counsel, unless emergency circumstances prevent such notice. In such emergency circumstances, notice shall be given as soon as practicable but no later than close of the next business day.

(4) Within 48 hours of receipt of information that a child is absent without leave ("AWOL"), Children and Family Services shall notify all counsel.

(5) Within 48 hours of receipt of information that a child is or was recently hospitalized for medical treatment, including psychiatric hospitalizations, Children and Family Services shall notify all counsel and must provide the child's counsel the name and location of the hospital.

(6) Notice by Children and Family Services relating to the above changes in placement must be given in writing, which includes by facsimile or email. Notice to the child's counsel shall include the child's address, telephone number and name of the caregiver.

(Rule 5.66 revised effective 1/1/16)

Rule 5.67. Parental Visitation

(1) Visitation/Contact Before Detention Hearing

Immediately after a child is taken into temporary custody, the social worker shall ensure that the child has regular supervised contact with his or her parent pursuant to W&I Code 308 unless the social worker has a reasonable belief that contact with the parent would be detrimental to the child. Detriment may include cases of physical or sexual abuse or coercion by a parent of the child relating to the reporting of abuse or neglect. In such cases, the Court shall address the issue of contact at the initial/detention hearing.

(2) Visitation/Contact After Detention Hearing

The determination of the right to visitation and contact, the length of any visitation or contact, whether any visitation or other forms of contact will be supervised (and by whom) and the frequency of visitation and contact must be made by the Court. The implementation and administration of the Court's order may be delegated to the social worker. These tasks may include time, place and manner of visitation. The Court may also delegate the discretion to the social worker to increase the frequency and duration of the visits and to permit unsupervised visits (sometimes with the explicit condition that minor's counsel be given notice before such visits).

(Rule 5.67 revised effective 1/1/16)

Rule 5.68. Notice to Caregiver

The social worker shall ensure that notice is provided to the current caregivers of a dependent child, including foster parents, relative caregivers, preadoptive parents, or nonrelative extended family members of all status review and permanency review hearings as required under W&I Code 293. The social worker shall also provide the caregiver, at least thirty (30) calendar days before such hearings, with a Caregiver Information Form (Judicial Council Form JV-290) and instructions on how to complete and file the Instructions to Complete the Caregiver Information Form (Judicial Council Form JV-290-INFO) with the court.

(Rule 5.68 revised effective 1/1/16)

Rule 5.69. Notice to Minor's Counsel Regarding Subpoenas

In the event that a social worker receives a subpoena or notice of a subpoena of a minor subject to a dependency action, the social worker shall provide immediate notice to minor's counsel in the dependency action. This notice shall be given at least five (5) business days before the date of the appearance of the minor child or within 48 hours of the social worker's receipt of information of the subpoena, whichever occurs later. The social worker is to provide minor's counsel with a copy of the subpoena in the possession of the social worker.

(Rule 5.69 revised effective 1/1/16)

Rule 5.70. Probation Reports Reporting Confirmed Information on AIDS and AIDS-Related Diseases

Medically verified information that a juvenile or a defendant has AIDS, or AIDS-related diseases or is HIV positive, when reported to the Court, shall be reported in a confidential memorandum, attached only to the Court's copy of the Probation Report. These memoranda will remain confidential, and will be kept permanently sealed.

(Rule 5.70 revised effective 1/1/16)

Rule 5.71. Court Appointed Special Advocates Program Guidelines

Pursuant to Welfare and Institutions Code Section 100, the program guidelines established by the Judicial Council for Court Appointed Special Advocate Programs is hereby adopted, and incorporated herein.

(Rule 5.71 revised effective 1/1/16)

Title Six. Reserved.

Title Seven. Probate Rules

Chapter 1. General Provisions

Rule 7.1. Probate Matters

Matters governed by the Probate Code, except compromises for minors and incompetents arising from matters not governed by the Probate Code, shall be set for hearing in the department(s) designated by the Presiding Judge. These departments will be known collectively as the Probate Division. The Probate Division will manage contested matters that require an evidentiary hearing until resolved or ready for trial, and will then set the trial date and department. For information about Contra Costa Probate Court Calendars, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.1 revised effective 1/1/16)

Rule 7.2. Judicial Commitments

Probate matters also include all matters arising under the Lanterman-Petris-Short Act and any other judicial commitments, except Mentally Disordered Sex Offenders, and shall be heard in the Probate Division at time and date as established.

(Rule 7.2 revised effective 1/1/15)

Rule 7.3. Trust Fund Withdrawals

An application for an order authorizing withdrawals of funds on deposit for the benefit of a minor shall be made by completing a form provided by the clerk of the Court for this purpose. The

application shall be signed under penalty of perjury and shall set forth the status of the account, the purpose for which the funds are to be withdrawn, the need for the withdrawal, and the reasons why the parents or parent are unable to provide the needed funds. If the funds are held in a probate guardianship, or are blocked by other order of the probate court, the application for release of funds shall be submitted to the Probate Division. If the funds are blocked by order of another department, and there is no probate guardianship of the estate, the application shall be submitted to the Presiding Judge.

(Rule 7.3 revised effective 1/1/15)

Rule 7.4. Probate Rules

All petitions, motions, and orders to show cause regarding probate matters shall be set in the Probate Division. Also see Local Rule 3.41.

(Rule 7.4 revised effective 1/1/15)

Rule 7.5. Reporting of Court Reporting in Probate

(a) Unavailability of court reporters in Probate matters

Official court reporters employed by the court are unavailable in the Probate Division effective January 1, 2013 and until further notice. Consult the Notice of Availability on the court's website for current status and any changes.

(b) Procurement of private court reporters

Any party who desires a verbatim record of the proceedings from which a transcript can later be prepared may procure the services of an outside private certified court reporter pro tempore to report any scheduled hearing or trial (see California Rules of Court, Rule 2.956).

(c) Procurement process for court reporter services

Parties electing to procure the services of an outside reporter must comply with Local Rule 2.51

(d) Fee not charged for unavailable court reporter

Pursuant to California Rules of Court, Rule 2.956(d), if a party arranges and pays for the attendance of a certified shorthand reporter at a hearing in a probate case because of the unavailability of the services of an official court reporter, none of the parties will be charged the reporter's attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(e) Attendance fee

If court reporters become available and in the court's discretion are provided by the court for any civil hearings, the parties will be required to pay the applicable reporter attendance fee provided for in Government Code Sections 68086(a)(1)(A) or (B).

(f) Transcript costs

Parties shall be responsible for all transcript costs pursuant to Government Code Section 69953.

(Rule 7.5 revised effective 1/1/16)

Chapter 2. Probate Court Proceedings

Rule 7.50. Probate Calendar

(a) Appropriate placement on Probate calendar

Probate calendars are arranged to facilitate efficient and effective resolution of matters before the Court. For information about probate calendars go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.50(a) revised effective 1/1/16)

(b) Calendar Procedures

Parties may request, but are not guaranteed, any particular date for calendaring their matter. For information about probate calendaring, go to the Probate Guidelines section at www.cc-courts.org. Parties who want exceptions to application of the calendar procedures as determined by the clerk may request the Probate Examiners make accommodations to the calendaring procedure—and may make verified application to the Probate Division.

(Rule 7.50(b) revised effective 1/1/16)

(Rule 7.50 revised effective 1/1/16)

Rule 7.51. Contested Matters

(a) Scheduling issue conference

The Probate Division will manage probate matters until they are ready for trial and will then schedule the matter for an issue conference as otherwise described in Local Rule 3.11. Also see Local Rule 7.1.

(b) Alternative Dispute Resolution programs for Probate matters

It is the policy of the Court to encourage the parties in all cases to consider the use of appropriate alternative dispute resolution options as a means of resolving their disputes

without trial. The court finds that it is in the best interests of all parties that they participate in alternatives to traditional litigation, such as arbitration, mediation, neutral evaluation, and voluntary settlement conferences. Therefore, the court may refer cases to an appropriate form of alternative dispute resolution (ADR) before they are set for trial, unless there is good cause to dispense with an alternative dispute resolution process. (See Title 3, Chapter 5).

(Rule 7.51(b) revised effective 1/1/17)

(c) Rules for alternative dispute resolution processes other than judicial arbitration

(1) Selection of provider. The parties may choose any ADR provider they wish, whether or not that provider is on the list described in the following section of these rules.

(2) Good faith participation is required. All parties to an alternative dispute resolution process must participate in the process in good faith.

(3) Personal appearance required. In conducting a session, the ADR provider should require the attendance of persons with full authority to resolve the dispute. The provider should only permit telephone appearances if good cause to waive personal appearance was shown in a timely manner prior to the session.

(4) Cost of the alternative dispute resolution process. Unless the ADR provider's fees and expenses have been ordered by the court, the parties and the provider must agree on the fees and expenses. The fees and expenses of the provider will be borne by the parties equally, unless they agree otherwise.

(Rule 7.51(c) new effective 1/1/17)

(d) Alternative dispute resolution provider list

The court maintains a panel list of alternative dispute resolution providers to assist parties and counsel in obtaining access to experienced and affordable alternative dispute resolution services. The panel list includes providers in the areas of mediation, neutral case evaluation, private arbitration, and judicial arbitration. The panel list, including names, qualifications, services provided and fees charged, will be posted on the court's website and will be available in the office of the ADR program administrator.

(Rule 7.51(d) new effective 1/1/17)

(Rule 7.51 revised effective 1/1/17)

Rule 7.52. Appearances

(a) Appearances in uncontested matters

Appearances at the first hearing in uncontested matters are not normally required. Unless otherwise ordered, appearances are required in the following matters:

(1) If a person has been cited or ordered to appear at a hearing, appearances by both the party and the party's attorney of record at that hearing are required. If the citation or order was requested by a party, then the attorney for the requesting party, or the requesting party if in pro per, is also required to appear.

(2) If the tentative ruling states "Appearances required" then appearances are required by the proponent of the matters on calendar, and all who have responded so the Court can make appropriate case management orders (e.g. discovery deadlines, or trial setting). Attorneys of record may appear for their clients.

(Rule 7.52(a)(2) revised effective 1/1/13)

(3) The proponent and all who have responded must attend at all subsequent hearings related to case management orders (e.g. discovery deadlines, or trial setting) if a matter has been continued previously, or the parties are advised otherwise by the tentative ruling. Attorneys of record may appear for their clients.

(Rule 7.52(a)(3) revised effective 1/1/16)

(b) Sanctions for failure to appear

A failure to appear as required may result in sanctions pursuant to Code of Civil Procedure Section 177.5.

(Rule 7.52 revised effective 1/1/16)

Rule 7.53. Verifications

Verifications standards:

(1) The attorney who represents a ward or conservatee may verify pleadings filed on behalf of the ward or conservatee.

(2) An attorney's verification on behalf of a client may be sufficient for pleading purposes, but unless the verification provides that the facts are within the personal knowledge of the attorney, then this does not provide the evidentiary support necessary for a ruling.

(3) An attorney's declaration as to facts or attachments which were allegedly intended to be included in a statement previously verified by the attorney's client is ineffective. (Revised effective 1/1/03 per Code of Civil Procedure Section 2015 and California Rules of Court, Rule 7.103)

(Rule 7.53 revised effective 1/1/15)

Rule 7.54. Submission of Proposed Order Before Date of Hearing

Except in the case of confirmations of sales, orders must be submitted to the Probate Division at least three (3) court days in advance of the scheduled hearing date. The hearing date shall be stated in the order. The proposed order shall be prepared on the assumption the petition will be granted, including requested fees. Orders submitted later will be reviewed and processed after the hearing and will generally be available the morning after the hearing.

(Rule 7.54 revised effective 1/1/15)

Rule 7.55. Responses to Tentative Rulings

Tentative rulings or calendar notes are available before the calendar hearings in the Probate Guidelines section at www.cc-courts.org. In order to be considered, responses to tentative rulings must be filed no later than the close of business, two (2) court days before the hearing and endorsed filed copies delivered to the Probate Examiner.

(Rule 7.55 revised effective 1/1/16)

Rule 7.56. Continuances to Cure Defective Pleadings or Procedures

(a) Continuance of first hearing

The first hearing on a matter may be continued to enable the petitioner to correct defective pleadings or procedures identified in the tentative ruling. The continuance can be made by telephone request to the clerk, or by the Court on its own motion, even if no appearance or request for continuance is made.

(b) Continuance or dismissal of matter

After the first hearing, the matter may be dismissed unless the petitioner shows good cause for a further continuance, by a filed declaration or an appearance at the hearing. Continuances following the first hearing may not be secured by requesting a continuance from the clerk.

(c) Renotice of dropped matters

A matter once dropped must be renoticed after it has been placed back on calendar. A matter dismissed must be refiled and renoticed.

(Rule 7.56(c) revised effective 1/1/01)

(Rule 7.56 revised effective 1/1/15)

Rule 7.57. JUDICIAL COUNCIL FORMS. REPEALED (See CALIFORNIA RULES OF COURT, RULE 7.101)

Rule 7.58. Discretion to Waive

The Court for good cause may waive the application of any Local Court Rule or Probate Guideline in an individual case.

(Rule 7.58 revised effective 1/1/15)

Rule 7.59. Fees

(a) Fee guidelines

The Probate Division may, from time to time, publish fee guidelines for the assistance of counsel and others. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.59(a) revised effective 1/1/16)

(b) Fee petitions for fiduciaries

Fee petitions for fiduciaries and their attorneys, as well as for others seeking payment from an estate in a probate department case (e.g., court-appointed counsel for conservatees with an adequate estate) are governed by a common set of guidelines but are subject to somewhat different considerations depending on the type of case in which they are presented. The common guidelines, dealing with format and acceptable rates and reimbursable costs, are contained in Chapter 12 below, and in the Contra Costa Probate Court Fees and Costs Guidelines at www.cc-courts.org.

(Rule 7.59(b) revised effective 1/1/16)

(c) Evaluation of fee petitions

Other considerations for evaluating fee petitions in more specific contexts are referenced in Local Rules 7.306 (probate administration), 7.426 (probate guardianships and conservatorships, including LPS conservatorships), and 7.450 (trusts). Also, see Local Rules 112 and 116 for additional instructions applying to all fee petitions.

(Rule 7.59(c) revised effective 1/1/15)

(Rule 7.59 revised effective 1/1/16)

Rule 7.60. Record Title

(a) Disclosure of title of record

If a Title of Record for a decedent's interest in an asset is different than the decedent's interest is alleged to be in a petition determining the characterization or disposition of the decedent's interest, the petition shall disclose to the Court what the Title of Record is for the asset. For example, if a Spousal Property Petition is filed seeking determination that community property realty passed to the surviving spouse, and the title of record for the property to the property is held as "joint tenants with right of survivorship" then that fact shall be disclosed.

(b) Community property

Community property held in joint tenancy title will be treated as community property unless there was a formal and express transmutation from community property.

(Rule 7.60 revised effective 1/1/15)

Rule 7.61. Court Ordered Fees for Fiduciaries and Attorneys

(a) No attorney for a guardian, guardian ad litem, minor, conservator, conservatee or personal representative shall request or accept any compensation from the estate (whether or not subject to court supervision) of the ward, incapacitated person, conservatee or decedent's estate without prior court order. This does not require prior court approval of payments received from trusts or other persons.

(b) The requirement of prior court approval applies to any attorney for any of the specified fiduciaries who is representing the fiduciary in any other civil action. For example, if a creditor files suit against a decedent's estate, and the personal representative hires separate counsel to defend the suit, prior court approval is required before payment of any fees to the separate counsel.

(c) In awarding or allowing reimbursement for compensation in situations described in paragraph (a), the Court is neither bound by (1) the terms of any attorney fee agreement executed without prior court approval in the proceeding nor (2) any amounts that have been paid previously. (See California Rules of Court, 7.753, 7.754, 7.755) For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.61 revised effective 1/1/16)

Rule 7.62. Factual Allegations

Declarations which merely recite or incorporate reference to code sections do not provide an evidentiary basis for action by the Court absent evidence that the declarant is an attorney or otherwise has sufficient expertise to express a credible opinion as to the operation of the code section. Absent such expertise, facts evidencing necessary compliance with a code section shall be stated in the pleadings.

(Rule 7.62 revised effective 1/1/16)

Rule 7.63. Guardian ad Litem

(a) Representation of guardian ad litem

A guardian ad litem must be an attorney or must be represented by an attorney.

(b) Waiver of beneficiary rights

A guardian ad litem may not waive or disclaim any substantive rights of the beneficiary without prior approval by the Court.

(Rule 7.63 revised effective 1/1/15)

Rule 7.64. Special Notice to Attorneys and Clients

A request for special notice by an attorney, absent an express statement otherwise, does not constitute a waiver of the notices required to be sent to the attorney's client under Probate Code Section 1214.

(Rule 7.64 revised effective 1/1/15)

Rule 7.65. Coordination of Fee Petitions with Accountings

(a) Filing fee petitions

Although the Probate Code does not prohibit fee petitions from being filed separately from accountings, the Court prefers to determine the amount of fees for fiduciaries and their attorneys (and if possible, for other attorneys who need prior approval for payment in the case) at the time the fiduciary's accounts are reviewed.

(b) Filing requirements

A petition before an accounting may be filed to determine compensation as long as the Inventory and Appraisal has been filed showing sufficient assets to pay the requested compensation (this condition does not apply to cases, such as trust administration, where an Inventory and Appraisal is not required to be filed). However, the fiduciary and counsel will not be allowed fees or costs from the estate for bringing such early petition, unless good cause for allowing fees before an accounting is shown.

(c) Fee petition clarification

A petition for appointment of a fiduciary that includes a request for periodic payment of fees on account under Probate Code §2643 or §10832 shall not be deemed a "fee petition" under this rule.

(d) Trust administrations

This rule does not apply to trust administrations where court-approved accountings are not required.

(Rule 7.65(d) new effective 1/1/13)

(e) Fee petition by counsel

A fee petition by counsel for a proposed conservatee or ward requesting less than $5,000 may be submitted for decision during ex parte hours, apart from an accounting, with fifteen (15) calendar days' notice to all persons who would be entitled to notice of the hearing if such petition were set on the regular calendar. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.65(e) new effective 1/1/16)

(Rule 7.65 revised effective 1/1/16)

Chapter 3. Petitions, Orders and Notices

Rule 7.100. Titles for Petitions and Orders [Repealed 1/1/03]

Rule 7.101. Material to be Included in Formal Rulings

Formal orders, judgment and decrees shall be drawn so that their full effect may be determined without reference to the petition on which they are based. As necessary for this purpose, documents shall be attached to, and referenced in, the order, judgment or decree, instead of referring to the other document by reference. All probate orders, judgments or decrees shall set forth all matters actually passed on by the Court, giving the relief granted, the names of the persons affected, and the full legal description of any real property (including Assessor's Parcel Number), or the amounts of money affected.

(Rule 7.101 revised effective 1/1/15)

Rule 7.102. Written Response

An objection or other written response to moving papers will be deemed a waiver of further notice as to those papers.

(Rule 7.102 revised effective 1/1/15)

Rule 7.103. Reserved. [REPEALED 1/1/03]

Rule 7.104. Applications for Ex Parte Orders

(a) Ex parte applications

Applications for ex parte orders must be accompanied by a separate order complete in itself. It is not sufficient for such an order to provide merely that the application has been granted, or that the sale of property set forth in the petition has been approved.

An application for an ex parte order must be verified and must contain sufficient evidentiary facts to justify issuing the order. Conclusions or statements of ultimate facts are not sufficient and a foundation should be shown for the petitioner's personal knowledge.

(b) Notice requirements

Since no testimony is taken in connection with ex parte petitions, the application must contain sufficient facts to justify granting the ex parte order. Petitioner must notify all interested or opposing parties by fax or telephone no later than 10:00 a.m. on the day before the scheduled hearing as provided by CRC, Rule 3.1203 and CRC, Rule 3.1204. An endorsed filed copy of a declaration regarding notice in compliance with CRC, Rule 3.1204 must be delivered to the Probate Department prior to the hearing. Orders dispensing with notice must be supported by a declaration setting forth the exceptional

circumstances that justify dispensing with notice. REPEALED IN PART (see California Rules of Court Rule 3.1203, Rule 3.1204, and Rule 7.55 & Probate Code 1202)

(Rule 7.104(b) revised effective 1/1/17)

(Rule 7.104 revised effective 1/1/17)

Rule 7.105. Petitions for Family Allowance

(a) Income and expense requirement

A petition for the family allowance under Probate Code Section 6540 et seq. must include a detailed statement of proposed recipient's income and expenses.

(b) Notice requirement for petitions for family allowance

A petition for family allowance, if made before the filing of the Inventory and Appraisal ordinarily may be presented ex parte. However, if the petitioner is someone other than the executor or there is a dispute as evidenced by papers on file in the proceedings, or there is a request for special notice, then all other parties must be notified in person or by telephone at least twenty-four (24) hours in advance of the time and place where the application for the ex parte order will be made. The petition must be presented by the attorney or unrepresented party requesting the ex parte order. Ordinarily, the order will be made for a period commencing with the date of death and continuing until the inventory is filed, but not to exceed six (6) months. If the order will be opposed, call the Probate Division ahead of time to make a specific appointment with the Court.

(c) Application and notification after personal representative qualified

If the application is made more than six (6) months after the personal representative has qualified, it shall be noticed and placed on the calendar.

(d) Time period for subsequent orders

Subsequent orders will be limited to a definite period, usually not to exceed twelve (12) months duration. It is the policy of this Court not to make orders for family allowance for an unlimited period.

(Rule 7.105 revised effective 1/1/15)

Rule 7.106. Bond on Petitions for Authority to Borrow Money

Petitions for authority to borrow money shall set forth the amount of bond in force and the amount of loan proceeds eligible to be covered by bond. If no additional bond is required, or if bond is waived, that fact shall be alleged.

(Rule 7.106 revised effective 1/1/15)

Rule 7.107. Nunc Pro Tunc Orders Correcting Clerical Errors

(a) Correction of error on order

If, through inadvertence, the signed order, judgment or decree fails to state the ruling actually made by the Court, or through some writer's error portions of the order, judgment or decree are incorrect, the Court will make a nunc pro tunc, judgment or decree order correcting the mistake upon declaration detailing the defect. If the modification to the order is the result of an error by an attorney or party, an ex parte application is required. If modification is the result of court error, a declaration in support of the amended order is sufficient.

(b) Nunc pro tunc order

A nunc pro tunc order, judgment or decree must take the form of a complete amended order, judgment or decree. The previously signed order must be attached to the ex parte application or declaration.

(Rule 7.107 revised effective 1/1/16)

Rule 7.108. General Notice Requirements

Counsel are reminded that the notice requirements in the Probate Code vary greatly. No set pattern may be discerned. The specific requirements of the Code (i.e., posting, mailing, publication, personal service, etc.). must be checked for every petition filed.

(Rule 7.108 revised effective 1/1/15)

Rule 7.109. Probate Hearing Once Noticed Cannot be Advanced

When a hearing on a probate matter has been noticed, or when it has been noticed and then continued to a definite date, the matter cannot be heard before the date set, except by Court order and new notice.

(Rule 7.109 revised effective 1/1/15)

Rule 7.110. Orders, etc., to be Complete

A judgment, degree or order shall be complete in itself, with attachments as necessary to avoid incorporating other documents by reference.

(Rule 7.110 revised effective 1/1/15)

Rule 7.111. Accounts and Reports

(a) Accountings submitted for court approval

Accountings submitted for court approval shall comply with Probate Code Section 1060 et seq.

(b) Statement of bond in accounting report

The report accompanying an accounting shall include a statement regarding the bond. This shall include the following:

(1) The amount of the currently posted bond.

(2) If no bond is posted, a statement of why no bond was required (e.g., "At the time of appointment, there were no assets subject to disposition by the fiduciary" or "Bond was waived in the will").

(3) If bond is required, the report shall state:

(A) the current value of all personal property subject to the petitioner's control;

(B) the amount of the estimated annual income for the next year;

(C) the fair market value, less encumbrances, of any real property which the fiduciary can sell without prior court order; and

(D) the amount of any public benefits regarding accounts for guardianships and conservatorships being received by or for the benefit of the ward or conservatee, including the identity of the person receiving the benefit.

(Rule 7.111 revised effective 1/1/16)

Rule 7.112. Petitions to Show who is Entitled to Notice

All petitions shall identify the names, addresses, and relationships of all persons entitled to notice.

(Rule 7.112 revised effective 1/1/15)

Rule 7.113. Identity or Whereabouts Unknown [repealed 1/1/03] (see California Rules of Court, Rule 7.52)

Rule 7.114. Notice Regarding Interests of Deceased Persons [repealed 1/1/03] (see California Rules of Court, Rule 7.51(e))

Chapter 4. Appointment of Executors and Administrators

Rule 7.150. Notice re: Special Letters

Petitions for letters of special administration will not be granted without twenty-four (24) hour (oral or written) notice to the surviving spouse or domestic partner as defined in Probate Code Section 1894, to the person nominated as executor, and to any other person whom the Court determines to be equitably entitled to notice. In making the appointment, preference is given to the person entitled to Letters Testamentary or of Administration, but if it appears that a bona fide contest

exists between these persons, the Court will consider the advisability of appointing a neutral person or corporation as Special Administrator, upon the filing of a proper petition.

(Rule 7.150 revised effective 1/1/15)

Rule 7.151. Petitions for Probate of Will and for Letters Testamentary; for Letters of Administration; or for Letters of Administration with Will Annexed

(a) Photographic copy of holographic instrument

When a holographic instrument is offered for probate, a photocopy of the instrument must be accompanied by an exact typewritten copy of the instrument, reproducing the instrument line by line and showing any words crossed out. Where an instrument written in a foreign language is offered, it must be accompanied by a copy translated into English by a Court certified translator.

(b) Name of predeceased beneficiary

If a named beneficiary predeceased the decedent or did not survive the designated survival period, that fact must be stated in Attachment 8 of the Petition.

(c) Requirement of personal representative form

Confidential Statement of Birth Date and Driver's License Number (Judicial Council Form DE-147S) is not required.

(d) Name of spouse or deceased person on petition

If Attachment 8 includes a spouse or any other person who is deceased as of the date of the petition, the petition shall state that person's date of death. The Court needs to know whether the person predeceased or survived the decedent.

(Rule 7.151(a)-(d) revised effective 1/1/15)

(e) Proof of Service of Notice of Petition to Administer Estate

A copy of the petition must be served with the initial Notice of Petition to Administer Estate. A copy of the petition should not be published with the Notice.

(Rule 7.151(e) new effective 1/1/15)

(Rule 7.151 revised effective 1/1/15)

Rule 7.152. Notice

(a) The following persons are entitled to NOTICE (see Probate Code § 8110):

(1) Heirs of the Decedent: Whether or not a decedent died with a will, the petition must contain the names and relationships of all of the decedent's heirs-at-law. An heir-at-law is any person who would be entitled to distribution of a part of the decedent's estate (including distribution by virtue of Probate Code Section 6402.5 if the

decedent had a predeceased spouse) if the decedent died intestate (without leaving a will);

(2) Beneficiaries Named in the Will: This includes all named contingent beneficiaries who may be entitled to share in the estate, and also includes persons provided for in the Will but whose gifts have been revoked by a subsequent modification to the will;

(3) Deceased Heir or Beneficiary See California Rules of Court, Rule 7.51(e); if heir or beneficiary died before decedent, see also Probate Code § 21110. [REPEALED 1/1/03] (See California Rules of Court, Rule 7.51(e));

(4) Trustee Nominee. Any nominated trustee of a trust created by the will;

(5) Beneficiaries of Testamentary Trusts. The terms "beneficiaries named in the Will" and "named contingent beneficiaries" used above include beneficiaries named in testamentary trusts. It is not adequate merely to give notice to the trustee of a trust where beneficiaries or contingent beneficiaries are named in testamentary trusts;

(6) Trustees of Inter-Vivos Trusts who will receive "pour over" gifts from the decedent's estate. Item 8 on the Petition For Probate (Judicial Council Form DE-111) requires the petitioner to list "all beneficiaries of a trust named in the decedent's will or any codicil in which the trustee and personal representative are the same person." Since use of applicable Judicial Council forms is mandatory and the purpose of Item 8 is to identify persons entitled to receive notice of the petition, the Probate Division will require notice to be given to present and contingent beneficiaries of trusts where the trustee is a beneficiary of the will and the trustee is identical to the proposed personal representative;

(7) Any non-petitioning Executor, including alternate executors named in the Will; and

(8) The California Attorney General, where there is a charitable trust involved (Probate Code Section 8111).

(b) Method of giving various notices

(1) **Unknown Address.** If the address of an heir or beneficiary is unknown, the Court requires a declaration stating specifically what efforts were made to locate such heir or beneficiary before the Court will dispense with notice or prescribe an alternate form of notice. See Probate Code Section 1212 and Code of Civil Procedure Section 413.30 as to what efforts are necessary. In general, these efforts shall include inquiry of relatives, friends, acquaintances, and employers and investigation of appropriate city and telephone directories, and the real and personal property index at the County Assessor's Office of the county of last known residence of the missing heir or beneficiary. REPEALED IN PART (see California Rules of Court, Rule 7.51(d))

(2) **Minors**. See Probate Code Section 1460.1 and California Rules of Court, Rule 7.51(d).

(c) Notice by mail - by whom given

If a Probate Code Section requires the clerk to "cause notice of the hearing to be mailed", the clerk fulfills this function by requiring counsel to do the mailing. Therefore, counsel is charged with this duty.

(Rule 7.152 revised effective 1/1/16)

Rule 7.153. Requirements of Publication for Notice of Petition to Administer Estate

(a) Publication and mailing of notice of petition to administer estate

The publication and mailing of Notice of Petition to Administer Estate under Probate Code Section 8120 is sufficient to include all instruments which are offered for probate filed with, and specifically referred to in the Petition for which notice is given. Any other Wills or supplement to a Will not specifically mentioned in the Petition must be presented to the Court in an amended or second Petition and a new Notice of Petition to Administer Estate must be published and mailed. (Probate Code Sections 8110 and 8120).

(b) Petitioner's responsibility to publish petition to administer estate

It is the responsibility of the petitioner to arrange for publication. The County Clerk does not have this responsibility.

(Rule 7.153 revised effective 1/1/16)

Rule 7.154. Court Discretion Regarding Bond

Executors nominated to serve without bond may nevertheless be required to post such bond as the Court may require. If the nominated executor is a nonresident of California, the Court will require bond as though the will had not waived bond. If all beneficiaries or heirs waive bond, or if one of multiple personal representatives is a California resident, the Court will consider reducing the bonding requirement for non-resident personal representatives to no less than $20,000 to provide protection for creditors. A declaration or attachment to the petition setting forth in detail the anticipated liabilities of the decedent and claims against the estate will be necessary to help the court determine the proper amount. FORMER SUBDIVISION B REPEALED IN PART (See California Rules of Court, Rule 7.204)

(Rule 7.154 revised effective 1/1/15)

Rule 7.155. Continuance to Permit Filing of Contest

When a petition for the probate of a Will is called for hearing, if an interested person appears and orally objects and declares that he or she desires to file a written contest, the Court will continue the hearing with the understanding that if a contest is not actually on file at the new hearing date, the hearing will nevertheless proceed as though there were no contest.

(Rule 7.155 revised effective 1/1/15)

Rule 7.156. Multiple Representatives

When multiple personal representatives are appointed, the clerk will not issue letters to less than all of them or separately to any of them, unless the order specifies otherwise.

(Rule 7.156 revised effective 1/1/15)

Chapter 5. Creditors' Claims

Rule 7.200. Nature and Form of Claims

(a) Claim vs. expense of administration

(1) The Court will not approve "creditors' claims" which represent obligations of the estate arising after the death of the decedent (except reasonable funeral expense). Such expenses are properly expenses of administration, not creditor's claims, and may be included for approval in the account or report.

(2) The Court will not approve "creditors' claims" which are requests for reimbursement by the person who paid what may otherwise have been a creditor claim. These are claims for equitable subrogation, and may be included for approval in the account or report.

(b) Form of creditor's claims

Creditor's claims will be liberally construed in favor of their sufficiency.

(Rule 7.200 revised effective 1/1/15)

Rule 7.201. Claims Filed with Clerk and Mailed to Personal Representative [Repealed 1/1/03] (see California Rules of Court, Rule 7.401; Probate Code 9150)

Rule 7.202. Claims of Personal Representatives and Attorneys

(a) Creditor's claim by personal representative

A creditor's claim of the personal representative or attorney shall be noted as such. Such a claim must be processed as provided in Probate Code Section 9252 notwithstanding authority to act under the IAEA. Where there is more than one personal representative, a creditor's claim submitted by one of the personal representatives must be approved by the other(s) before submission to the Court for approval.

(b) Hearing on claim of personal representatives or attorney

Unless a claim by a personal representative or attorney for the personal representative appears reasonable, and any persons requesting special notice have waived the notice as to the claim, a hearing shall be held as set forth in Probate Code Section 9252(a) and

notice given to all persons entitled to such notice, including all residuary beneficiaries, together with a copy of the claim, pursuant to Probate Code Section 1220.

(Rule 7.202(b) revised effective 1/1/15)

(Rule 7.202 revised effective 1/1/15)

Rule 7.203. Funeral Claims

An unusually large claim for the decedent's funeral and/or interment is a questionable claim and may be set for hearing pursuant to the procedure set forth in Local Court Rule 7.202(b) above. Counsel is advised to review the case of Estate of Malgor (1947) 77 Cal.App.2d 535, 176 P2d 66. Where appropriate, the personal representative shall either include facts in the petition or file a separate declaration to justify an unusually large expenditure for funeral expenses by reason of the value of the estate and/or the standard of living adopted by the decedent during his lifetime. Interest will be allowed on creditor's claims for funeral expenses only as made payable by Health and Safety Code Section 7101.

(Rule 7.203 revised effective 1/1/15)

Chapter 6. Sales

Rule 7.250. Sales of Real Property not under IAEA

Rule 7.251. Return of Private Sale

(a) Cash deposit required for purchases to be confirmed by court

Bids for the purchase of real property, when required to be returned to the Court for confirmation, must be accompanied by a minimum deposit of ten percent (10%) of the purchase price at the time of hearing unless the buyers' committed loan proceeds exceed ninety percent (90%) of the purchase price, in which event the minimum deposit shall be the difference between the committed loan proceeds and the purchase price.

(b) REPEALED IN PART (See California Rules of Court, Rule 7.451)

(Rule 7.251(b) revised effective 1/1/03)

(c) Court approval of secured junior deed of trust

The Court will approve the taking of a promissory note secured by a junior deed of trust upon a showing that it serves the best interests of the estate.

(d) Application of statutory formula re overbid

The Court must consider not only whether the bid is arithmetically the highest, but also whether it is in the best interest of the estate. Counsel for the parties involved shall be prepared with factual information that will aid the Court in making this determination.

(e) REPEALED IN PART (See California Rules of Court, Rule 7.452)

(Rule 7.251(e) revised effective 1/1/03)

(Rule 7.251 revised effective 1/1/15)

Rule 7.252. Broker's Commissions

(a) Improved property

Upon the confirmation of sale of improved real property, the Court will ordinarily allow a broker's commission not to exceed six percent (6%). If a greater amount is requested, the petition to confirm sale must be accompanied by written declarations setting forth the advantages to the estate in allowing a larger percentage as commission.

(b) Unimproved property

Upon the confirmation of sale of unimproved real property, the Court will ordinarily allow a broker's commission not to exceed ten percent (10%). The Court will determine the kind of property which constitutes unimproved property in each case and may request counsel to file declarations setting forth relevant facts in the determination of what is "unimproved" real property.

(c) Order must show commission allocation

The order confirming sale must show the total commissions allowed and any allocation agreed upon between the brokers.

(Rule 7.252 revised effective 1/1/15)

Rule 7.253. Broker's Commissions in Overbid Situation

See Probate Code Section 10160 et seq. A chart demonstrating the division of the broker commission when estate property is sold subject to Court confirmation is available in the Probate Guidelines section at www.cc-courts.org.

(Rule 7.253 revised effective 1/1/16)

Rule 7.254. Exclusive Listings for Sale of Property (Probate Code Section 10150(c) [Repealed 1/1/03] (see California Rules of Court, Rule 7.453)

Rule 7.255. Condominiums, Community or Cooperative Apartments

A condominium is an interest in real property and must be sold as such, unless it is held as a limited partnership. A cooperative apartment is also real property and must be sold as such.

(Rule 7.255 revised effective 1/1/15)

Rule 7.256. Purchase of Estate Property by Personal Representative or His or Her Attorney

The purchase of estate property by the personal representative or by the personal representative's attorney is permitted only as set forth in Probate Code Sections 9881-9885. The Court will approve such a purchase with the consent of all residual beneficiaries by a writing filed with the Court.

(Rule 7.256 revised effective 1/1/15)

Rule 7.257. Tangible Personal Property

(a) Perishable or depreciating property

Perishable or depreciating property in an estate shall be disposed of promptly. The personal representative may be held accountable for the value of the property if there has been an unreasonable delay in disposing of such property. Such property may be sold without notice. See Probate Code Sections 10252 and 10259(a)1. If counsel wishes Court confirmation of such sales (10259c), counsel shall use the form Ex Parte Petition for Approval of Sale of Personal Property and Order (Judicial Council Form DE-275).

(b) Non-perishable or non-depreciating property

With the exceptions set forth in Probate Code Sections 10252(a), (b) and (d), non-perishable or non-depreciating personal property may be sold subject to Court confirmation at either public auction or at private sale, after giving notice as set forth in Probate Code Section 10250, et seq. The time for giving notice may be shortened in the discretion of the Court.

(Rule 7.257 revised effective 1/1/15)

Chapter 7. Accounts, Fees and Petition for Distribution

Rule 7.300. Notice of Petition for Distribution

At least fifteen (15) calendar days before the hearing of the petition, notice of the hearing must be served upon each named beneficiary whose interest is affected by the petition and to the heirs of the decedent in intestate estates. Also see Probate Code Section 1220. Notice shall also be given to: a) the trustee of any intervivos trust to which the estate pours over; b) to trust beneficiaries if required under Probate Code Section 1208; c) to the trustee of any testamentary trust.

(Rule 7.300 revised effective 1/1/16)

Rule 7.301. Property to be Distributed must be Listed

(a) Description of property

The petition for distribution must list and describe in detail all property to be distributed, either in the body of the petition or in the prayer, or by a schedule in the accounting, and incorporated in the petition by reference. This includes a statement of the amount of cash

on hand. A description by reference to the inventory is not acceptable. See also requirements in Probate Code Section 1064.

(b) Tracing survivor of interstate decedent

If an intestate decedent who survived his or her spouse leaves no issue, the applicability of Probate Code Section 6402.5 must be alleged and the necessary tracing must be carried out as far as is possible.

(Rule 7.301(b) revised effective 1/1/03)

(Rule 7.301 revised effective 1/1/15)

Rule 7.302. Form of Accounting

The general guidelines for accountings are now set forth in Probate Code Section 1060 et seq.

(Rule 7.302 revised effective 1/1/15)

Rule 7.303. Waiver of Account

(a) Waiver by residuary beneficiaries

The waiver of account by the residuary beneficiaries alone is sufficient, even though there may be specific legatees and devisees, if the petition for distribution enumerates the specific bequests and devises, shows that there are sufficient assets to satisfy such bequests and devises, and prays that they be distributed. REPEALED IN PART (See California Rules of Court, Rule 7.550 for information required in reports on waiver of account)

(Rule 7.303(a) revised effective 1/1/15)

(b) Distribution from testamentary trust

When property is being distributed in a testamentary trust, an account may be waived by the trustee and all present beneficiaries of the trust. The beneficiaries must all be ascertained, adult and competent, or represented by a guardian, conservator or guardian ad litem, who must execute the waiver.

(Rule 7.303(b) revised effective 1/1/15)

(Rule 7.303 revised effective 1/1/15)

Rule 7.304. Statutory Fees and Allowable Costs [Repealed 1/1/03] (see California Rules of Court, Rule 7.705)

Rule 7.305. Inheritance by Surviving Spouse

Formal probate of community, quasi-community, or separate property passing or confirmed to a surviving spouse in a decedent's estate pursuant to Probate Code Section 13502 must be supported by a timely written election expressing acknowledgement of a consideration of the alternative procedures available pursuant to Probate Code Section 13650. Written elections

pursuant to Probate Code Section 13502 shall contain an express acknowledgment that the inclusion of property passing to or belonging to the surviving spouse in the probate estate could result in additional appraisal fees, commissions, and attorney fees.

(Rule 7.305 revised effective 1/1/15)

Rule 7.306. Extraordinary Fees

Petitions for compensation for extraordinary services under Probate Code § 10811 shall be supported by a declaration, complying with Contra Costa Probate Court Guidelines from each individual requesting approval of extraordinary fees. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org. The petition should recite only the amounts claimed and the relevant period of time, referring to the accompanying declaration(s), which should contain the explanation and justification. See also California Rules of Court, Rules 7.702 and 7.703 for declaration content.

(Rule 7.306 revised effective 1/1/16)

Rule 7.307. The Order

(a) Distribution and listing of cash and non-cash assets

The distribution of property must be separately stated in detail, listing non-cash assets to be distributed as described in the Inventory and Appraisal, as well as the amount of cash to be distributed, under the name of each beneficiary. The order must be complete in itself and the total estate distributed must agree with property on hand as shown on Schedule F of the Summary of Account. Description by reference to the inventory is not acceptable.

(b) Distribution of real property included in order

For real property to be distributed, the order must include the legal description, the street address, if any, and the assessor's parcel number.

(c) Testamentary trusts

For orders establishing testamentary trusts, see California Rules of Court, Rule 7.650.

(7.307(c) revised effective 1/1/08)

(Rule 7.307 revised effective 1/1/15)

Rule 7.308. Segregating Trust Income and Principal

When any part of the estate is to be distributed to a trustee, and the accumulated income is to be paid by the trustee to the trust beneficiaries, the order shall allocate receipts and disbursements between principal and income.

(Rule 7.308 revised effective 1/1/15)

Rule 7.309. Creditor's Claims

(a) Petition for final distribution

The Petition for Final Distribution must show that all of decedent's creditors received a Notice of Administration to Creditors (Judicial Council Form DE-157) at least seventy-five (75) calendar days before the hearing, or were paid or that there were no known creditors of decedent. (Probate Code Section 10900)

(Rule 7.309(a) revised effective 1/1/16)

(b) Payment of funeral or debt expenses after general powers issued

Unless accountings are waived, if any funeral expense or debt of the decedent was paid more than four months after letters with general powers issued, the petition shall show why the claim was not barred or the personal representative may be surcharged with interest for the payment.

(*Rule 7.309(b) revised effective 1/1/01)*

(c) Payment of funeral and debt expenses from estate

Unless accounts are waived, if a decedent's debt or funeral expense was paid from the estate without the filing of a creditor claim, the petition shall address the five elements (including timeliness of payment) of Probate Code Section 11005.

(Rule 7.309(c) revised effective 1/1/01)

(Rule 7.309 revised effective 1/1/16)

Rule 7.310. Federal Estate Taxes

(a) Proration of federal estate taxes

When proration of federal estate taxes is required by Probate Code Section 20110 et seq., the petition for distribution shall include a schedule showing the computation of the proration.

(b) Final distribution of estate after estate taxes filed and paid

An estate is not ready for final distribution until the estate tax returns have been filed, and the tax paid, unless no estate tax return is required to be filed.

If an estate tax return is required, the order for final distribution shall include a provision that there will be no final discharge until final resolution of the estate tax liability (e.g. receipt of closing letter).

(Rule 7.310(b) revised effective 1/1/08)

(Rule 7.310 revised effective 1/1/15)

Rule 7.311. Specifically Devised Property

As to expenses allocable to specifically devised property (e.g., taxes, maintenance, repairs, insurance, debt servicing) see Estate of McSweeney (1954) 123 Cal.App.2d 787). For apportionment of income and expenses, see Probate Code Sections 12002, 9650, and 1063.

(Rule 7.311 revised effective 1/1/15)

Rule 7.312. Distribution to Minors

Where the Court has discretion, funds for minors or incompetent persons without a guardian or conservator of the estate will be required to be placed in a blocked, federally insured account. The Court does not favor transfer under the California Uniform Transfers to Minors Act unless the Will so provides.

(Rule 7.312 revised effective 1/1/15)

Rule 7.313. Preliminary Distribution

(a) Waiver of bond requirement

In the event of a preliminary distribution made before the time for filing creditor's claims has expired, a bond MUST be required of the distributees (Probate Code Section 11622). After the time for filing claims has expired, the Court will usually require a distributee's bond unless the Inventory and Appraisal has been filed and the Petition sets forth sufficient facts showing that the distribution may be made without loss to creditors or injury to the estate or any interested person.

(b) Petition to not require bond

If the petition requests that no bond be required of the distributees, a clear and concise statement showing why bond should not be required must be included in the petition.

(Rule 7.313 revised effective 1/1/15)

Rule 7.314. Procedure to be Followed by a Personal Representative in Actions for Damages Following Wrongful Death of Decedent or Other Actions that Survive the Death of Decedent

(a) Issue special letters

Special letters may be the proper vehicle for such actions. In appropriate circumstances, the Court may appoint a Special Administrator for a limited purpose with a termination date specified in the order and may require an appearance at a scheduled hearing date for a status report and to continue the appointment of the Special Administrator beyond that date.

(b) Property of the estate

If a personal representative collects damages arising out of the physical injury of the decedent or covering funeral expenses and costs of last illness, he or she shall hold such money in his or her representative capacity as property of the estate.

(c) Damages for wrongful death

Damages for wrongful death are held by the personal representative as a representative of the statutory beneficiaries and are not part of the estate. (Estate of Waits (1944) 23 Cal.2d 676). The disposition of such damages for wrongful death and the amount of attorney's fees and costs shall be determined by the Court on a petition pursuant to Probate Code Section 9835.

(d) Notice requirements

In addition to the usual notices given on hearing of such a petition, under Probate Code Section 9835, notice shall be served on the heirs at law in the same manner as if each had filed a request for special notice. (See also Code of Civil Procedure Sections 377.10 et seq.).

(Rule 7.314 revised effective 1/1/15)

Rule 7.315. Grant of Additional Powers to Testamentary Trustee

Notice must be given under Probate Code Section 17203 where the Petition for Distribution requests the Court to grant a trustee additional powers not conferred by the Will. The Court may require that a guardian ad litem be appointed for persons unascertained or not in being. (Probate Code Section 15405)

(Rule 7.315 revised effective 1/1/15)

Rule 7.316. Application for Final Discharge

All Ex Parte Petitions for Final Discharge and Order (Judicial Council Form DE-295) shall be submitted with a copy of the order of final distribution, and copies of any receipts from distributees. If the order requires distribution of funds to a blocked account, the request for final discharge shall be accompanied by a completed Receipt and Acknowledgment of Order for the Deposit of Money Into Blocked Account (Judicial Council Form MC-356). If the order distributes real property, the copy of the order submitted with the request for final discharge shall show that the order has been recorded in the appropriate county. If the order provided for a withhold greater than $1000.00 there shall be included a schedule of disbursements for the withhold.

(Rule 7.316 revised effective 1/1/15)

Rule 7.317. Payment of Costs of Administration

A petition for final distribution or to terminate the proceeding must expressly state that all charges for legal advertising, bond premiums, probate referee's services and costs of administration have been paid.

(Rule 7.317 revised effective 1/1/15)

Chapter 8. Inventory and Appraisal

Rule 7.350. Preparation of Inventory and Appraisal

Provide complete descriptions of each asset in the estate. (See Probate Code Section 8850). The legal description, street address (or a notation that the property is "unimproved") and APN shall be shown for each parcel of real property. See California Decedent Estate Practice (CEB Rev. 2013, Chapter 13); see also California Probate Referees website: probatereferees.net and the Guide to Using California Probate Referees found therein for a complete description of how properly to list assets on the Inventory.

(Rule 7.350 revised effective 1/1/15)

Rule 7.351. Waiver of Appraisal by Probate Referee

(a) Waiver of Probate Referee's appraisal

The Court does not favor the waiver of the Probate Referee's appraisal under Probate Code Section 8903 in the absence of exceptional circumstances.

(b) Deferral of Probate Referee's appraisal

The Court may allow deferral of the Probate Referee's appraisal on a showing (1) that all beneficiaries have waived the Probate Referee's Appraisal and (2) that fees and commissions for the personal representative and attorney have been waived. If these conditions remain when the estate is ready for final distribution, the Court may then waive the Probate Referee's appraisal.

(Rule 7.351 revised effective 1/1/15)

Chapter 9. Guardianships and Conservatorships

Guardianships

Rule 7.400. Initiation of Guardianship Investigation

The Probate Investigations Unit will initiate a guardianship investigation except when the court specifically directs otherwise, only after the petitioner(s) has submitted a complete "Proposed Guardianship Information" (Local Court Form GC-20). The Probate Investigations Unit will initiate a termination of guardianship investigation only after the petitioner(s) has submitted a complete "Termination of Guardianship Information" (Local Court Form GC-21).

(Rule 7.400 new effective 1/1/15)

Rule 7.401. Temporary Guardianships

The Court will not order a change of custody under a temporary guardianship unless doing so appears necessary for the protection of the minor. Minimum notice to parents will be required unless justified by a supporting declaration.

(Rule 7.401 revised effective 1/1/15)

Rule 7.402. Consultation with Other Departments re: Custody or Dependency Proceedings

Where a petition for guardianship of the person of a minor is pending and where it appears to the Court that a custody or dependency proceeding concerning the same minor is pending in any other department of the Superior Court, a consultation will be had between the judicial officers of the department in which such proceeding or writ is pending, and a determination made as to whether or not the matter should be heard separately or a consolidation arranged.

(Rule 7.402 revised effective 1/1/15)

Rule 7.403. Guardianships for Dependent Children

A guardianship for dependent minor children must be established in Juvenile Court under Welfare and Institutions Code Sections 366.25(e) or 366.26(d). The Juvenile Court retains jurisdiction to modify, revoke or terminate such guardianships. See Welfare and Institutions Code Sections 366.3 and 366.4.

(Rule 7.403 revised effective 1/1/15)

Rule 7.404. Restriction on Parental Use of Minor's Estate

As there is a statutory liability upon the parents to support their children, where one or both parents are living, the Court will not permit guardianship funds to be used for the minor's ordinary support and maintenance except upon a showing of the parents' financial inability or other circumstances which would justify the Court in departing from this rule in the best interest of the minor.

(Rule 7.404 revised effective 1/1/15)

Rule 7.405. Final Account of Guardian

(a) Appearance by ward

An appearance by the ward at the hearing on the guardian's final account and petition will be required unless either:

(1) Proof of service is on file verifying that a copy of the final account and petition, and notice of hearing thereon, has been served upon the ward not less than fifteen (15) calendar days before the hearing, (Probate Code Section 1460), or

(2) The ward's written acknowledgment of receipt and approval of the petition and final account is on file.

(b) Waiver of account by ward

The Court does not favor the waiving by the ward of a guardian's final account when the ward has reached majority, and normally the Court will not approve a petition when the final account is waived, unless the ward is present in Court at the time of the hearing.

(c) Discharge of guardian

(1) A guardianship of the person and estate will terminate pursuant to Probate Code Sections 1600 and 1601.

(2) A discharge of the guardian will not occur until the expiration of one (1) year from the date the minor attained the age of eighteen (18) years. See Probate Code Section 2627.

(3) In the case of a minor for whom a conservatorship will be required, a petition for appointment of a conservator may be filed during the proposed conservatee's minority in order to make the appointment of a conservator effective immediately upon the minor's attaining the age of eighteen (18) years (Probate Code Section 1820 (b).

(Rule 7.405 revised effective 1/1/16)

Rule 7.406. Setting guardianship hearing when a temporary guardianship has NOT been granted

The matter shall be set for hearing generally not sooner than sixty (60) calendar days after the filing date to allow time for the Court Investigator's Report.

(Rule 7.406 new effective 1/1/17)

Rule 7.407. – Rule 7.410. Intentionally Omitted

Rule 7.411. Appointment of Conservator

(a) Appointment of conservator

Although Probate Code Section 2106 gives the Court discretion to appoint one conservator for several conservatees, the Court will generally not grant a petition joining more than one conservatee in a single proceeding, except husband and wife or domestic partners as defined in Probate Code Section 1894.

(b) Appointment of Conservator

The matter shall be set for hearing generally not sooner than sixty (60) calendar days after the filing date to allow time for the Court Investigator's Report (Probate Code Section 1894).

(Rule 7.411(b) revised effective 1/1/17)

(Rule 7.411 revised effective 1/1/17)

Rule 7.412. Ex Parte Petitions for Appointment of Temporary Conservatorships

(a) Notice

Petitioner must notify all interested or opposing parties by fax or telephone no later than 10:00 a.m. on the day before the scheduled hearing as provided by CRC, Rule 3.1203 and CRC, Rule 3.1204. An endorsed filed copy of a declaration regarding notice in compliance with CRC, Rule 3.1204 must be delivered to the Probate Department prior to the hearing. Orders dispensing with notice must be supported by a declaration setting forth the exceptional circumstances that justify dispensing with notice. REPEALED IN PART (see California Rules of Court, Rule 3.1203, Rule 3.1204, Rule 7.55) Minimum notice to the conservatee and conservatee's spouse, if any, pursuant to Probate Code Section 2250(e)(2) and (3) will be required unless the Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Judicial Council Form GC-112) is approved by the Court prior to the hearing.

(b) Contents of Ex Parte Petition for Appointment of Temporary Conservatorship

An application for an ex parte order appointing temporary conservator (Judicial Council Form GC-111) must be verified and must contain sufficient evidentiary facts to justify.

(Rule 7.412 revised effective 1/1/17)

Rule 7.413. Specific Medical Treatment and Placement

(a) Authority of conservator

A conservator of the person generally has authority to fix the residence of, and place the conservatee in, any facility in this state, including a facility which restricts conservatee's ability to leave. This authority is subject to limitations which may be placed on the conservator by statute or court order. These limitations include, but are not limited to, the following:

(1) The placement must be the least restrictive appropriate setting which is available and necessary to meet the conservatee's needs. Ordinarily, a conservatee should be allowed to remain in the conservatee's residence in which the conservatee resided before the establishment of the conservatorship so long as this is feasible.

(2) A conservatee with dementia may be placed in a facility specifically described in Probate Code Section 2356.5(b) only with authorization as provided in that section. The Court will not make an order for placement under Probate Code Section 2356.5(b) absent a showing that the specifically proposed placement is described in Probate Code Section 2356.5(b). A petition for a court order regarding placements in a facility not specifically described in Probate Code Section 2356.5(b) will be deemed a petition for instructions pursuant to Probate Code Section 2359.

(3) Placement in a mental health treatment facility as defined in Probate Code Section 2356(a) requires an LPS conservatorship.

(Rule 7.413(a) revised effective 1/1/16)

(b) Consent for psychotropic medications in conservatorships

Psychotropic medication in conservatorships under the Probate Code is generally governed by the same provisions as other medical treatment. If the conservatee has been adjudicated to lack the capacity to consent to medical treatment generally, or to the application of psychotropic medication, then the conservator of the person generally has authority to consent to the medication. However, if the medication as described in Probate Code Section 2356.5 is to be given to a conservatee for the treatment of dementia who lacks the capacity to give informed consent to that medication, then the conservator of the person may authorize the medication only with prior authorization as provided by that Section.

(Rule 7.413(b) revised effective 1/1/13)

(Rule 7.413 revised effective 1/1/16)

Rule 7.414. Termination

Conservatorship may be terminated pursuant to Probate Code Sections 1860 et seq., and Section 2626. The filing of a certification of competency issued by the superintendent of a state hospital pursuant to Welfare and Institutions Code Section 7357, or other provision of law, does not, of itself, terminate a conservatorship. Conservatorships terminate by operation of law upon the death of the conservatee. Termination does not cause the Court to lose jurisdiction as to some issues, such as approval of accountings or awarding fees (Probate Code Section 2630 et seq.).

(Rule 7.414 revised effective 1/1/15)

Rule 7.415. Accounts of Conservator

Probate Code Section 2621 prescribes the requirement for giving notice of hearing on the account. See, also, Probate Code Sections 2620 and 2630 et seq., regarding provisions pertaining to accounts on termination of conservatorships.

(Rule 7.415 revised effective 1/1/15)

Rule 7.416. Orientation Class Requirements for Unlicensed Conservators

All conservators of person and/or estate who are not California Licensed Professional Fiduciaries (licensed by the Professional Fiduciary Bureau) should make reasonable efforts to complete either or both, depending on appointment, the Contra Costa Superior Court Probate Division Conservator of Person and/or Conservator of Estate classes that are offered monthly by the Contra Costa County Public Law Library. If a course is completed, the course completion form should be filed with the court.

(Rule 7.416 revised effective 1/1/15)

Rule 7.417. – Rule 7.418. Intentionally Omitted

Rule 7.419. Warning on Order [Repealed 1/1/03]

Rule 7.420. Copies for Court Investigator

(a) Extra copy of pleadings

When an account, report or petition is filed as to which an investigation and/or report by the Probate Court Investigator is required, an extra copy of that pleading along with any other pleadings filed in relation to the matter shall be given to the legal process clerk at the time of filing. It is then to be routed to the Court Investigator. This includes (a) any petition for appointment of guardian or conservator, (b) any petition for appointment of temporary guardian or conservator, (c) any accounting except when the guardianship or conservatorship has terminated; and, (d) any petition for medical consent authority.

(Rule 7.420(a) revised effective 1/1/15)

(b) Petitioner to provide copies of pleadings to Court Investigator's office

If the Court requires a report from the Court Investigator after a pleading is filed, or if the extra copy required under this provision was inadvertently not given to the legal process clerk, then copies of all related pleadings, including the petition, accounting, orders, letters, inventory and appraisals, etc., shall be furnished by the petitioner by delivery or transmission to the Court Investigator's office.

(Rule 7.420(b) revised effective 1/1/15)

(Rule 7.420 revised effective 1/1/15)

Rule 7.421. Intentionally Omitted and Reserved [Repealed 1/1/13]

Rule 7.422. Temporary Guardian or Conservator

Upon the filing of a petition, a temporary guardian or conservator of the person or estate, or both, may be appointed under Probate Code Section 2250 et seq. A separate petition for the appointment of a general guardian or conservator must be presented to the Court to be filed before a petition for a temporary guardian or conservator will be considered.

(Rule 7.422 revised effective 1/1/15)

Rule 7.423. Instructions Regarding General Duties and Conflicts of Guardian or Conservator

Before Letters are issued, each guardian or conservator must complete, sign and file a Letters of Guardianship (Probate-Guardianships and Conservatorships) (Judicial Council Form GC-250) provided by the Judicial Council. The form shall set forth the guardian or conservator's duties as a fiduciary and outline the responsibilities as an officer of the Court. Social Security Number, driver's license number and date of birth do not need to be supplied on the form.

(Rule 7.423 revised effective 1/1/15)

Rule 7.424. Bonds of Conservators and Guardians

Bond for an individual conservator or guardian will generally not be waived. The Court generally will not require a bond for amounts in blocked accounts. (See Probate Code Section 2328).

(Rule 7.424 revised effective 1/1/15)

Rule 7.425. Accounts

(a) Time of filing accounts with court

The first account shall be filed on or before the first anniversary date of the order appointing the guardian or conservator; and subsequent accounts shall be filed at least biennially thereafter. The first account shall be for a minimum period of nine months from the date of appointment of the general conservator and shall also include any period of temporary appointment of the person as conservator or guardian.

(b) Separate accounts required

Where there are multiple wards or conservatees joined in a single guardianship or conservatorship proceeding, a separate accounting shall be provided for each of them.

(c) Account ending date

The ending date of an account, except an account ending upon the death of a conservatee, shall not be more than three months before the date it is filed with the Court. Filing an accounting late is not good cause for preventing the Court and court investigators from reviewing the current information regarding the matter.

(Rule 7.425(c) revised effective 1/1/03)

(d) Final account upon termination of guardianship

The final account following termination of a guardianship or conservatorship of the estate must state that all charges for legal advertising, bond premiums, probate referee's services and costs of administration have been paid.

(Rule 7.425(d) revised effective 1/1/13)

(e) Status report in lieu of final account following termination

The final account following the termination of a conservatorship or guardianship of the estate should be filed within six (6) months of the termination date (e.g., the death of the conservatee or age the ward attains majority). If the conservator or guardian is unable to file the final account with the six-month period, the conservator or guardian shall file a status report setting forth the reasons for the delay and how much additional time is needed.

(Rule 7.425(e) new effective 1/1/15)

(Rule 7.425 revised effective 1/1/15)

Rule 7.426. Conservator and Guardian Compensation and Attorney's Fees

(a) Compensation of guardians and conservators

Petitions for compensation of guardians and conservators and their attorneys shall be supported by a declaration, complying with Contra Costa Probate Court Guideline Attachment #2 from each individual requesting approval of fees. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org. The court prefers that the petition itself recite only the amounts claimed and the relevant period of time, referring to the accompanying declaration(s), which should contain the explanation and justification. See also California Rules of Court, Rules 7.751(b) and 7.756 for declaration content.

(Rule 7.426(a) revised effective 1/1/16)

(b) Compensation of attorneys

Petitions for compensation of attorneys not representing fiduciaries may incorporate the explanation and justification into the petition, without a separate declaration.

(Rule 7.426 (b) revised effective 1/1/13)

(Rule 7.426 revised effective 1/1/16)

Rule 7.427. Independent Exercise of Powers

(a) Declaration required for independent powers request

The Court will ordinarily not grant the powers enumerated in Probate Code Section 2591. Because of the broad scope of this section, the Court requires a detailed declaration as to the necessity for the specific independent power desired.

(b) Nature of independent power

When independent powers are requested and granted, it is not sufficient to incorporate by reference the statute or its subsections. The power must be described in sufficient detail so that any person reading the document can determine the nature of the power requested or granted. Quoting the full text of the subsection enumerating the power under Probate Code Section 2591 is the preferred method of complying with this rule. Even when granting the requested powers, the Court will normally require confirmation of sale of real property and prior court approval of attorney's fees.

(Rule 7.427(b) revised effective 1/1/15)

(Rule 7.427 revised effective 1/1/15)

Rule 7.428. Investments by Guardian or Conservator (Probate Code Section 2570 et seq.)

(a) Real estate investment

Investment in real estate, either by purchase or encumbrance, will not be authorized unless supported by an appraisal by the Probate Referee regularly appointed in the guardianship or conservatorship proceeding.

(b) Life insurance

A purchase of life insurance on the minor ward's life will not be authorized.

(c) Declaration required for request to invest

If a request for special notice has not been filed, a petition for authority to invest may be heard ex parte provided the Court makes an order dispensing with notice. A declaration justifying dispensing with notice shall accompany or be incorporated in the petition.

(Rule 7.428 revised effective 1/1/15)

Rule 7.429. Account Statements with Accountings

Any account statement submitted pursuant to Probate Code Section 2620 which is required by that section to be confidential shall be filed as a separate document complying with California Rules of Court, Rules 2.100 et seq., including a verified statement by the petitioner identifying the document. The caption of the document shall include the word "CONFIDENTIAL" in all capital letters.

(Rule 7.429 revised effective 1/1/15)

Chapter 10. Trusts

Rule 7.450. Trustee Compensation, and Attorney's Fees

Petitions for approval of prospective or previously paid compensation to trustees and/or their attorneys should discuss the factors in California Rules of Court, Rule 7.776 to the extent warranted by the circumstances of the case. See Probate Code §§ 16243 and 16247. For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at www.cc-courts.org.

(Rule 7.450 revised effective 1/1/16)

Rule 7.451. Establishment of a Trust

(a) Trust provisions for incapacitated person

Absent special circumstances, whenever a trust is to be established by court order for the benefit of an incapacitated person, the trust shall contain the following provisions:

Protector of Trustor: Regardless of any other provision of the trust, in administering the trust, the trustee shall be subject to the same terms and conditions as a conservator of the estate during the lifetime of the trustor, including but not limited to:

(1) Posting bond for assets and income of the trust.

(2) Accounting to the Court (to be filed in this proceeding).

(3) Abiding with investment limitations.

(4) Adhering to limitations on gifts, pledge or sales of assets (including returns for confirmation and overbids).

(5) Providing for the trustor's needs without regard for the interest of the remainder beneficiaries.

(6) Obtaining prior court approval for payment of fees to attorneys, conservators and trustees.

(7) Obtaining prior court approval of any change of trustee during the trustor's lifetime.

(8) Obtaining prior court approval for sale of beneficiary's personal residence, regardless of whether or not the residence was previously property of a conservatorship estate

(Rule 7.451(a)(8) revised effective 1/1/15)

(b) Bond requirement in order

The formal order shall provide that the trustee may not receive assets or otherwise act until the filing of a bond in the amount set by court.

(Rule 7.451 revised effective 1/1/16)

Rule 7.452. Establishment of Special Needs Trust from Inheritance by Court Order

To the extent that a person with special needs has not received a distribution of an inheritance from a probate or trust estate, the court may, upon suitable petition, issue an order establishing a special needs trust under Probate Code 3600 et seq. or 4541 complying with 42 United States Code §1396p(d)(4)(A). Unless the order explicitly excludes application of Local Rule 902. Local Rule 902 shall apply to administration of the special needs trust.

NOTE: For discussion of establishment of special needs trusts by court order, see Sections 11.32 through 11.51 and 15.24 of the CEB treatise on Special Needs Trusts.

(Rule 7.452 revised effective 1/1/15)

Chapter 11. Protective Proceedings

Rule 7.501. Proceeding for Spousal Property Transaction

As to petitions pursuant to Probate Code Section 3100 et seq.:

(1) The petition must be supported by a declaration of a licensed physician or licensed psychologist within the scope of his or her licensure as to the capacity of the non-petitioning spouse (Probate Code Section 810 et seq.).

(2) Counsel will be appointed for the non-petitioning spouse if the petition proposes a substantial transfer to the petitioner.

(3) When the petitioner is predicated upon the non-petitioning spouse's qualification for Medi-Cal benefits, notice shall also be given to the Director of the California Department of Health Services.

(4) In petitions to transfer assets, related to Medi-Cal eligibility, the petitioner shall provide the Court with schedules showing such calculations as would be required in an administrative hearing to the extent that the Community Spouse Resource Allowance or the Minimum Monthly Maintenance Needs Allowance would be in issue. The Court will not make orders modifying the Community Spouse Resource Allowance nor the Minimum Maintenance Monthly Needs Allowance but may make findings as to the proper amounts as needed to support the order.

(5) The Court will not issue general support orders in petitions under Probate Code Section 3100 et seq.

(Rule 7.501 revised effective 1/1/15)

Rule 7.502. Establishment of a Trust [Repealed 1/1/13]

Chapter 12. Guidelines for Probate Rules - Attachments

Guideline, Attachment 1 – The ABCs of Dividing the Commission Pie in Probate Sales (includes chart)

LLOYD W. HOMER, ESQ.

CAMPBELL

(a) Division of broker commission

The following chart demonstrates the division of the broker commission when estate property is sold subject to Court confirmation pursuant to Probate Code Sections 10160-10167. If the property subject to sale is being sold pursuant to the personal representative's authority under independent administration, the chart is inapplicable and Probate Code Sections 10400-10600 must be consulted. For sales subject to Court confirmation, the personal representative also needs to consult Probate Code Sections 10250-10264 (personal property) and Probate Code Sections 10300-10316 (real property) regarding the manner of conducting the sale.

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WHO ARE A, B AND C?

A = The estate (Seller). If the estate has a broker, that will be broker A.

B = The bidder (Buyer). If the bidder has a broker, that will be broker B.

C = The successful overbidder (New Buyer). If C has a broker, that will be broker

FACTS:

Original bid $100,000.

Where there is an overbid, the increased bid is $110,000

Commission allowed by the Court is 6%

	A SELLER	B BIDDER	C OVERBIDDER	PROBATE CODE SECTION	COMMISSION TO BROKER
1	No Broker	No Broker	No Over bid	None	None
2	No Broker	No Broker	No Over bid	None	None
3	No Broker	No Broker	Broker	10163(b)	"C" receives $5,000 (Not $6,600 because of limitation of Section 10162)
4	No Broker	Broker	No Over bid	10162.3	"C" receives $6,000
5	No Broker	Broker	No Broker	10164	"C" receives $6,000
6	No Broker	Broker	Broker	10165(c)(2) 10165(b)	"B" receives $3,000 "C" receives $3,600 ($3,000 on original bid and $600 on the increased bid)
7	Broker	No Broker	No Over bid	10162.5	"A" receives $6,000
8	No Broker	Broker	No Over bid	10162.7	"A" receives $3,000 "B" receives $3,000 (or as "A" and "B" have agreed)
9	Broker	No Broker	No Broker	10162.5	"A" receives $6,000
10	Broker	No Broker	Broker	10165(c)(1) 10165(b)	"A" receives $3,000 "C" receives $3,600 ($3,000 on original bid and $600 on the increased bid)
11	Broker	Broker	No Broker	10164(c)	"A" receives $3,000 "B" receives $3,000 (or as "A" and "B" have agreed)
12	Broker	Broker	Broker	10165(c)(3)	"A" receives $1,500 "B" receives $1,500 (or as "A" and "B" have agreed) "C" receives $3,600 ($3000 on original bid and $600 on the increased bid)

The following documents are provided as referenced by the local rules, but are not intended to be adopted as local rules. These documents are included for informational purposes only.

(Guideline Attachment 1, revised effective 7/1/06)

Guideline, Attachment 2 – Probate Department Fees and Costs Guidelines

The Probate Department has established these general guidelines for allowable fees and costs in probate, trust, guardianship and conservatorship proceedings.

FEES

(a) Attorney's rates:

The standard maximum attorney's fees for guardianships, conservatorships and extraordinary probate services is $400.00 per hour. The Court will consider higher hourly rates upon a showing of good cause. The standard maximum attorney's legal assistant rate is $150.00 per hour.

(Guideline, Attachment 2, Fees (a) revised effective 1/1/17)

(b) Fiduciary rates:

The standard maximum hourly rate allowed for professional fiduciaries is $150.00 per hour.

(Guideline, Attachment 2, Fees (b) revised effective 1/1/17)

(c) Non-professional fiduciary rates:

The standard maximum hourly rate for other fiduciaries is $50.00 per hour.

(Guideline, Attachment 2, Fees (c) revised effective 1/1/17)

(d) Higher rates:

The determination of requests for higher rates will be based on all relevant factors presented, including special expertise applicable to the services provided, circumstances of the service, and relationship to the decedent, or other parties.

(Guideline, Attachment 2, Fees (d) revised effective 7/1/02)

(e) Travel time:

The Court will not generally allow attorney fees for more than one hour travel time, total, per appearance.

(Guideline, Attachment 2, Fees (e) revised effective 7/1/02)

(f) Format and content:

(1) Fee requests, except those calculated using a percentage of the assets, shall include a narrative description of the types of services performed, including the

number of hours and the rates requested for each type, distinguishing between hours and rates for each person performing each type of service. "Types of services" means a project-based approach, so that all activities (e.g., correspondence and phone calls, drafting pleadings, court appearances, research, etc.) related to a particular objective (e.g., initial petition, general administration, each contested matter, sale of property, substituted judgment, preparation of each accounting, etc.) should be summarized and addressed together as one "type." Do not group and discuss services based on activity (e.g., all court appearances as one "type," all correspondence as another "type," etc.).

(Guideline, Attachment 2, Fees (f)(1) revised effective 1/1/13)

(2) Copies of timesheets or billing statements need not be attached or provided unless requested by the Court or its staff (probate examiners or court investigators). However, in anticipation that time records or statements may be requested, separate entries should be made for each different activity and project, so that the amount of time expended for one activity is not obscured by "clumping" it with other activities in a single time entry.

(3) Fee requests, except those calculated using a percentage of the assets (see paragraph G below) and those below the maximum amount without a declaration (see subparagraph F.4 below), shall state the number of hours expended by the attorney in preparing the explanation and justification of the attorney's compensation, and also the number of hours expended by the attorney in preparing the explanation and justification of the fiduciary's compensation, if applicable. The Court will ordinarily approve up to two and a half hours for preparation of the attorney fee explanation without requiring separate justification for the amount of time spent. The Court is likely to require separate justification for attorney time spent in excess of two and a half hours for the attorney fee portion. The Court may require separate justification for any amount of attorney time spent on the fiduciary fee portion. Such justifications are not required with the fee petition or declaration, but parties and attorneys might choose to provide them at the outset to avoid a possible continuance.

(4) Notwithstanding the foregoing, the Court will ordinarily approve an annual fiduciary fee of up to $1,500.00 for non-professional fiduciaries, and up to $3,000.00 for professional fiduciaries, without requiring a declaration.

(5) See Fee Declaration Template below for example of how narrative description and explanation might be presented.

(Guideline, Attachment 2, Fees (f) revised effective 1/1/16)

(g) Percentage of assets calculations:

The Court will approve, without a supporting declaration, annual fees of one percent (1%) of the present fair market value of all estate property, real or personal, at the beginning of the accounting period, but not including income received during the accounting period nor net gains and/or losses. Good faith estimates of fair market value of real property by the

fiduciary are sufficient for this purpose. The Court will ordinarily approve a minimum annual fiduciary fee of up to $1,500.00 for non-professional fiduciaries, and up to $3,000.00 for professional fiduciaries.

(Guideline, Attachment 2, Fees (g) revised effective 1/1/16)

COSTS AND EXPENSES

(h) Reasonable costs

Reasonable court costs will be allowed.

(i) Disallowed costs

The Court will not allow reimbursement, or approve expenditures, for expenses incurred for ordinary business operations associated with services compensated by:

(1) statutory compensation or;

(2) professional fees (e.g., attorneys, professional fiduciaries and corporate fiduciaries). Unusual amounts of such expenses which are disproportionately large in consideration of the fee amount may be approved.

These expenses include, without limitation, copying, postage, telephone calls, cellular telephone charges, facsimile transmissions, email or internet access. Courier rates and charges may be subject to court review. Upon a proper and detailed showing, reimbursement for travel and other expenses may be allowed. Attorneys and fiduciaries may claim copy expenses for any timesheets or billing invoices attached to fee declarations or petitions or produced upon request, and for reproduction of documents required under Probate Code § 2620(c), at the rate of 10 cents per page (if reproduced in-house) or actual out-of-pocket expense (if reproduced by outside copy service, for black and white on ordinary copy paper).

(Guideline, Attachment 2, Costs (i)(2) revised effective 1/1/17)

(Guideline, Attachment 2, revised effective 1/1/17)

Guideline, Attachment 3 – Fee Declaration Template

Components of fee declaration

[caption]

1. I am [identifying information]. I make this declaration in support of [reference to petition or other purpose]. Statements herein are true of my personal knowledge, except for those stated upon information and belief, which I also believe to be true for the reasons stated.
2. This declaration describes services I have provided from [beginning date] through [ending date]. I am requesting compensation at the rate of $[rate] per hour for my

services and [specify other rates for each person billing time included in this fee request]. Total compensation requested is $[total amount], based on [X] hours @ $[first rate] ($[subtotal]) plus [Y] hours @ $[second rate] ($[subtotal]) [continue if needed for more than two persons].

3. In addition, I am requesting reimbursement for the following costs: [specify]

4. Services for which I am now seeking compensation are summarized as follows [categories are examples only]:

[The following categories are more typical of attorney services than fiduciary services]

A. Initial Petition: [Describe services rendered by each person involved.]

B. Temporary Powers Petition: [Describe services rendered by each person involved.]

C. General Administration: [Describe services rendered by each person involved.] [Typical activities for this category would be marshalling assets, preparation of inventory and appraisal, investment decisions, bill-paying and account reconciliation. This is by no means an exhaustive list.]

D. Sale of Residence: [Describe services rendered by each person involved.]

E. Contested Claim: [Describe services rendered by each person involved.]

F. Substituted Judgment Petition: [Describe services rendered by each person involved.]

G. Accounting and Fee Petition: [Describe services rendered by each person involved. In addition, specify amount of time spent preparing this fee declaration and (if declarant is the attorney) amount of time spent preparing client-fiduciary's fee declaration.]

[The following categories are more typical of fiduciary services than attorney services]

H. Initial Case Evaluation and Document Review: [Describe services rendered by each person involved. This would include conferring with fiduciary's attorney, proposed beneficiary of services and/or his/her attorney, and preparation of pleadings before appointment.]

I. General Care Management: [Describe services rendered by each person involved.] [Typical activities for this category would be evaluating care needs, hiring and supervising care providers, client status monitoring and visitation, accompaniment on medical professional office visits, and communications with family members and other interested persons regarding general health and care status, including fiduciary's attorney. This is by no means an exhaustive list.]

J. General Financial Administration: [Describe services rendered by each person involved.] [Typical activities for this category would be marshalling assets, preparation of inventory and appraisal, investment decisions, bill-paying and

account reconciliation, and communications with fiduciary's attorney regarding these matters. This is by no means an exhaustive list.]

K. Sale or Encumbrance of Property: [Describe services rendered by each person involved.]

L. Eviction or Other Special Proceeding: [Describe services rendered by each person involved.]

M. Accounting and Fee Petition: [Describe services rendered by each person involved.]

5. Time spent on each type of service is summarized as follows:

[Match first column categories to descriptions used in paragraph 4. For example, if using the attorney-type categories (which are only examples, not mandatory), row descriptions would be as follows:]

	Declarant ($X/hr)	Person #2 ($Y/hr)	Person #3 ($Z/hr)
Initial Petition			
Temporary Powers Petition			
General Administration			
Sale of Residence			
Contested Claim			
Substituted Judgment Pet.			
Accounting and Fee Pet.			
Total hours			
Charges			

6. [If paralegal used, give facts to show compliance Probate Code § 2642(a) and California Rules of Court, Rule 7.754.]

7. [To extent appropriate, add further explanation or justification, including any relevant and significant factors in California Rules of Court 7.702, 7.756, or 7.776.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: [Date]

_____

[Declarant Name and Office]

(Guideline, Attachment 3, revised effective 1/1/16)

Guideline, Attachment 4 – Probate Department Operations

(a) Calendars

The probate calendars are as follows:

Tuesdays at 1:30 p.m. in Dept 15 – all probate cases involving the Public Guardian.

Tuesdays at 1:40 p.m. in Dept. 15 – all probate cases (e.g. LPS Conservatorships) governed by the Welfare & Institutions Code.

All other probate matters are currently scheduled as follows:

Mondays, Wednesdays and Fridays at 9:00 a.m. for all other conservatorships.

Mondays, Wednesdays and Fridays at 9:30 a.m. for guardianships.

Tuesdays and Thursdays at 9:00 a.m. – all other probate matters.

(Guideline, Attachment 4(a), revised effective 1/1/15)

(b) Ex parte applications

All requests for ex parte orders shall be submitted to the Probate Examiners for review between 9:30 a.m. and 11:00 a.m. Monday through Friday, 725 Court Street, Room 210, Martinez, CA.

(Guideline, Attachment 4(b), revised effective 1/1/15)

(c) Tentative rulings

Tentative rulings are generally available at least five (5) court days before the hearing on the Tentative Rulings Website at www.cc-courts.org/tr. If the website is down, or for some reason cannot be accessed, the number to call between 1:30 p.m. and 4:00 p.m. any time after the ruling is posted, is (925) 608-2613.

Tentative rulings are not posted for matters on the Tuesday, 1:40 p.m. calendars due to confidentiality requirements. Parties to such matters and their attorneys may receive the tentative rulings for their specific matters by calling the probate staff between 1:30 p.m. and 4:00 p.m. at (925) 608-2613.

(Guideline, Attachment 4(c), revised effective 1/1/16)

(Guideline, Attachment 4 revised effective 1/1/16)

Title Eight. Appellate Rules

Chapter 1. General Provision

Rule 8.1. Appellate Department

(a) Sessions

Regular sessions of the Appellate Department of the Superior Court, County of Contra Costa shall be held on the first Friday of each calendar month at 1:30 p.m. Special sessions shall be held at the call of the Presiding Judge.

(Rule 8.1(a) revised effective 1/1/00)

(b) Court record

Pursuant to California Rules of Court Sections 8.830(a)(1)(B) and 8.833(a), the Court elects to use the original trial court file as the record of the written documents from the trial court proceedings instead of a clerk's transcript.

(Rule 8.1(b) revised effective 1/1/11)

(c) Record of oral proceedings

(1) In appeals of infraction cases, the Appellate Division permits the Appellant, pursuant to California Rules of Court, Rule 8.915, to submit as the record of oral proceedings the official electronic recording of the proceedings.

(2) The Appellate Division prefers a transcript or recording of oral proceedings over a Statement on Appeal. If Appellant elects to use a Statement on Appeal, the Appellate Division requires strict compliance with Rule of Court 8.916. If appellant does not comply with Local Rule 8.916, the Appellate Division may dismiss the appeal for lack of an adequate record. If a Statement on Appeal does not adequately apprise the Appellate Division of the content of the proceedings below, the Appellate Division may, on its own motion and with notice to the parties, augment the record pursuant to Rules of Court 8.923 and 8.841 with an official transcript or electronic recording of proceedings.

(Rule 8.1(c) revised effective 1/1/14)

(d) Oral argument

Unless otherwise ordered, counsel for each party, upon all direct appeal matters, shall be allowed fifteen (15) minutes for oral argument. The appellant or the moving party shall have the right to open and close.

(Rule 8.1(d) revised effective 7/1/08)

(e) Briefs

Briefs shall be prepared, served, and filed as provided by California Rules of Court, Rule 8.88. Briefs shall comply with the provisions of California Rules of Court 8.883 and 8.884.

(Rule 8.1(e) revised effective 1/1/10)

(f) Calendaring

A hearing will be set as a matter of right in direct appeals only. All other appellate matters, for example writs, will be set at the discretion of the Appellate Department.

Hearings will be set pursuant to the California Rules of Court. The Appellate Department generally hears all appeals at 1:30 p.m. on the first Friday of each month.

(Rule 8.1(f) revised effective 7/1/08)

(g) Motions

All motions shall be heard at regular sessions unless a different time of the hearing of a particular motion is designated by the Presiding Judge of the Appellate Department.

(Rule 8.1(g) revised effective 1/1/00)

(Rule 8.1 revised effective 1/1/15)

LIST OF FORMS MENTIONED IN LOCAL COURT RULES

(Forms list revised effective 1/1/16)

LOCAL COURT FORMS:

ADR-201	Panel Member Selection *(Mandatory)*
ADR-304	Mediation Statement *(Optional)*
ADR-305	Mediator Report *(Mandatory)*
ADR-404	Arbitration Statement *(Optional)*
ADR-504	Neutral Case Evaluator Statement *(Optional)*
ADR-610	Request for Assignment of Discovery Facilitator *(Mandatory)*
ADR-612	Notice of Assignment of Discovery Facilitator *(Mandatory)*
ADR-614	Finding of Non-Compliance *(Mandatory)*
ADR-615	Notice of Termination of Appointment of Discovery Facilitator *(Mandatory)*
ADR-616	Recommendations of Discovery Facilitator and Termination of Appointment of Discovery Facilitator *(Mandatory)*
ADR-617	Rejection of Assigned Discovery Facilitator *(Mandatory)*
ADR-618	Notice to Deponent and Deposition Officer of Assignment to Discovery Facilitator Program and Stay of Records Production Date *(Mandatory)*
CV-655b	ADR Case Management Stipulation and Order (Unlimited Civil) *(Mandatory)*
CV-655d	Notice to Defendants *(Optional)*
CV-659d	ADR Case Management Stipulation (Limited Civil) *(Mandatory)*
FamLaw-107	Declaration Re Requests for Emergency Orders *(Mandatory)*
FamLaw-110	At Issue Memorandum *(Mandatory)*
FamLaw-112	Request for Case Management Conference *(Mandatory)*
FamLaw-113	Case Management Conference Statement *(Mandatory)*
GC-20	Proposed Guardian(s) Information *(Mandatory)*
GC-21	Termination of Guardianship Information *(Mandatory)*
TR-121	Defendant's Request and Declaration to Vacate Civil Assessment *(Mandatory)*

JUDICIAL COUNCIL FORMS:

CM-110	Case Management Statement
DE-111	Petition for Probate

DE-157	Notice of Administration to Creditors
DE-275	Ex Parte Petition for Approval of Sale of Personal Property and Order *(Mandatory)*
DE-295	Ex Parte Petition for Final Discharge and Order
DE-147S	Confidential Statement of Birth Date and Driver's License Number
FL-141	Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration
FL-150	Income and Expense Declaration
FL-182	Judgment Checklist-Dissolution/Legal Separation
FL-300	Request for Order
FL-326	Declaration of Private Child Custody Evaluator Regarding Qualifications
FL-327	Order Appointing Child Custody Evaluator
GC-112	Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator
GC-250	Letters of Guardianship (Probate-Guardianships and Conservatorships)
JV-200/JV-205	Custody Order-Juvenile-Final Judgment-Visitation Order-Juvenile
JV-290	Caregiver Information Form
JV-290-INFO	Instructions to Complete the Caregiver Information Form
JV-570	Request for Disclosure of Juvenile Case File
JV-575	Petition to Obtain Report of Law Enforcement Agency
MC-051	Notice of Motion and Motion to Be Relieved As Counsel-Civil
MC-052	Declaration In Support of Attorney's Motion to Be Relieved As Counsel-Civil
MC-053	Order Granting Attorney's Motion to Be Relieved As Counsel-Civil
MC-356	Receipt and Acknowledgment of Order for The Deposit of Money Into Blocked Account
MC-500	Media Request to Photograph, Record, or Broadcast
MC-510	Order on Media Request to Permit Coverage
NC-100	Petition for Change of Name
NC-110	Attachment to Petition for Change of Name
NC-120	Order to Show Cause for Change of Name (Change of Name)

For local court forms, visit: www.cc-courts.org/forms

For Judicial Council forms, visit: www.courts.ca.gov/forms

INDEX

BEYOND THE OATH:

Recommendations for Improving Civility

Initial Report of the California Civility Task Force

A joint project of the California Lawyers Association and the California Judges Association

September 2021

Introduction

In 2014, the California Supreme Court—at the recommendation of the State Bar of California Board of Trustees—took a significant step aimed at improving civility among California lawyers. It adopted what is now Rule 9.7 of the California Rules of Court, adding new language to the attorney oath of admission. The new rule required anyone thereafter admitted to practice law in the Golden State to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The change resulted from an admirable effort by the American Board of Trial Advocates (ABOTA) and its allies to inspire greater focus on civility and professionalism by convincing states to add civility language to their oaths. Pat Kelly, then Chair of the State Bar Board of Trustees and now a member of this task force, drafted the language and shepherded the effort in California. The hope was and is that the oath's aspirational language would influence new lawyers to embrace civility.

The changed oath signaled a renewed commitment to civility by the legal profession. But while the commitment remains, incivility persists. Most lawyers entered the profession before 2014 and have never taken the oath. And many who have taken the oath seem to have forgotten their promise. In an era marked by coarseness and political division, the legal profession suffers from a scourge of incivility. Discourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system. Moreover, incivility among lawyers extends beyond litigation, interfering with, if not derailing, transactions of every kind. It can create toxic workplaces. And unfortunately, young lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups are disproportionately on the receiving end.

The time has come for remedial action beyond the oath. This report sets forth four concrete, realistic, achievable, and powerful proposals to improve civility in California's legal profession. Through this initial report, the California Civility Task Force asks its sponsoring organizations, the California Lawyers Association (CLA) and the California Judges Association (CJA), to endorse

these proposals and join in asking the State Bar and Supreme Court to implement them.

1. Require one hour of MCLE devoted to civility training, included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility.
2. Provide training to judges on the need to both curtail incivility and model civility, both inside and outside the courtroom, explaining the tools available to them to do so.
3. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation; and
4. Require *all* lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The California Civility Task Force

The California Civility Task Force is a joint project of the CLA and CJA. It consists of approximately 40 leading lawyers and judges from across the state, all committed to fairness, justice, and the improvement of the legal profession. A list of members, with biographical information, is attached as Appendix 1.

The task force is sui generis, having arisen from grass-roots concern about incivility and having been embraced by the State Bar of California, CLA, and CJA.

In 2019, leaders of the Association of Business Trial Lawyers (ABTL) from across the state gathered for a weekend retreat. More than one hundred prominent judges and lawyers spent several hours addressing incivility and possible responses to it, in a wide-ranging discussion moderated by Court of Appeal Justice Brian Currey.

Not content merely to talk about incivility, the participants resolved to do something about it. First, the Los Angeles ABTL chapter published a summary of the discussion and a collection of articles growing out of it. A copy is attached as Appendix 2. Second, on behalf of this group, Justice Currey approached Alan Steinbrecher, then Chair of the Board of Trustees of the State Bar, to inquire about the possibility of implementing one of the group's proposed solutions: designating one hour of the existing MCLE requirement for civility training. Steinbrecher's response was to appoint Justice Currey as Chair of this task force, and request that Justice Currey assemble a talented and diverse group of judges and lawyers, examine the issues, and return with a series of proposals. He also designated Brandon Stallings, a member of the State Bar Board of Trustees, to serve as Vice Chair of the task force. At the suggestion of Steinbrecher's successor, Sean SeLegue, and with enthusiastic support from their respective leadership, responsibility for the task force later shifted from the State Bar to CLA and CJA. Both organizations added additional members to the task force, and Heather Rosing, who served as the first president of CLA, was named a Vice Chair of the task force.

The members of the task force wish to express their gratitude to the State Bar, CLA, and CJA for their support of the task force and demonstrated interest in improving civility in California.

The Need to Readdress Incivility

Thirty years ago, dealing with a case whose very existence it attributed to a "fit of pique between counsel," the First District Court of Appeal addressed this entreaty to California lawyers: "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the

slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641.

What's happened since? Despite repeated calls for course correction from every corner of the profession, incivility has only increased. Bullying, intimidation, and nastiness have too often replaced discussion, negotiation and skillful, hard-fought advocacy. We have reached the point where it has become increasingly necessary to remind some of our number that "Objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other such characteristics, is uncivil and unacceptable." (*Briganti v. Chow* (2019) 42 Cal.App.5th 504.)

"The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are." (*In re Mahoney (2021)* 65 Cal.App.5th 376.)

We are professionals. We are officers of the court. We are governed by Rules of Professional Conduct, or in the case of judges, Canons of Ethics. We are not just vendors or suppliers who come into the court to do business; we are justice's lifeblood. The judicial system is not a collection of buildings, it's a collection of people and principles. And we have been entrusted with its safekeeping. The problems and conflicts with which we deal—like those encountered by our fellow professionals in medicine and science and engineering—are too important to be obscured and marginalized by aggression and chicanery.

We know this. And the courts have been trying for decades to get us to address it. "'[T]he necessity for civility is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.'" (*Lasalle v. Vogel*, (2019) 36 Cal.App.5th 127, 141, quoting Chief Justice Warren E. Burger, The Necessity for Civility (Address to the

American Law Institute), 52 F.R.D. 211.) Now is the time for us to live up to our responsibility as exemplars.

Civility matters not simply because lawyers are examples to others on how to engage competing ideas and interests. It matters because our system of justice simply cannot function fairly and reliably with systemic incivility. In a 2020 Gallup Poll, a meager 21% of respondents rated lawyers as having very high/high honesty and ethical standards.[1] The perceived incivility between lawyers and between lawyers and judges, as often portrayed in the media, is a significant driver in the poor perception of lawyer honesty and professionalism. Why does this perception matter? Because a populace that does not perceive lawyers—who are the gateway to accessing justice—to be honest and ethical translates to a populace that does not trust its legal system. Lawyers are the last line of defense for the Rule of Law, the sine qua non of the freedoms we hold so dear. If we lose the trust of our colleagues and our fellow citizens, we put those freedoms at risk.

We also owe it to ourselves as human beings. Ours is an exceptionally stressful profession. At its best, it can take a toll on the individuals who practice it, and what we're seeing today is not the profession at its best. According to a recent study by the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation, nearly 21% of lawyers are problem drinkers and over 36% *admit to* struggling with alcoholism. Another 9% *admit to* prescription drug abuse. Another study shows 28% fighting depression. A working environment described by one court as "rife with cynicism, awash in incivility" (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293) will continue to exacerbate these numbers if we don't take steps to ameliorate them. We deserve better for ourselves and our loved ones.

We are professionals, and "[c]ivil behavior is a core element of attorney professionalism. As the guardians of the Rule of Law that defines the American social and political fabric, lawyers should embody civility in all

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1 (https://news.gallup.com/poll/328136/ethics-ratings-rise-medical-workers-teachers.aspx.)

they do. Not only do lawyers serve as representatives of their clients, they serve as officers of the legal system and public citizens having special responsibility for the quality of justice. To fulfill these overarching and overlapping roles, lawyers must make civility their professional standard and ideal." (J. Reardon, *Civility as the Core of Professionalism,* Business Law Today, September 2014 (ABA Business Law Section).)

Our system of justice requires lawyers to exercise honesty, integrity and accountability, without which, the system will fail. In a 2014 survey of Illinois lawyers (, 85% of respondents reported experiencing some instance of uncivil or unprofessional behavior within 6 months of the survey. Examples included playing hardball (such as not agreeing to reasonable requests for extensions); inflammatory writings; and—reported by over 16% of respondents—misrepresenting or stretching the facts or negotiating in bad faith.[2] All are counter to the dictates of our professional conduct rules.

Whether in litigation or a transactional context, our adversarial system requires zealous representation. But an adversarial system should not be confused with an acrimonious one. Zealous representation in an adversarial system still necessitates objective analysis, active listening to the other side's position to best address adversarial points and the need to focus on the ultimate goal of the system, which is the resolution of issues. As Jayne Reardon, Executive Director of the Illinois Supreme Court Commission on Professionalism, observed, "research conclusively bears out, (1) civil lawyers are more effective and achieve better outcomes . . . " and ". . . clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer." *Civility as the Core of Professionalism, supra.*

In contrast, rampant incivility leads to an inability to analyze cases and legal positions because incivility clouds meaningful analysis. Incivility breeds a lack of self-responsibility. Incivility erodes adherence to an honor system. And most critically, incivility justifies unfounded vilification of others

2 (https://2hla47293e2hberdu2chdy71-wpengine.netdna-ssl.com/wp-content/uploads/2015/04/Study-of-Illinois-Lawyers-2014.pdf)

Understanding that it is such a critical component of effective advocacy, how can civility be promoted among lawyers? The attorney oath is a good start; but it's only a start. Civility takes effort and training. Promising to be civil without a continuous reminder of the promise allows the promise to fade. We are convinced that the initiatives we have laid out in this report will start us back onto the high road on which our practice should travel.

Restoring civility will not be easy, but it must be done. And soon. Every generation of uncivil lawyers teaches incivility to the next. We must act now, and act decisively. "If this be quixotic, so be it; Rocinante is saddled up and we are prepared to tilt at this windmill for as long as it takes." (*Kim v. Westmoore Partners*, *supra*, 201 Cal.App.4th 267, 293.)

Proposals of the California Civility Task Force

Proposal 1: Ask the State Bar Board of Trustees to mandate one hour of civility MCLE training (without increasing total MCLE hours). Some portion of the civility training should be devoted to making the profession more welcoming to underrepresented groups by addressing the link between incivility and bias.

Our first proposal is to ask the State Bar Board of Trustees to amend State Bar Rule 2.72 (which contains MCLE requirements) to require, as a part of the existing total MCLE hours required, one hour of civility training. For most lawyers, a total of twenty-five hours is required during each MCLE compliance period. Of the required hours, at least four must be devoted to legal ethics, at least one must deal with recognition and elimination of bias in the legal profession, and at least one must address substance abuse or other mental or physical issues that impair a lawyer's ability to provide competent legal service. Our proposal would *not* increase the total number of hours required. Instead, it would require that at least one of the existing required hours be devoted to civility.

The goal is to promote courtesy, integrity, and professionalism in the bar. We believe mandatory MCLE civility programs could and should educate

attorneys about the economic and human costs of incivility; provide lawyers with reasons and tools to change their own behavior if they are uncivil; teach lawyers how to help those who are uncivil change their behavior; help lawyers deal with stress and dissatisfaction caused by toxic uncivil behavior; and reduce bias-driven incivility.

Voluntary continuing legal education programs on civility already exist, of course. The problem is that attendees are self-selected: Those most committed to civility (including those who have been victimized by incivility) are the most likely to attend. Thus, these courses tend to "preach to the choir." Making civility education mandatory would bring those who need education the most into the tent. All attendees would be able to reflect on their own behavior, and become empowered to make necessary improvements.

Task force members have reviewed existing civility programs available online. Some programs are decidedly better than others. We envision that mandating civility education would spur the creation of excellent new programming on the topic by California MCLE providers. To aid in that effort, we have provided the following additional resources. Appendix 3 includes a list of California cases dealing with civility and a summary of key cases. Appendix 4 contains a table and memorandum identifying and describing some individuals who have expertise in workplace incivility generally (i.e., not limited to the legal profession). It also includes a list of some individuals who have written or spoken about incivility. The listings do not purport to be exhaustive, and the mere fact that a name is listed does not imply that the task force endorses that person's views. Appendix 5 describes referral and dispute resolution techniques that have been employed in other jurisdictions to resolve disputes among lawyers, and in private and public organizations to resolve disputes among employees. Although we are not currently recommending that California adopt such a program, the idea warrants further study.

The amended MCLE rule should specify that some portion of civility training must be devoted to addressing the link between incivility and bias. If our profession is serious about increasing diversity and embracing justice, it must

reduce incivility directed at attorneys who come from underrepresented groups. Doing so would be consistent with the State Bar's Strategic Plan, which includes (as part of Goal 4 of that plan) promotion of "policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves." Appendix 6 is a memorandum authored by task force members exploring bias-driven incivility in the legal profession. An important article by Justice Lee Edmond and Judge Samantha Jessner entitled "Gender Equality is Part of the Civility Issue" is included in Appendix 2. These resources could be used as starting points for programming on this topic.

The task force is grateful that the State Bar already requires at least two hours of MCLE dealing with the recognition and elimination of bias in the legal profession and society, including one hour focusing on implicit bias and the promotion of bias-reducing strategies. We believe that melding the topics of incivility and bias, as we have proposed, would be a powerful tool to accomplishing our collective goal of a more open and welcoming profession.

The task force considered whether the mandatory civility MCLE requirement should be limited to lawyers who practice in a litigation environment. Based on anecdotal reports, however, we have concluded that lawyers in non-litigation practices also encounter incivility, including bias-driven incivility. We therefore believe it would be appropriate to require civility MCLE training for all lawyers.

Proposal 2: Ask the Chief Justice, as head of the Judicial Council, and the Center for Judicial Education and Research Advisory Committee (CJER) to provide specific training to judges on promoting civility inside and outside courtrooms. CJA should commit to do the same.

The task force believes judges can and should play a critical role in improving courtesy, integrity, and professionalism among lawyers. Judges can and often do serve as civility role models. These judges set the stage for improved civility by making clear that civility and professionalism are expected norms both inside and outside the courtroom. The profession would benefit from new

training programs designed to arm judges with tools to have a greater impact on promoting civility among lawyers.

Judges receive training and continuing judicial education from multiple sources. For example, new judges attend New Judge Orientation and later attend Judicial College. All judges are required to complete specified hours of continuing judicial education. Some continuing judicial education is provided through the Center for Judicial Education and Research Advisory Committee (CJER). CJA is another significant provider of excellent judicial education programs. Judges also attend other judicial education programs and MCLE programs. And of course, judges frequently teach continuing education programs for other judges and lawyers.

The task force's second proposal is to have CLA and CJA ask the Chief Justice, as head of the Judicial Council, to ask CJER to develop and promote programs specifically designed to educate judges on the need both to model civility and to require civility and professionalism both in and out of the courtroom. We also ask CJA to commit to developing and promoting such programs. Task force members Judge Wendy Chang and Judge Stuart Rice are developing a new PowerPoint presentation on the topic. It can be adapted for use by other judges who are willing to present on the topic. The presentation is a work in progress and will be beta tested and refined. The current version is attached as Appendix 7. Also, Appendix 2 contains an article by Justice Currey and then Los Angeles County Superior Court Presiding Judge Kevin Brazile entitled "Seven Things Judges Can Do to Promote Civility Outside the Courtroom," and an article by Justice Lee Edmon and Judge Samantha Jessner entitled "Gender Equality is Part of the Civility Issue." The two articles could be used as a starting point for additional judicial education programs on promoting civility, and can be used as handouts at any such program.

Proposal 3: Ask the State Bar Board of Trustees to recommend to the Supreme Court revisions to the Rules of Professional Conduct to clarify that repeated incivility constitutes professional misconduct and that civility is not inconsistent with zealous advocacy.

Other states have provisions in their rules of professional conduct making clear that incivility is not required for zealous client representation. Some states also have rules specifying that incivility constitutes professional misconduct.

Our proposal for similar rules in California is contained Appendix 8.

We suggest several modifications to clarify that civility is consistent with zealous advocacy.

California already has a rule specifying "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d). One of our proposals would add a comment that a lawyer may violate this rule "by repeated incivility while engaged in the practice of law or related professional activities." The language is intended to preclude disciplinary proceedings based on an isolated incident of incivility or conduct unrelated to the profession. Our proposal defines "incivility" for purposes of the rules as "discourteous, abusive, harassing, or other significantly unprofessional conduct."

We are aware that making incivility a breach of the rules of professional conduct may be controversial in some circles. Some lawyers may have First Amendment concerns. Others may be concerned that a single misstep could land them in hot water with the State Bar. Our proposal should allay both concerns. Our task force members are ardent defenders of the First Amendment and have no interest in deterring lawyers from advocating controversial legal positions.

Similarly, we are open to adding further definitional language so lawyers can have clarity about what conduct is and is not prohibited. In *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, the Ninth Circuit concluded that

California Business & Professions Code §6068(f)'s admonition that lawyers should abstain from "offensive personality" was void for vagueness, but appeared to find no such problem with the phrase "conduct unbecoming a member of the bar." We are confident that a rule can be drafted that gives attorneys sufficient notice of what conduct violates the rule.

Another issue is the rules' scope—should they apply only when lawyers are representing clients, when they are acting in any professional capacity (including participating in bar association activities), or at all times? The current oath requires lawyers to pledge to strive to conduct themselves "at all times" with dignity, courtesy and integrity. We propose language limiting the rule's application to when the lawyer is practicing law or engaged in professional activities. Some might prefer a rule limited to when a lawyer is representing a client. We acknowledge reasonable minds may differ on this issue.

In any event, we view our proposal as a starting point. We would fully expect the State Bar rulemaking bodies to take public input, consider alternative language, and craft a rule that best serves the public and the profession. We look forward to assisting in that process.

We share the view that a single misstep or isolated outbreaks of incivility should not result in State Bar discipline, which is why our proposal only applies to "repeated incivility." Indeed, we hope the mere existence of a disciplinary rule prohibiting incivility will spur civility.

Finally, we suggest that the State Bar develop a diversion program that would allow those charged for the first time with repeated incivility to avoid disciplinary proceedings by completing a civility mentorship program that could be modeled after judicial demeanor mentorships. The lawyer being mentored would pay for any costs. Ideally, judges would also be able to refer lawyers to this program, and allow layers to complete the program in lieu of paying sanctions for incivility.

Proposal 4: Ask the Supreme Court to amend Rule of Court 9.7 to require all attorneys, when annually renewing their licenses to practice law, to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

As noted above, since 2014, the California Rules of Court have required every lawyer newly admitted to practice in California to take an oath that includes a civility pledge: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." (Cal. Rules of Court, rule 9.7, enacted in 2013 as rule 9.4.) But incivility continues to plague the profession. Part of the problem is that most lawyers were admitted to practice before 2014 and have never taken the civility pledge. As one part of a multi-pronged response to incivility, the Civility Task Force recommends amending Rule 9.7 (or adding a new rule) to require all attorneys to take the civility pledge annually. For example, the rule could be amended to read:

Rule 9.7. Attorney Oath and Civility Pledge

(a) Oath required when admitted to practice law

In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

(b) Annual civility pledge

Each active licensed attorney must take or reaffirm the civility pledge described in subsection (a) of this rule each year when paying annual bar dues. The State Bar must adopt appropriate procedures to ensure compliance with this requirement.

(c) Failure to take or reaffirm annual civility pledge

Failure to take or reaffirm the civility pledge as required by this rule may result in [administrative suspension/involuntary inactive enrollment].

The procedure could be as simple as checking a box when renewing online or by mail.

We are all in this profession together, and all lawyers should take the aspirational civility pledge.

Conclusion

The time has come for our profession to take additional steps to promote civility. We have made four significant proposals and ask that our sponsoring organizations, CLA and CJA, adopt resolutions embracing them.

Task force members are committed to sharing these proposals with the legal community and engendering support for them. We also commit to working with the Supreme Court, the Judicial Council, the Judicial Council Rules Committee, the State Bar Board of Trustees, and the State Bar Committee on Professional Responsibility and Conduct to fine tune these proposals or consider others.

Thank you for your support of the task force and for considering our views.

Justice Brian S. Currey, Chair
On behalf of the
California Civility Task Force

Appendices:

Appendix 1: Members of the California Civility Task Force

CIVIL TASK FORCE BIOS

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Justice Brian S. Currey, Chair

Justice Currey is honored to serve on the California Court of Appeal, Second Appellate District. He praises his talented, distinguished, and cordial colleagues, top-notch staff, and the generally excellent quality of lawyers who practice before his court. Together they enable the court to exercise its duty to do justice in the wide variety of cases before it.

On the civility front, he chairs the California Civility Task Force, a joint project of the California Lawyers Association (CLA) and California Judges Association (CJA), in cooperation with the State Bar of California. He authored a leading case linking (and condemning) incivility and bias, *Briganti v. Chow*, 42 Cal.App.5th 504 (2019), and co-authored a key article outlining ways judges can encourage civility in the legal profession. *See* B. Currey & K. Brazille, "Seven Things Judges Can Do to Promote Civility Outside the Courtroom," Summer 2019 ABTL-LA Report 11, 12-13.

Governor Jerry Brown appointed him to the Court of Appeal in 2018. The Commission on Judicial Appointments unanimously confirmed his appointment after the JNE Commission bestowed an "exceptionally well qualified" rating. Prior to his appointment, he served *pro tem* in Divisions 1 and 3 of the Second District Court of Appeal.

Before his elevation to the Court of Appeal, he served four years as a Judge of the Los Angeles County Superior Court. His assignments included presiding over a misdemeanor criminal courtroom, handling a wide variety of cases as the only civil judge at the Compton Courthouse, and serving in the Complex Civil Litigation Court.

In 2010, Los Angeles Mayor Antonio Villaraigosa appointed him as Counsel to the Mayor, and later also Deputy Mayor for Economic and Business Policy. In those roles, he served on the Mayor's small executive team, and oversaw the City departments responsible for the airport, port, convention center, planning, building and safety, and other key functions. His time at City Hall gave him an insider's understanding of how government works and a deeper understanding of public policy issues facing the Golden State.

Before that, he spent nearly 30 years litigating complex cases at O'Melveny and Myers LLP, one of the state's oldest, largest, and most highly regarded law firms. He performed various roles, including Vice-Chair of the firm's award-winning litigation department. While at O'Melveny, he served on a *pro bono* basis as counsel to the Christopher Commission after the Rodney King incident, was a member of the Los Angeles County Bar Association's task force on criminal justice reform, and secured a Supreme Court victory

allowing the U.S. Census to more accurately count traditionally undercounted groups. His firm was honored for a pro bono program he helped create whereby its lawyers gained trial experience by serving as deputy prosecutors for several smaller cities. He also received an award from an environmental organization for his pro bono work in Southern California.

Justice Currey serves on the CJA Executive Committee and represents appellate judges on CJA's Executive Board. Before going on the bench, he served for many years on the Board of Trustees of the Los Angeles County Bar Association (LACBA) and the Executive Committee of LACBA's Litigation Section. He was a lawyer representative to the Ninth Circuit Judicial Conference, Chair of the Magistrate Judge Selection Committee for the Central District of California, and chaired LACBA's federal courts committee. He has been a member of ABTL-LA's Board and Judicial Advisory Committee. He is or has been a member of several other important professional associations. He speaks and writes on legal issues, and has taught at the USC Gould School of Law.

Justice Currey attended the University of California, Davis, where he was recognized as the outstanding male graduate, and the University of Virginia Law School, where he served on the editorial board of the *Virginia Law Review*.

In his spare time, he likes running, hiking, kayaking, fly-fishing, and enjoying life with family and friends. *Rev. 8.21.*

Heather L. Rosing, Vice Chair
Shareholder and CEO, Klinedinst Attorneys
Immediate Past President, California Lawyers Association

Heather L. Rosing is a Shareholder with Klinedinst PC, with five offices across the West. Ms. Rosing chairs the firm's Professional Liability and Ethics Department and serves as the newly elected CEO and President. Ms. Rosing litigates and tries complex malpractice and fraud cases, advises in the areas of ethics and risk management, and serves as an expert witness. In her decades of defending lawyers and other professionals, Ms. Rosing has numerous notable victories in legal malpractice cases in state court, federal court, and arbitration. She also defends judicial officers before the Commission on Judicial Performance. Well known for her advocacy and contributions to the profession, Ms. Rosing was one of 18 lawyers honored as "Lawyer of the Decade" by the Daily Journal in January 2021.

A certified specialist in legal malpractice and a former member of the ABA Standing Committee on Lawyers' Professional Liability, Ms. Rosing also served as an appointed advisor to the Rules Revision Commission of the State Bar of California, which recommended wholesale revisions to the Rules of Professional Conduct (adopted in large part by the California Supreme Court in 2018), and an appointed member of the Mandatory Insurance Working Group of the State Bar. She frequently speaks on a pro bono basis on issues pertaining to malpractice, ethics, and risk management across California and the country. Ms. Rosing was also appointed to serve as the co-vice chair of the Civility Task Force, which is a joint effort among the California Lawyers Association (CLA), the State Bar, and the California Judges Association (CJA). Ms. Rosing is also a member of the CJA's Judicial Fairness Coalition, which focuses on education about the judicial branch and the importance of judicial independence.

In 2018 and 2019, Ms. Rosing served as the inaugural President of the CLA, the largest statewide voluntary Bar Association in the country. During her tenure, she launched the organization with a focus on its 16 Sections, the California Young Lawyers Association, governmental affairs, bar relations, and initiatives in the areas of diversity, access to justice, and civics education. Under her leadership, CLA took over the Annual Meeting, which has brought together judges, lawyers, and organizations from across the State for several days of meetings for over 80 years. Ms. Rosing now is the President of the philanthropic sister organization of CLA, the California Lawyers Foundation (CLF). CLF is focused on supporting organizations, causes, and projects related the core CLA initiatives.

Previously, she served for four years on the State Bar of California's Board of Trustees as Vice-President, Treasurer, and Chairperson of the Regulations, Admissions, and Discipline Oversight Committee. A strong advocate for judicial and legal diversity, Ms. Rosing served as President of ChangeLawyers (formerly the California Bar Foundation), which awards pipeline grants, scholarships, and fellowships across the State. Ms. Rosing has served in leadership roles of many other organizations, including as President of the San Diego County Bar Association in 2008, where she launched a Diversity Fellowship Program, spearheaded a civility initiative, and founded a pro bono program to assist active duty servicemembers.

The recipient of numerous accolades, Ms. Rosing was recognized by the *Daily Journal* as Top Lawyer of the Decade in 2021 as well as Top 100 Lawyers in California (2018-2021). Best Lawyers recognized Ms. Rosing as Lawyer of the Year for 2022 in Legal Malpractice Law Defense. She also has been

frequently honored by *San Diego Super Lawyers*, including Top 25 Women San Diego Super Lawyers, Top 50 San Diego Super Lawyers, and Number 1 Attorney in San Diego County. Ms. Rosing was named Woman of Influence in Law 2021 by the *San Diego Business Journal* which previously honored her as CFO of the Year (2011, 2014, 2016). She is the recipient of the San Diego Law Library Foundation's Excellence in Public Service Award (2019), Fastcase 50 (2019), Earl B. Gilliam Bar Foundation's Corporate Commitment to Diversity Award (2016), Lawyer of the Year by the San Diego Defense Lawyers (2015), and the Exemplary Service Award by San Diego Volunteer Lawyer Program (2014).

Brandon Stallings, Vice Chair

Brandon Stallings is a Deputy District Attorney V at the Kern County District Attorney's Office. He is a Supreme Court appointee to the State Bar Board of Trustees and has served on the board for the past six years. He currently sits as chair of the Regulation and Discipline Committee which oversees the discipline, judiciary, probation and rehabilitation offices of the Bar. He has served as chair of the Audit Committee, chair of the Programs Committee, liaison to the Committee on Professional Responsibility and Conduct Committee during the rewriting of the Rules of Professional Conduct, Appointment Liaison, Member of the Ad Hoc Commission on the Discipline System and is Liaison to the Probation Department Re-design and Collaborative Justice Working Group. Mr. Stallings is former chair of the Young Lawyers Section of the Kern County Bar, Court Advisory Committee, former member of the Board of Directors for the Kern County Bar Association and presents at undergrad and law schools on legal ethics, professional responsibility, ethical issues facing prosecutors, overview of the criminal justice system, prison gangs and basic legal principles. He chairs the Mothers Against Drunk Driving Auxiliary Committee for Kern County and sits of the New Wine Church Board and advises on a committee addressing drug addiction programs administered by the church.

Tad Allan

Tad Allan is Of Counsel in O'Melveny & Myer's Los Angeles office, having recently retired following 32 years as a partner in the firm's Business Trial and Litigation Practice. His practice focused on automobile and aviation industry litigation, and he also played a leading role in many of the firm's large, highly visible trials.

In the automotive industry, Tad has extensive expertise in automotive dealer litigation, including dealer terminations and dealer network issues, class actions and general commercial litigation. Tad prevailed in more than a dozen trials for his automobile manufacturer clients, which included American Honda Motor Company, General Motors, and Ford Motor Co.

Tad also represented major airlines and aviation manufacturers in air crash cases, commercial litigation and in regulatory issues, such as FAA safety investigations. Among the airline and aviation industry companies Tad has represented are Atlantic Aviation, China Eastern Airlines, United Airlines, U.S. Airways, Alaska Airlines, Flying Tigers Airlines, Lockheed (now Lockheed Martin), and Sikorsky.

Outside of the automotive and aviation industries, Tad has played instrumental roles in many high-stakes trials. For example, Tad was a member of the trial team that obtained a defense jury verdict in a $12 billion antitrust case brought by Rambus, Inc. against the firm's client Hynix Semiconductor, Inc., a result that was hailed by the *Daily Journal* as one of the Top Defense Verdicts of 2011.

Tad served on the California State Bar's Commission on Judicial Nominees Evaluation from 2011-13. He also served in many leadership positions within O'Melveny for associate development, including training, work assignment and mentoring.

Illustrative Professional Experience

Guimei v. General Electric Co., 172 Cal. App. 4th 689 (2009) (case arising out of air crash in China properly stayed in favor of proceedings in China, on forum non conveniens grounds)

Daugherty v. American Honda Motor Co., Ltd., 144 Cal. App. 4th 824 (2006) (auto manufacturer not liable for defects that do not manifest within the warranty period)

In re Claremont Acquisition Corp., 186 B.R. 977 (C.D. Cal. 1995), aff'd, 113 F.3d 1029 (9th Cir. 1997) (GM's decision to reject a prospective dealer upheld since based on objective, performance-related criteria)

Woods v. Saturn Distribution Corp., 78 F.3d 424 (9th Cir. 1996) (award of arbitration panel consisting of Saturn employees and dealers enforced notwithstanding charge of "evident bias")

Education

George Washington University, J.D., 1981 University of California at Berkeley, B.A., 1976

Hon. Katherine A. Bacal,
Judge Bacal is the supervising judge of the San Diego Superior Court's civil division, where she also handles an independent calendar. In the past, Judge Bacal presided over family and criminal matters, including handling felony arraignments for two years in the Chula Vista courthouse.

Before being appointed to the bench by Governor Arnold Schwarzenegger in January 2008, Judge Bacal was a partner/principle at Baker & McKenzie LLP. She started her legal career at Gibson, Dunn & Crutcher LLC. Judge Bacal received her law degree from the University of Texas at Austin and her undergraduate degree from the University of Redlands, Johnston Center, where she graduated Phi Beta Kappa with a liberal arts degree.

Judge Bacal was the judicial liaison to the San Diego County Bar Association's Legal Ethics Committee for several years. She is also a member of the judicial advisory board of ABTL, San Diego and the current co-chair of its civility committee. Judge Bacal is also the chair of the San Diego Superior Court's local rules committee. Serving in all of these roles, Judge Bacal was on the subcommittee that proposed revised civility guidelines adopted by the SDCBA and included in the San Diego Superior Court's local rules. Judge Bacal is a member of the California Judges Association and has presented updates to its membership. She is also a long-time member of the Advisory Board of Lawyers Club of San Diego. Before being appointed to the bench, Judge Bacal was Lawyers Club's president and received Lawyers Club's Belva Lockwood Award in 2015. Judge Bacal is also a member of the Louis M. Welsh Chapter of the American Inns of Court (which focuses on professionalism, ethics and civility) and is a two-time former small-group leader.

Sarah J. Banola
Ms. Banola is the Founding Partner of BRB Law LLP. She

concentrates her practice in the areas of professional responsibility, regulatory law, and employment law. Her professional responsibility practice includes representing lawyers and law firms in matters related to legal ethics, legal negligence, attorney-client fee disputes, professional discipline, State Bar admission, and conflicts of interest. She is a member of the California Bar's Committee on Professional Responsibility and Conduct (COPRAC) and was appointed to serve as the Vice Chair of COPRAC for the

2021-2022 Committee year. Ms. Banola is a past chair and current member of the Bar Association of San Francisco's (BASF) Legal Ethics Committee, a Board member of the Conference of California Public Utility Counsel (CCPUC), and a member of Women in Public Utilities (WIPU) and California Lawyers Association's Civility Task Force. Ms. Banola is a frequent lecturer and author on the law governing lawyers. She serves as a contributing editor to the professional responsibility chapter of the California Practice Guide on Employment Litigation and the legal malpractice chapter of the California Practice Guide on Claims and Defenses, published by the Rutter Group. She has also moderated a panel on lawyer impairment for COPRAC's 24th Annual Statewide Ethics Symposium and presented on civility guidelines before BASF.

Kendra L. Basner

Kendra Basner is a partner at O'Rielly & Roche LLP. She is an experienced litigator and certified specialist in legal malpractice law. Ms. Basner devotes her practice to counseling and advising lawyers, law firms, in-house corporate counsel, legal service providers and related businesses concerning legal ethics, risk management, and law practice planning and compliance with the unique perspective gained through advocating on behalf of lawyers in civil cases and State Bar discipline matters. Ms. Basner also serves as a consultant and expert on legal malpractice matters and related litigation.

After beginning her legal career as a prosecutor, Ms. Basner was a partner at an Am Law 200 firm where she spent over a decade defending lawyers and other professionals in civil cases and disciplinary actions in addition to advising on legal ethics and risk management matters. She is certified as a specialist in legal malpractice law by the State Bar of California Board of Legal Specialization. Knowing and appreciating the true obstacles and risks that lawyers, law firms and legal services face allows Ms. Basner to target issues and streamline the solutions to minimize the risk of liability.

Ms. Basner is a thought leader in legal ethics and law firm risk management both in California and nationally. She frequently speaks at local, national and international events on topics related to legal ethics, legal services, legal malpractice and law firm compliance; and she regularly contributes to legal industry publications and resources. In November 2020, Ms. Basner published anarticle,"12 Steps to a Healthier Law Practice in 2020: Step 11– Actions Speak Louder Than Words" which addresses the state of civility in

California. A complete list of Ms. Basner's recent publications and presentations can be found at: https://oriellyroche.com/attorney/kendra-l-basner/

Ms. Basner holds membership and leadership roles in some of the legal industry's most important professional groups addressing the pressing issues that face law firms and legal services today, including serving as an Editorial Board member of the ABA/BNA Lawyer's Manual on Professional Conduct; a Board member and Future of Lawyering Committee member for the Association of Professional Responsibility Lawyers (APRL); a Fellow of the American Bar Foundation; a selected member of the California Lawyers Association's (CLA) Civility Task Force; a past member of the State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC); and a member of the Attorney Discipline Defense Counsel (ADDC).She is also a current member and the Immediate Past Chair of the Bar Association of San Francisco's (BASF) Legal Ethics Committee, for which she was honored with BASF's 2019 Award of Merit. Ms. Basner also previously served on the Ethics Committee for USA Lacrosse.

Justice William W. Bedsworth

Justice William W. Bedsworth is the longest serving justice in the history of the 4th District Court of Appeal, Division 3. His 24 years on the court have included many noteworthy opinions including *People v. Garcia* (2000) 77 Cal.App.4th 1269, the first gay rights precedent in California, which prompted the California legislature to change its law governing jury selection to bar peremptory challenges on the basis of sexual preference. He has also authored several civility precedents, most notably *Kim v. Westmoore Partners* (2012) 201 Cal.App.4th 267 and *Lasalle v. Vogel* (2019) 36 CalApp.5th 127, and is a frequent speaker on national and statewide civility panels. In 2017, the California Chapter of the American Board of Trial Advocates honored him by creating the William W. Bedsworth Judicial Civility Award.

A graduate of Loyola Marymount University and Berkeley Law, Justice Bedsworth serves on the Board of Visitors of UCI Law School. He served on the Board of Directors of the National Conference of Christians and Jews and was a principal in Fair Share 502 (a charity whose 10 members raised almost a million dollars for homeless children).

He was the Hispanic Bar Association's Judge of the Year in 1997, the Celtic Bar's Judge of the Year in 2012, and received the LGBT Lavender Bar Association's first Leadership Award in 2011. In 2015, he was given the

David G. Sills Award, the Orange County Bar Association's Lifetime Achievement Award for appellate law. He was the 2018 recipient of the Franklin G. West Award, the highest honor bestowed by the Orange County Bar Association.

In addition to law review articles, he has published in the lay press, most recently in Sierra and Coast magazines. His monthly humor column "A Criminal Waste of Space" is nationally syndicated, and self-described as the most aptly named feature of the dozen legal publications in which it appears. He has won several awards for it, including six from the California Newspaper Publishers Association. In 2019 he won the California Newspaper Publishers Association contest to identify the best newspaper column in California.

In 2010, he was chosen for one of George Mason University's coveted Green Bag awards – the two other winners in his category were Nina Totenberg of NPR and Jeffrey Toobin of *The New Yorker*. In 2019, his opinion in *Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, was chosen by Green Bag as the recipient of one of five awards nationwide for "exemplary legal writing."

In 2003, *The Times of London* gave him its Judicial Wisdom of the Year award for recognizing that "There is no non-culpable explanation for monkeys in your underpants." His third collection of legal humor, *Lawyers, Gubs and Monkeys*, was published by Van de Plas Publishing in 2017.
Justice Bedsworth lives with his wife Kelly and their surfeit of cats in Laguna Beach, California. He worked as a National Hockey League goal judge for 15 years (he proudly wears a 2007 Stanley Cup ring) and was the subject of a story in *ESPN The Magazine* entitled "Justice of the Crease."

Michelle L Burton

Michelle Burton is an owner and the Managing Partner of Burton Kelley LLP, a women owned, civil litigation firm specializing in complex insurance coverage, bad faith defense, insurance defense, professional liability, regulatory compliance, and construction defect. Ms. Burton has obtained numerous jury trial defense verdicts for her clients against multi-million dollar claims throughout California. In addition to her trial practice, Ms. Burton is a Certified Appellate Specialist and has authored and argued numerous writs and appeals addressing insurance-related matters. She has mediated, negotiated and resolved thousands of property claims throughout California and Washington.

Ms. Burton frequently provides webinars on claims handling, coverage issues and litigation strategies. Ms. Burton has been a speaker at the DRI on emerging coverage issues for the Cannabis industry. The Combined Claims Conference on Property Appraisals and the ABTL on jury selection and use of technology in the court room. Ms. Burton has served as the President of the San Diego Chapter of the Association of Business Trial Lawyers (2018) where she started a Civility Committee to restore civility in the practice of law. The Civility Committee was expanded to all ABTL Chapters and became a statewide mission with collaboration between the bench and the bar. Ms. Burton is one of the ABTL representatives on the State-Wide Civility Task Force. She has been recognized as a Lawyer of Distinction in Civil Litigation (2015-2020), Super Lawyer (2018-2021), AVVO Top-Rated Lawyer (2018-2021) and in *Lawyer Monthly's* Women in Law Awards (2018). She is also a Fellow of the American Bar Foundation, for her commitment to the legal profession and her community. Ms. Burton was also President of Run Women Run for 10 years, a political action committee devoted to the mentorship and advancement of women in politics.

Ms. Burton obtained her B.S. degree from San Diego State University and her law degree from California Western School of Law. Ms. Burton is licensed in California and Washington.

Judge Wendy Chang

Judge Wendy Chang is a Judge of the Los Angeles Superior Court, assigned to an unlimited civil Independent Calendar courtroom. She was appointed by Governor Brown.

Prior to her appointment, Judge Chang was a leading national voice in the law governing lawyers, focusing her practice on the representation and counseling of lawyers and law firms, and having been a frequent national and local speaker and author on the subject. She was a certified specialist in legal malpractice law by the State Bar of California. She currently serves as a member of the State Bar of California State Bar's working group on Closing the Justice Gap and the 2021 California Lawyers Association Civility Task Force. Judge Chang previously served as a member of the State Bar of California's Task Force on Access Through Innovation of Legal Services,1 as an advisor to the State Bar of California's Commission for the Revision of the Rules of Professional Conduct (II) and also as Chair the State Bar of California's Standing Committee on Professional Responsibility and Conduct. She also served on the American Bar Association's Standing Committee on

Ethics and Professional Responsibility and on Los Angeles County Bar Association's (LACBA) Professional Responsibility and Ethics Committee. Judge Chang is a co-chair of the National Asian Pacific American Bar Association's Judiciary & Executive Nominations and Appointments Committee, and has served in that capacity since 2007. Ms. Chang served on LACBA's State Appellate Judicial Evaluation Committee for 6 years, and is former chair of the Appointive Office committee for the Women Lawyers Association of Los Angeles. She is a former member of the Board of the National Association of Women Lawyers, and a former president of the Southern California Chinese Lawyers Association. Judge Chang was also a contributing editor to Ronald E. Mallen "Legal Malpractice" treatises (2018 edition), published by Thomson Reuters.

Judge Chang received her juris doctor from Loyola Law School, Los Angeles, and her bachelor's degree from the University of California Los Angeles.

David Carr

David C. Carr, an attorney in private practice in San Diego, California, specializes in ethics advice to lawyers, California State Bar discipline defense, and attorney licensing.

Mr. Carr is a 1986 graduate of Loyola Law School in Los Angeles. Following several years of practice in commercial law and business litigation, Mr. Carr joined the State Bar of California as a staff attorney in 1989. He served as counsel to the State Bar's audit and review panel from 1989 to 1992. Mr. Carr served on the National Organization of Bar Counsel's advisory committee to the American Bar Association's McKay Commission on discipline enforcement in 1991.

He moved from oversight of the discipline system in 1992 to prosecuting cases as a deputy trial counsel in the discipline prosecutor's office of the State Bar. After five years trying discipline, admissions and reinstatement cases before the State Bar Court Hearing Department, Mr. Carr began to specialize in appellate advocacy before the State Bar Court's Review Department, resulting in 10 published decisions between 1997 and 2000.

During the shutdown of the State Bar in 1998 after former Gov. Pete Wilson's veto of the State Bar dues bill, Mr. Carr worked as an unpaid volunteer in the discipline system. He argued as amicus counsel to the California Supreme Court that a special master be appointed to oversee discipline

system spending, an idea adopted by the Supreme Court in its decision reviving the discipline system (In re Attorney Discipline System (1998) 19 Cal.4th 582.)

After the Supreme Court ordered a special dues assessment, Mr. Carr became an assistant chief trial counsel and manager of the general trials unit in Los Angeles in 1999. He also worked on discipline policy issues as the chief trial counsel's liaison with the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) and the State Bar Court Executive Committee.

Mr. Carr returned to private practice in 2001 and his hometown of San Diego in 2002. He is a member of the San Diego County Bar Association, where he is active on the Legal Ethics Committee. Mr. Carr is a member of the Association of Professional Responsibility Lawyers (APRL), the ABA Center for Professional Responsibility, and the Association of Discipline Defense Counsel (ADDC), where he served as president from 2008 through 2011. He is also a member of COPRAC for the 2018-2021 term. As an adjunct faculty member, Mr. Carr has taught responsibility at the Thomas Jefferson School of Law in San Diego.

Mr. Carr grew up in the South Bay suburbs of San Diego and attended high school in the small desert community of Borrego Springs. After high school, he attended UCLA, where he graduated with a degree in history in 1978.

Judge Linda H. Colfax

Judge Linda H. Colfax, a San Francisco Superior Court Judge since 2011, currently sits in the criminal division of the court, supervises the preliminary hearing courts, and presides over serious preliminary hearings. Judge Colfax has also served as a juvenile court judge and family court judge, has presided over both civil and criminal trials, and served on her court's appellate panel for three years. and Executive Committee for 4 years.

Currently, Judge Colfax is a Vice President of the California Judges Association (CJA), a co-chair of the LGBT Judicial Officers of California (LGBT-JOC), a co-chair of CJA's Task Force on the Elimination of Bias and Inequality, and an active board member of the International Association of LGBTQ Judges.

Judge Colfax believes local service and involvement is equally important. She serves on the San Francisco Superior Court's Executive Committee, co-teaches the Bench Demeanor Training for temporary judges, serves as San

Francisco Superior Court's co-coordinator for the Judicial Council's Judges in the Classroom program, and has volunteered to mentor those seeking appointment to the bench both through her local court and the LGBT-JOC.

Prior to her election to the San Francisco bench, Judge Colfax worked as a San Francisco deputy public defender. Judge Colfax earned her A.B. from Harvard and her J.D. from the University of Michigan. While attending Michigan, Judge Colfax was one of the founding members of the Michigan Journal of Race and Law and served as an Articles Editor.

Outside of the legal world, Judge Colfax most enjoys spending time with her wife and 2 young adult children and friends, traveling, biking, walking her dogs, rock climbing or gardening.

Judge David J. Cowan

Judge David J. Cowan is Supervising Judge of the Civil Division of the Los Angeles County Superior Court. In that capacity, he is responsible for assignment of trials around the County, among other duties pertaining to managing Civil, including the PI Hub, I/C, UD and Small Claims courts, as well as the Complex Program. Judge Cowan is also active in this role in working with numerous local bar associations on issues of importance to the Bench and Bar and in ensuring the Court is responsive to lawyers' needs and concerns. In particular, he has instituted Bench Bar Working Groups on addressing the effects of the pandemic on Civil jury trials, as well as related to management of employment cases.

Previously, Judge Cowan was an Assistant Supervising Judge of Civil and sat in an I/C courtroom at the Mosk Courthouse.

Judge Cowan was formerly Supervising Judge of the Probate and Mental Health Depts. While in Probate, after initially handling a calendar of decedent estates, trusts, conservatorship and guardianship cases, he went on to focus on long cause or complex trials and settlement conferences.

Judge Cowan is a member of the Probate and Mental Health Advisory Committee to the Judicial Council of California, as well as Vice-Chair of the Probate Law Committee of the Calif. Judges Ass'n. He is also a member of numerous LASC committees, including Chair of the Special Civil Jury Trials Committee, as well as on the Court's COVID-19 Working Group.

Judge Cowan was appointed a Judge by Governor Jerry Brown in 2014. Previously, Judge Cowan served as a Court Commissioner. For much of that

time, Judge Cowan handled a Family Law calendar at the Santa Monica Courthouse.

Prior to going on the bench, Judge Cowan practiced business and real estate litigation for seventeen years. He started at Rogers & Wells, now known as Clifford Chance. Later, he had his own office.

Judge Cowan is a graduate of Univ. of Calif., Hastings College of the Law and Columbia University.

Judge Cowan has also taught as an Adjunct Professor at Loyola Law School on various subjects for more than ten years. He is a frequent speaker to different Bar groups on a variety of legal issues.

Jeremy M. Evans

Jeremy M. Evans is the Chief Entrepreneur Officer (CEO), Founder & Managing Attorney at California Sports Lawyer®, representing entertainment, media, and sports clientele in contractual, intellectual property, and dealmaking matters. Evans is an award-winning attorney and industry leader based in Los Angeles.

His clients range from *Fortune 500* companies to entrepreneurs, athletes, entertainers, models, directors, television showrunners and film producers, studios, writers, individuals and businesses in contractual, intellectual property, formation, production, distribution, negotiation, and dealmaking matters. Evans is a graduate of the University of California, Los Angeles (UCLA) with a Bachelor of Arts in Political Science with an Emphasis in American Politics (BA '05), Thomas Jefferson School of Law with a Juris Doctor (JD '11), Pepperdine University Rick J. Caruso School of Law with a Master of Laws in Entertainment, Media, and Sports Law (LLM '18), and Pepperdine University George L. Graziadio School of Business and Management with a Master of Business Administration in Entertainment, Media, and Sports Management (MBA '20).

Evans is a faculty member at California State University, Long Beach, (CSULB) and American Public University | American Military University, where he teaches Collegiate Sports Administration, Sports and Recreation Facility Management, Sports Communication, Sports Marketing, Promotion, and Public Relations, Sports Law, Sales and Promotions in Sport, and professional development courses in the two graduate sport management programs. He writes a weekly column for Sports Radio America and produces and hosts a weekly podcast “Bleav in Sports Law”, ranked the number one

sports law podcast in the world, with the Bleav Podcast Network. He currently serves as President-Elect of the California Lawyers Association (CLA), Secretary of the California Lawyers Foundation, and co-captain of outreach in Southern California with the Sports Lawyers Association.

Within the California Lawyers Association, he serves on the Joint Task Force on Civility in the Legal Profession with the California Judges Association and State Bar of California, co-chairs the Member Engagement Committee, is Ex-Officio to the Governance Committee, Chair of Sponsorships for the CLA Annual Meeting and Solo & Small Firm Summit, and Ex-Officio to The State Bar of California Liaison. With the non-profit arm of the CLA, the California Lawyers Foundation, he serves as Secretary and on the Fundraising and Governance & Nominations Committees, while leading the Signature Event Series programing.

Evans is also U.S. Production Counsel with MediaMonks | S4 Capital, one of the largest advertising agencies in the world.

Prior to opening California Sports Lawyer®, Evans worked as a Graduate Law Clerk at the Superior Court of California, advising judicial officers in civil and criminal law and motion matters. Prior to law school, he worked as the associate director for corporate finance at Quinn Emanuel Uquhart & Sullivan LLP. He has also worked as a legislative aide and field representative in the California State Legislature and continues to work on local and national campaigns.

Todd G. Friedland

Mr. Friedland is a founding partner of the business litigation firm Stephens Friedland LLP where his practice focuses on commercial litigation and strategic counseling including matters related to corporate governance and fiduciary duty, complex contract and manufacturing disputes, trade secrets, unlawful business practices, business torts, and real estate issues. Prior to forming Stephens Friedland LLP, Mr. Friedland practiced with the multi-national law firm of Pillsbury Winthrop Shaw Pittman. Mr. Friedland was also a Judicial Law Clerk to the Honorable Paul Boland and the Honorable Alexander H. Williams of the Los Angeles Superior Court, and a Judicial Extern for the Honorable Alicemarie H. Stotler, U.S. District Court, Central District of California.

Mr. Friedland has served the legal community in a variety of positions including: President of the Orange County Bar Association (2016); President

of the OCBA Charitable Fund (2017); President of the Association of Business Trial Lawyers - Orange County (2020); President of the Constitutional Rights Foundation Orange County (2010); and President of Project Youth OCBF (2021). Mr. Friedland has served and continues to serve on numerous committees including the OCBA Editorial Advisory Committee, Mentoring Committee, and Leadership Committee.

Mr. Friedland is the recipient of numerous recognitions that include being AV rated by Martindale-Hubbell, named a Southern California Super Lawyer (2011-2021), listed in Best Lawyers in America (2015-2021) and U.S. News & World Report Best Law Firm (Litigation) (2016-2021), awarded Top 50 Attorneys in Orange County (2018-2021).

As President of the Orange County Bar Association, Mr. Friedland created the Civility Task Force which drafted the OCBA Civility Guidelines. Today, those guidelines constitute the preamble to the Orange County Superior Court's Local Rules. Mr. Friedland currently co-chairs the Civility Task Force and is a frequent lecturer on civility issues. His presentations entitled "Don't Let Covid Infect Your Civility and Professionalism" and "Civility: Always the Right Path" have reached hundreds of legal professionals, students and court externs. Justice Sandra Day O'Connor stated: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Mr. Friedland wholeheartedly agrees.

Ryan Harrison

Ryan Harrison, Sr. is an associate in the Sacramento, California, office of Jackson Lewis P.C. His practice focuses on defending employers in single plaintiff litigation matters in state and federal court, and at arbitration. He also has experience litigating labor disputes before the Public Employment Relations Board and litigating employee disciplinary matters and grievances in labor arbitration. He is also an experienced investigator, having conducted hundreds of neutral investigations for public and private sector employers regarding issues of unlawful discrimination, retaliation, conflicts of interest, embezzlement, and government corruption. Ryan has also provided advice and counsel for local government entities on ethics issues falling under the purview of the Fair Political Practices Commission.

Prior to his legal career, Ryan served as a dignitary protection law enforcement officer in the California State Senate, later returning to the institution as a policy consultant, and then becoming the principal internal

investigator for the Senate Rules Committee during the height of the #MeToo movement.

During law school, Ryan externed for the Chief Justice of the Supreme Court of California and competed on the number one nationally ranked UC Hastings Moot Court competition team. Ryan also co-founded a student legislative lobbying corps that helped secure a substantial apportionment to the law school enabling the construction two new campus buildings and the renovation of a third.

Ryan is committed to serving his community. In addition to his service on multiple state and local boards, he has served as a planning commissioner and as a Board of Appeals Commissioner for the City of West Sacramento.

Jeanne Fugate

Jeanne Fugate has a wide-ranging practice, focusing primarily on employment litigation and complex civil litigation. Jeanne is a first chair trial lawyer. She obtained a multi-million dollar verdict in a trade secret misappropriation case after a three-week jury trial, which was affirmed in full on appeal. She has led internal investigations for corporate clients related to numerous issues, including #metoo sexual discrimination and hostile work environment claims, and has in many cases successfully resolved those claims before litigation was filed. Jeanne was named as a Top 100 Woman Lawyer in California by The Daily Journal in 2018 and 2019. Jeanne was also recognized by the Los Angeles Business Journal on its "Thriving in Their 40s" list (2020) and as a Most Influential Women Lawyer (2017).

Jeanne is actively involved in bar and civic organizations in Los Angeles and across the state. In addition to her work on the Civility Task Force, Jeanne was involved in discussions aimed toward increasing civility in the legal profession while serving on the Board of the Association of Business Trial Lawyers (ABTL). Jeanne also chaired several ABTL-LA committees, including the Dinners Committee and the Annual Seminar organization committee.

Jeanne is President of the Board of California Change Lawyers (fka California Bar Foundation), which has a mission to increase diversity, inclusion, and access to justice throughout the California legal system. For the past seven years, Jeanne has served on the Board of Civil Service Commissioners for the City of Los Angeles, which oversees the appeals of the 60,000 City employees as to hiring and disciplinary issues and served terms

as the President (2018-2020) and Vice President (2016-2017). She is deeply involved with the Los Angeles chapter of the Federal Bar Association, co-chairing the Government Relations committee.

Jeanne, the daughter of two public school teachers, enjoys giving CLEs on a number of topics, including trial presentation, deposition taking and preparation, and providing mentoring and advice for more junior attorneys on a number of topics.

Jeanne clerked on the Ninth Circuit and the Southern District of New York.

Skyler Gray

Skyler Gray is an associate attorney at Goodwin Procter LLP in their emerging technologies practice. Skyler formerly served as Deputy Legal Counsel to Los Angeles Mayor Eric Garcetti. She graduated summa cum laude from UC Irvine School of Law and summa cum laude from UCLA with a B.A. in Communication Studies, College Honors. She clerked for the Hon. Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia.

Marisa Hernández-Stern

Marisa Hernández-Stern is a Supervising Deputy Attorney General in the California Department of Justice Worker Rights & Fair Labor Section. Marisa graduated from Brown University and UCLA School of Law. After working at the U.S. Department of Justice Civil Rights Division, Voting Section, Marisa clerked for the late Hon. Judge Harry Pregerson, Ninth Circuit Court of Appeals. She previously worked at two private public interest law firms, Traber & Voorhees and Hadsell Stormer Renick & Dai, and Neighborhood Legal Services of Los Angeles County.

Marisa served as the 2020 President of the Mexican American Bar Association of Los Angeles County (MABA) and is the longtime chair, and current co-chair, of the MABA Judicial Externship & Scholarship Program. She is a board member of Federal Bar Association-Los Angeles and Los Angeles County Bar Association Litigation Section Executive Committee, and recently completed her term as Trustee on the Brown University Alumni Association Board of Governors. Marisa has been recognized by the Hispanic National Bar Association as a 2021 "Top Lawyer Under 40" and Super Lawyers Rising Star. She is a past recipient of the UCLA Academic Senate

Diversity, Equity, and Inclusion Award, which recognizes contributions to further a diverse, impartial, and inclusive academic environment at UCLA.

Tamila C. Jensen, Esq.

Ms. Jensen is a graduate of the University of California at Berkeley and earned her law degree from the University of California at Davis School of Law. She recently earned an LLM in Transnational Commercial Practice, Lazerski University, Poland. Ms. Jensen has an active practice in Los Angeles where she represents private professional fiduciaries and lay people in the Probate Courts. The focus of her practice is elder law and real property. She is past president of the Los Angeles County Bar Association. Ms. Jensen has taught widely including at Indiana University School of Business, and seminars at the School of Law, Debrechen, Hungary, and at the European School of Law and Economics, Pristina, Kosovo. Ms. Jensen participates in several volunteer activities including the Foreign Direct Investment (FDI) international moot court arbitration competition. Ms. Jensen is on the board of directors of Neighborhood Legal Services Los Angeles. She is a certified mediator and participates as a settlement officer in volunteer mediation and arbitration programs through LACBA. She has authored many articles including the recent "Scalia's Lasting Legacy: Debating the Constitution - The Living Constitution," *Valley Lawyer*, May 2016.

Patrick M. Kelly

Patrick M. Kelly is one of the pre-eminent mediators, trial lawyers, litigators, law firm leaders and professional association leaders in the country. He has vast experience in numerous substantive areas that he will bring to bear in efficiently, effectively and economically resolving matters as a mediator, arbitrator or referee. During his lengthy career, Mr. Kelly has tried, litigated, arbitrated, mediated and/or settled thousands of cases involving the following areas of law: Insurance Coverage and Bad Faith, Employment, Personal Injury, Product Liability, Professional Liability, Class Actions and Complex Litigation, Commercial Litigation, Premises Liability and Sports Litigation

<u>INSURANCE EXPERTISE</u>

From 1980 to 2019, Mr. Kelly served as Partner and Senior Counsel at Wilson Elser Moskowitz Edelman & Dicker LLP, an international litigation firm founded in insurance defense. His practice focused on advising and

representing insurance carriers in coverage matters and defending individuals and companies in high-stakes professional liability and commercial cases. He also handled numerous insurance bad faith, insurance coverage, product liability, premises liability, employment litigation, ski resort liability and railroad liability matters. He has particular experience with class actions involving directors and officers (D&O) liability, product liability, employment and consumer fraud claims.

From 1980 through 2013, Mr. Kelly served as the firm's Los Angeles Region Managing Partner, Western Region Managing Partner and Director of Litigation, and Member of the firm's Executive Committee. He also served as General Counsel to Snow Summit Ski Corporation, an owner of several ski resorts in California.

Mr. Kelly is a frequent author, columnist and lecturer in numerous subjects including trial tactics, insurance coverage and bad faith, personal injury, and professional liability. He is an original co-author of Insurance Litigation, The Rutter Group California Practice Guide, a frequently cited insurance treatise in California, and continues to edit the Directors and Officers chapter of the publication.

HONORS & AWARDS

Shattuck-Price Outstanding Lawyer Award, Los Angeles County Bar Association, Southern California Lawyer of the Year (Arbitration), The Best Lawyers in America, Griffin Bell Volunteer Achievement Award, Dispute Resolution Services, Top 100 Lawyers in California, Daily Journal, MetNews Person of the Year, Metropolitan News Enterprise, Bench Bar Coalition Advocacy Award, Bench-Bar Coalition, Diversity Award, State Bar Council on Access and Fairness, Lifetime Achievement Award, Association of Ski Defense Attorneys, Repeatedly recognized by Marquis Who's Who in American Law, as a Super Lawyer, as a Best Lawyer, and as one of the the Irish Legal 100EDUCATION & TRAINING

Mediating the Litigated Case (40 hours), Straus Institute for Dispute Resolution
40-Hour Mediation Training Program, Los Angeles County Bar Association
J.D., Loyola Law School, Los Angeles, California
B.A., Pomona College, Claremont, California
LEADERSHIP POSITIONS

Mr. Kelly's reputation as a problem solver and community leader have been recognized by his peers on both sides of the litigation spectrum. He has been elected to numerous professional organizations and leadership positions,

including:, President of the State Bar of California, President of the Los Angeles County Bar Association, Associate of the American Board of Trial Advocates (ABOTA), Fellow of the International Academy of Trial Lawyers, President of the Professional Liability Underwriting Society (PLUS), President of Dispute Resolution Services, President of the Coalition for Justice, Federation of Defense and Corporate Counsel

He also served multiple terms as a Los Angeles Delegate to the American Bar Association House of Delegates and the Steering Committee of the Open Courts Coalition.

SERVICE TO THE JUDICIARY

Mr. Kelly was elected or appointed to several positions working with the California Judiciary, including:

Member of the California Judicial Council, the board chaired by the Chief Justice that oversees the California Judicial Branch, including all California courts

Special Advisor to the Executive Committee and Commissioner for the Commission on the Future of the California Courts, which developed the recommendations guiding development of the courts

President of the the Coalition for Justice, which supports the independence of the judiciary

One of 11 members and Chair of the Rules Committee for the Commission on Judicial Performance, which administers judicial discipline in California state courts

In Federal Court, Mr. Kelly served two terms as a Lawyer Representative to the 9th Circuit and the Federal Magistrate Selection Committee.

SERVICE TO THE COMMUNITY

In pursuing his service to the community, Mr. Kelly was a member of the Boards of Directors of numerous community service organizations, including the Legal Aid Foundation of Los Angeles, the Constitutional Rights Foundation, and Loyola Law School of Los Angeles. He was also appointed by the then-mayor as a Commissioner of the Los Angeles Homeless Services Authority.

ARTICLES

California State Bar, California Lawyers Association, Los Angeles County Bar Association, International Academy of Trial Lawyers, American Board of Trial Advocates, Association of Business Trial Lawyers.

Beverly Hills Bar Association
Association of Ski Defense Attorneys
Claims and Litigation Management Alliance
Irish American Bar Association
Cowboy Lawyers
American Bar Association
Professional Liability Underwriting Society
Chancery Club of Los Angeles

Mr. Kelly's background and accomplishments have been the subject of numerous profiles in legal publications. He is also a frequent author and columnist.

Jessica Kronstadt

Jessica Kronstadt is a Deputy District Attorney for the Los Angeles County District Attorney's office. Ms. Kronstadt is currently assigned to the Sex Crimes Division, where she prosecutes child sexual abuse matters. In July 2021, Ms. Kronstadt was recognized by the Daily Journal as one of its "Top 40 Under 40" lawyers. Ms. Kronstadt received a Distinguished Young Alumna Award from Washington University in St. Louis School of Law in April 2019. She currently serves as President of the Women Lawyers Association of Los Angeles (WLALA). She was recognized as WLALA's "Changemaker of the Month" in April 2018. She has been acknowledged by Los Angeles Magazine as a "Rising Star" in public interest. Ms. Kronstadt received her B.A. from Yale University, where she was a member of the Varsity Women's Volleyball Team. Ms. Kronstadt received her J.D. from Washington University in St. Louis School of Law. After graduating from law school, Ms. Kronstadt worked as a litigation associate at Latham & Watkins and as a staff attorney at Bet Tzedek Legal Services. She has served on the WLALA Board of Governors since 2012. Ms. Kronstadt also serves on the Los Angeles County Bar Association's President's Task Force on Racial and Social Justice. She has also served on the Executive Committee of the Criminal Justice Section for LACBA, and as a board member of the California Young Lawyers Association. Ms. Kronstadt is a past Co-Chair of the Young Lawyers

Division of the Los Angeles Chapter of the Association of Business Trial Lawyers. She has run in and successfully completed five marathons.

Arnold Lee

Arnold Lee is an Assistant City Attorney for the City of Pasadena. He received his J.D. from Southwestern Law School and his B.A. in history and political science from UCLA. He currently serves as the President of the Asian Pacific American Bar Association of Los Angeles County and is a member of the Diversity Advisory Committee for the UCLA Alumni Association. He is also the immediate past-president of the Asian Pacific Alumni of UCLA and is a former board member of OCA - Greater Los Angeles, a civil rights organization dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders (AAPIs). Prior to practicing law, Arnold served as staff, intern, and volunteer on many statewide, legislative, and local candidate and issue campaigns. Additionally, he has served in leadership positions in statewide and local political organizations and advocated for voter education and voter outreach by providing training and resources to activists.

Commissioner Cynthia Loo

The Honorable Cynthia Loo received her Juris Doctorate from the University of Southern California. She has been a Superior Court Commissioner for the Kern Superior Court since 2016. In 2014 she served as a Commissioner for the Mariposa Superior Court and from 2000-2013 she served as a subordinate judicial officer with the Los Angeles Superior Court.

Much of her career as well as time off the bench, has been devoted to public service, efforts focused on inclusion and diversity in the legal profession, and access to justice.

While in law school, she interned at AYUDA, a non-profit agency assisting low-income individuals in domestic violence, immigration, juvenile, family law and unlawful detainer cases. She was a legal intern for the late U.S. District Court Judge Edward Rafeedie, as well as a law clerk at the Equal Employment Opportunity Commission.

Cynthia worked from 1991-1999 at the Children's Law Center of Los Angeles representing abused children. Prior to her judicial duties, she volunteered with the Legal Aid Foundation's Unlawful Detainer Equal Access Project as

well as the Los Angeles Superior Court / Los Angeles County Bar Association's Domestic Violence Project, where she returned to volunteer the Summer of 2013.

Cynthia was an adjunct law professor at the Peoples College of Law (PCL) from 2005 to 2013 where she taught criminal procedure, juvenile law, family law and evidence. PCL is a non-profit law school that trains lawyers devoted to social justice and was opened in part to give those historically denied access to legal training an opportunity to go to law school. Tuition is affordable because the professors donate their salaries back to the law school.

In 2005 Cynthia received the "Outstanding Judicial Officer of the Year" award from the Los Angeles County Juvenile Court's Bar Association. She received a "Community Leadership Award" by the Asian Pacific American Dispute Resolution Center and was awarded a "Teachers Making a Difference Award" in 2011. She received the 2014 "Public Service Award" from the Asian Pacific American Bar Association of Los Angeles County and in June 2017 the "President's Award" from the Asian Pacific American Women Lawyer's Alliance.

Cynthia is most proud of her efforts regarding inclusion and elimination of bias. She was the 2013-2014 Chair of the State Bar's Council on Access and Fairness, which during her tenure among other accomplishments implemented a state-wide pipeline into the legal profession program in collaboration with several well-respected community colleges, universities and law schools; as well as several state-wide diversity on the bench programs in collaboration with Governor Brown's office.

She is a past co-chair of the Multicultural Bar Alliance of Southern California and a past President of the Asian Pacific American Women Lawyers Alliance.

In 2016, she was a founding member for the Multicultural Bar Alliance of Kern County, a co-chair in 2020 and continues to serve a judicial advisor. On behalf of the MCBA she has organized and moderated several programs aimed at "bringing the law alive" - introducing students and new lawyers to the contemporary practice of law, the satisfaction of a legal career, and the role and responsibility we all have as leaders in the community of setting a good example of mutual respect and fairness, as well as the importance of "giving back."

Amy R. Lucas

Amy Lucas is a partner at O'Melveny and Myers, LLP. She is an accomplished litigator and trial lawyer who has guided clients to victories in

high-profile, high-stakes matters. Her adept skills—during and after trial, in discovery, and before litigation—have yielded success on complex cases at all levels. She regularly counsels clients on contract and intellectual property disputes, mass tort and product liability cases, business torts, and class actions.

Amy has represented a diverse range of clients, including some of the most influential companies in the world. Her dedication and diligence have produced headline-making results for clients—and in some cases, kept clients out of the headlines. Her knowledge runs deep across industries, including the pharmaceutical, finance, technology, entertainment, automotive, and new media sectors.

In addition to her regular practice, Amy devotes significant time to pro bono matters, and has represented clients in criminal trials, civil litigation, and administrative hearings, including in federal and state courts of appeals and the US Supreme Court.

Mike Madokoro

Mike Madokoro is the Managing Partner of the Los Angeles office of Bowman and Brooke LLP, a national law firm of trial lawyers representing domestic and international corporations in complex litigation. With more than 31 years of experience, Mike is a highly sought-after trial attorney who defends the world's largest automotive and product manufacturers in high-exposure product liability litigation. Mike's clients have taken advantage of his trial and litigation skills, relying on him to manage national discovery programs.

Mike has developed a wide range of product liability litigation experience and has also defended against allegations of premises liability, toxic tort liability, employment wrongful termination, qui tam claims, and other business litigation matters across the country. A graduate of UCLA and the University of the Pacific, McGeorge School of Law, Mike was the President of the Japanese American Bar Association in 2019, is active on the Board of JABA's Educational Foundation, and is a member of the California Lawyer's Association's Statewide Civility Task Force, the National Asian Pacific American Bar Association, California Minority Counsel Program, Multicultural Bar Alliance, Defense Research Institute, and Japan America Society. Mike currently serves as the Secretary for the Executive Committee of the Los Angeles County Bar Association's Litigation Section, where he has also co-chaired the Court Alerts, Breakfast at the Bar, Brown Bag Lunch, and Programs Committees. Mike has moderated two programs on Civility in the

Courtroom and in the Practice of Law for the LACBA Litigation Section featuring judges from the United States District Court for the Central District of California, the Los Angeles County Superior Court, and the California Court of Appeals. He is a Co-Chair of the LACBA Affinity and Affiliate Bar Group's Homelessness Service Initiative. Previously, Mike has also served on LACBA's Outstanding Juist Award Committee.

In addition to having been honored as a Southern California Super Lawyer for seven years (2007-2013), he was named one of the Most Influential Minority Attorneys by the Los Angeles Business Journal (2018), has been named to the Lawyers of Color Power List twice (2014 and 2020), and named as a Client Service All-Star by BTI Consulting Group (2017). Due in part to Mike's commitment to diversity and inclusion, Bowman and Brooke was awarded the CMCP's Drucilla Stender Ramey Majority-Owned Law Firm Diversity Award (2015). In 2018, Mike was the first runner-up in the Leukemia & Lymphoma Society's Man of the Year, Los Angeles Chapter, fundraising campaign.

Michael Mallow

Michael Mallow is the managing partner of Shook, Hardy & Bacon's Los Angeles office and is a co-chair of the firm's national Class Action & Appellate Practice Group. Michael is a trial lawyer and for more than twenty years, has focused his practice primarily on defending consumer class and regulatory actions throughout California and nationally. Michael also represents clients in general commercial litigation and counsels clients on minimizing litigation risk.

Michael is proud of the strong relationships he has created and maintained with opposing counsel in his cases. He is an outspoken advocate for civility and served as the founding chair of the Los Angeles Association of Business Trial Lawyers' Civility Committee. In this role, he helped create the Los Angeles ABTL's Civility Report that was published in the Summer of 2020, and which was dedicated to articles about civility, many of which were authored by members of the Civility Task Force.

Michael's efforts to better the bar and legal profession include serving as a member and former co-chair of the Los Angeles County Bar Association, Litigation Section, Complex Court Committee; an officer and member of the Board of Governors of the Los Angeles ABTL; a member of the Los Angeles County Bar Association, Litigation Section Executive Committee; and the founding co-chair of the Cambridge Class Action Defense Forum.

Michael is the recipient of numerous accolades, including recognition by Chambers USA in the categories of California Litigation: General Commercial, and Product Liability: Consumer Class Action; and The Legal 500 United States in Dispute Resolution – Product Liability, mass torts and class actions: automotive/transport and consumer products. Law360 named him one of the "Transportation MVPs of the Year" in 2018, and a "Privacy & Consumer Protection MVP" in 2012. BTI Consulting Group recognized him as a "BTI Client Service All-Star" in 2012. Southern California Super Lawyers has honored him for Class Action/Mass Torts, Business Litigation and Civil Litigation Defense from 2005-2022. In 2005, Michael was included in the "Top 20 Under 40" listing of the Daily Journal Extra. Michael also received the President's Volunteer Service Award from the President's Council on Service and Civic Participation.

When not practicing law, Michael is an avid marathoner, triathlete and four-time Ironman, completing Ironman Maryland (2018), Ironman Vineman (Sonoma County, California, 2016), Ironman Cozumel (2015) and Ironman Boulder (2014).

Alan M. Mansfield

Mr. Mansfield is of Counsel at Whtley Kallas LLP. He has practiced primarily in the area of national health care, privacy, and consumer class action and public interest litigation since 1989. His clients have included such public interest organizations as the California Medical Association, the Independent Physical Therapists of California, the Utility Consumers Action Network and Privacy Rights Clearinghouse.

Mr. Mansfield was one of the lead counsel in *Garrett v. City of Escondido*,465 F.Supp. 2d 1043 (S.D. Cal. 2006), in the U.S. District Court for the Southern District of California, which successfully challenged the legality of the City of Escondido's immigration landlord-tenant enforcement ordinance. Based on that and other work in the community performed by both him and the previous firm for which he was the managing partner (Rosner & Mansfield LLP), he and his firm was awarded the 2007 Public Service by a Law Firm Award by the San Diego County Bar Association. He currently volunteers as a *pro tem* commissioner for the San Diego County Superior Court handling small claims and traffic matters.

Mr. Mansfield is the Past President of the Association of Business Trial Lawyers, San Diego Chapter. Over the last several years when he was an

officer, ABTL helped lead the state-wide discussion of concrete actions to take on a state-wide basis to address issues of civility. Such discussions in part lead to the adoption effective January 1, 2020 of the Preface to the Local Rules of the San Diego County Superior Court referencing and expecting all attorneys to follow the San Diego County Bar Association's Attorney Civility and Practice Guidelines. (He also is a Master member of the Enright Inn of Court, and has been a team leader for numerous committees responsible for making presentations to members of Inn, including several addressing issues of civility and implicit bias. Previously Mr. Mansfield was a Lawyer Representative to the Ninth Circuit Judicial Conference, Southern District of California (6/2008 to 6/2010), where he helped create and make presentations to the Southern District of California Judicial Conference, including on issues of diversity in the legal profession.

Mr. Mansfield received his B.S. degree, *cum laude*, in Business Administration - Finance from California Polytechnic State University, San Luis Obispo in 1983 and his *Juris Doctorate* degree from the University of Denver School of Law in 1986. He is admitted to the Bar of the State of California, to the United States District Courts for all Districts of California, to the United States District Court for the Districts of Colorado, Michigan and New Jersey, to the Second, Third, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeal, and to the Supreme Court of the United States of America.

Robin Meadow

Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP, a Los Angeles-based appellate boutique. He joined the firm in 1994 after 23 years as a trial and appellate lawyer at a large commercial firm. His practice continues the substantive focus he developed in his earlier years—business disputes, real estate, partnerships, and probate and entertainment law. But, like most appellate lawyers, he is a generalist, and at GMSR he has handled multiple significant appeals involving healthcare, family law, personal injury, and bankruptcy.

Recognition of Mr. Meadow's appellate practice includes: California Lawyer of the Year, California Lawyer Magazine (the "CLAY" award), for his work on Estate of Duke (2015) 61 Cal.4th 871; the Los Angeles County Bar Association's Pamela E. Dunn Appellate Justice Award (2014); Best Lawyers' Los Angeles Appellate Practice "Lawyer of the Year" (2013, 2018); named in Best Lawyers for Appellate Law, Bet-the-Company Litigation, and Trusts

and Estates; and named in Chambers and Partners USA as a Band 1 Appellate Litigator in California.

Mr. Meadow has long believed in the importance of civility, and over the course of his 50-year career he has learned first-hand that participation in the organized bar is one of best ways to practice and promote civility. He has been a member of the California Academy of Appellate Lawyers since 1988, serving as president in 2005-2006, and has been a Fellow of the American Academy of Appellate Lawyers since 2000. He is also a member of Chancery Club of Los Angeles and the Association of Business Trial Lawyers. His leadership roles in law-related settings include multiple terms as a trustee of the Los Angeles County Bar Association; chairing or co-chairing multiple LACBA committees, including Appellate Courts, Arbitration Executive Committee, Judicial Evaluation and Juvenile Justice; serving as LACBA's representative to the committee that oversaw the design of the Edmund D. Edelman Children's Court; and ultimately serving as LACBA president in 2003-2004. He has served on the boards of the ACLU Foundation of Southern California and Public Counsel, and was president of Public Counsel in 1994 1995. He assisted in creating the Second District Court of Appeal's Pro Bono Project and Self-Help Clinic.

In his capacity as co-editor of the ABTL Report of the Los Angeles chapter of the ABTL, Mr. Meadow played a major role in creating the Report's Summer 2019 issue on civility, and he authored the article reporting on the civility roundtable at the 2019 Joint Board Retreat. He has also served on the ABTL-LA's Civility Committee.

Jonathan A. Patchen

Jonathan A. Patchen, a partner in the Litigation Department, is a leading technology and commercial trial lawyer focusing on complex civil litigation, trials and arbitrations. He has first-chaired bench and jury trials in federal and state court, arbitrated disputes, and briefed and argued cases on appeal.

Mr. Patchen has substantial experience handling disputes involving trade secrets and other intellectual property, breach of contract, breach of fiduciary duty, partnership and corporate governance, professional liability, and other complex business issues. He counsels leading companies across the consumer brands, bioscience, technology and financial services industries on a range of

technology disputes, with a particular focus on trade secrets, employee mobility, contract and fiduciary duty claims.

Mr. Patchen received a J.D. (magna cum laude) from Harvard Law School in 2003, where he served as Managing Editor of the *Harvard International Law Journal*. He received a B.S. in Economics and a B.A. in Political Science from the University of Wyoming in 2000, where he was a member of Phi Beta Kappa. Following graduation from law school, Mr. Patchen was a judicial clerk for the Hon. Ronald Gould of the Ninth Circuit U.S. Court of Appeals.

Mr. Patchen currently serves as Northern District of California Lawyer Representative and a member of the Advisory Board of the Ninth Judicial Circuit Historical Society. He is a member of the Board of Governors for the Association of Business Trial Lawyers (ABTL), Northern California Chapter and is advisor to, and former voting member of, the Executive Committee of the Litigation Section of the California Lawyers Association. He is also a member of the Executive Board of the Harvard Law School Association, Northern California Chapter.

Mr. Patchen has also served as a member and chair of the Bar Association of San Francisco's Judiciary Committee, as a member and chair of the Executive Committee for the Litigation Section, and as Symposium Chair for the 2015 Complex Courts Symposium. Mr. Patchen has organized or participated in numerous other professional panels, including organizing a panel regarding "Civility in the Law" through the ABTL.

Bradley S. Pauley

Brad Pauley is a partner at Horvitz & Levy LLP in Burbank, where his practice focuses exclusively on civil appeals and writs. He currently serves as President of the Los Angeles County Bar Association (LACBA). Founded in 1878, LACBA is one of the nation's largest voluntary metropolitan bar associations. Through its Professional Responsibility and Ethics Committee, LACBA regularly issues ethics opinions that are of value to judges and lawyers throughout the State. Brad has served as a LACBA Officer or member of its Board of Trustees since 2016. He also served as Chair of LACBA's Appellate Courts Section from 2015 through 2017.

Brad has long been active in the American Bar Association. Until recently, he represented LACBA in the ABA House of Delegates. He also served as Chair of the ABA's Council of Appellate Lawyers from 2014 to 2015 and, in that

capacity, he served on the Boards of both the ABA's Appellate Judges Conference and the Appellate Judges Education Institute (AJEI).

Brad began his legal career at Paul, Hastings, Janofsky & Walker LLP in Los Angeles, where he was a member of the firm's professional responsibility committee. He received his B.A., summa cum laude, from the University of California, Los Angeles, and received his law degree from UCLA School of Law. While at UCLA Law, he studied professional responsibility and ethics under the late California Supreme Court Justice Cruz Reynoso. Brad is admitted to practice before the state courts of California as well as the U.S. Court of Appeals for the Ninth Circuit and the United States Supreme Court.

Bryan R. Reid

Bryan Reid is a partner in the San Bernardino office of Lewis Brisbois Bisgaard & Smith and a member of the firm's Long-Term Care & Elder Law Practice. Mr. Reid's civil trial practice focuses on the defense of healthcare and long term care providers in professional negligence, elder abuse and related claims. He also has significant experience litigating cases in the field of sports and recreation liability having represented some of the most well-known names in professional sports.

Bryan is a Fellow of both the American College of Trial Lawyers and the International Society of Barristers. He is also an active member of the American Board of Trial Advocates, currently serving as a co-chair of the organization's national committee on Professionalism, Ethics and Civility. He has also served as president of CAL-ABOTA (representing the seven California chapters) and the San Bernardino/Riverside chapter of ABOTA.

A graduate of Southwestern University School of Law's SCALE program in 1991, Bryan has been awarded the Jennifer Brooks Lawyer of the Year Award by the Western San Bernardino County Bar Association (2019-2020) and Arthur W. Kelly, Jr. Civility Award by the San Bernardino and Riverside County Chapter of ABOTA (2016). Bryan has also been identified as one of the top 100 Civil Defense Litigators for Southern California by America's Top 100 and he enjoys an AV Rating by Martindale-Hubbell.

Bryan is admitted to practice before:

The State Bar of California
United States District Court for the Central District of California
United States Courts of Appeals for the Ninth Circuit
United States Supreme Court

Judge James R. ("Reg") Reilly

Judge James R. Reilly was appointed to the Alameda County Superior Court by Governor Brown in February 2018. He is currently assigned to a Civil Direct Calendar Department in Oakland. Since his appointment, he has also had assignments in Criminal Court in Oakland and the General Civil Department (restraining orders, unlawful detainer, and small claims) in Hayward. Before his appointment, Judge Reilly practiced civil litigation for 30+ years in San Francisco, with a focus on commercial litigation and product liability litigation. He has been a member of the American Bar Association, the San Francisco Bar Association and, currently, the Alameda County Bar Association. Additionally, he has served as an arbitrator for the Counties of Alameda and Contra Costa, as a mediator for the County of Contra Costa, and as a judge pro tem for the County of San Francisco. Before his legal career, Judge Reilly was an officer in the United States Navy for seven years, serving in the Third and Seventh Fleets. He earned his A.B. from the University of California at Berkeley and his J.D. from the University of San Francisco.

Judge Stuart M. Rice

Stuart M. Rice is a Judge of the Superior Court assigned to a civil independent calendar court in the Stanley Mosk Courthouse. He was appointed by former governor Arnold Schwarzenegger on July 27, 2005 after having served as a court commissioner from March 1, 2003 until his appointment. While a commissioner, he served as president of the California Court Commissioners Association. Judge Rice is a recent past- president of the California Judges Association while also serving a one-year term as a member of the Judicial Council.

He currently serves on the Judicial Council's Civil and Small Claims Committee and is a board member for the California Judges Foundation. Through the foundation, Judge Rice has established the Adam Z. Rice Memorial Scholarship Award, a needs-based scholarship for aspiring law students. He also serves as a member of the statewide task force on Civility in the Legal Profession.

Judge Rice is chair of the LASC Temporary Judge Committee, Legislative and Government Relations Committee and serves as a member of the Court's Executive Committee and Civil Jury Trial Committee. He was president of

the Benjamin Aranda III chapter of the American Inns of Court (an organization devoted to enhancing civility in the legal profession) in 2013-2014.

In 2012, Judge Rice was presented with the Judge William E. MacFaden Award as Judge of the Year by the South Bay Bar Association. He was honored in June 2021 with the Justice Sandy Lucas Judge of the Year Award by the Long Beach Bar Association. He received the Outstanding Mentoring Award from CA State University Dominguez Hills for leading the court observer program for undergraduates interested in a career in the law.

Judge Rice is a frequent speaker and educator and has been on the faculty of the Witkin Judicial College from 2005 to the present. He has taught numerous classes to judicial officers, attorneys, and court staff on a variety of subjects specializing in bench conduct and demeanor, high conflict personalities, and bias.

Prior to joining the bench, Judge Rice was an associate at Gottlieb, Gottlieb and Stein from 1978-1983 and then a senior partner at Rice and Rothenberg. He was the President of the Long Beach Bar Association in 2000 and the Long Beach Barristers in 1983. He also served as a member of the State Bar Board of Governors, the JNE Commission and the Legal Services Trust Fund Commission. He received a bachelor's degree magna cum laude from Tufts University and a J.D. from Northeastern University School of Law.

Michael Schonbuch

Michael Schonbuch attended The State University of New York at Albany on a Full New York State Regents Scholarship. He graduated from the Boston University School of Law in 1990 and promptly relocated by himself to Los Angeles in order to lift weights at Gold's Gym Venice and to become a trial lawyer.

Michael was admitted as an Associate to The American Board of Trial Advocates (ABOTA) in the year 2000 and currently holds the rank of Advocate. He was the President of The Association of Southern California Defense Counsel in 2015 and The President of California Defense Counsel in 2018. Michael became the President of The Los Angeles Chapter of ABOTA in 2020 and held that position through June of 2021. He is the Course Director of The Jack Daniels ABOTA Trial School at Loyola Law School and a frequent presenter at multiple ABOTA Masters in Trial Programs. Michael frequently teaches trial skills and civility at events hosted by ASCDC,

CAALA, ABOTA as well as various law schools including Loyola and Pepperdine. He is also a Fellow in The American College of Trial Lawyers.

Douglas N. Silverstein

Douglas N. Silverstein has devoted more than a quarter century career to litigating labor and employment cases. He is a founding partner of Kesluk, Silverstein, Jacob & Morrison, P.C., and leads the firm's trial, labor and employment, and class action efforts. Doug has been recognized by fellow attorneys, the national news media, and the general public as an employment law expert, and regularly writes and lectures on labor issues.

For over a decade, Doug exclusively represented companies at the national labor and employment law firms of Morgan, Lewis & Bockius; Ballard, Rosenberg, Golper & Savitt; and Littler Mendelson. He has represented numerous Fortune 1000, 500, 100 and 50 corporations. In addition to his employment law experience, Doug has substantial traditional labor experience before the National Labor Relations Board. He served as Southern California lead counsel in the 2003 grocery strike. Doug has also litigated ERISA cases with significant amounts at stake.

For the past 17 years, Doug has focused his practice on protecting the rights of employees in a wide variety of areas, including discrimination, harassment, retaliation, wrongful termination, whistleblowers, trade secrets, non-competes, and wage and hour class actions. In addition to his litigation practice, Doug negotiates employment and severance agreements on behalf of executives.

He has handled and argued cases in the California Supreme Court, California Courts of Appeal, Second, Ninth and D.C. Circuits, and has numerous published opinions establishing law on issues of first impression. More importantly, he takes cases to trial. In the last ten years, Doug has taken 19 cases to trial, winning 18 of them. In his last six trials where punitive damages were at issue, he obtained punitive damages in all six. Doug has been appointed lead class counsel in more than 100 wage and hour class, collective and representative actions.

Prior to joining a law firm, Doug was a Judicial Extern Clerk to former Chief Judge Alex Kozinskiof the Ninth Circuit, and a Judicial Extern Clerk to Judge Irving Shimer of the Los Angeles County Superior Court.

Doug is the Immediate Past Chair of the Los Angeles County Bar Association (LACBA) Litigation Section Executive Committee, where he meets regularly with federal and state court judges, and bar leaders to advance the cause of justice. He also serves on the Los Angeles Superior Court Bench Bar Committee. Doug will serve as the President of the Consumer Attorneys Association of Los Angeles (CAALA) in 2022, and is a past Chair of CAALA's Las Vegas Convention, the largest plaintiff's trial convention in the country. Doug currently serves on the California Civility Task Force, and seeks to foster civility throughout the practice of law. Admitted to practice before all state and federal courts in California, Doug is a member of the American, California, and Los Angeles County Bars Labor and Employment Law Sections, the National and California Employment Lawyers Associations, the American Association for Justice, and the Consumer Attorneys Organizations of California and Los Angeles.

For seven years straight, Doug has been honored as one of the top labor and employment attorneys in California by *The Daily Journal*. In the past ten years, Doug has had more than 50 speaking and writing engagements. He has been consistently designated a Super Lawyer, and was even asked to evaluate other labor and employment attorneys under consideration for being named a Super Lawyer.

Doug earned his J.D., *magna cum laude*, at Whittier Law School, where he was the Senior Articles Editor of the *Whittier Law Review*, won numerous awards in moot court and for academics, and received several merit scholarships. He earned his M.B.A. at Nova University, where he was awarded special recognition for outstanding academic achievement, and was a Henry King Stanford Scholar at the University of Miami, Florida, where he earned his B.A.

Through his class action practice, Doug has secured contributions in the hundreds of thousands of dollars to legal aid foundations in California that provide access to justice for those unable to afford it. Doug has been a Board Member and General Counsel of the non-profit Tripod, the leading education and support organization for deaf children and their families. He is also an Honorary Board Member of the Los Angeles Trial Lawyers for Charity (LATLC). Doug is conversant in Spanish. Doug coached his children on numerous sports teams, winning several league championships and the state championship in soccer, before his kids realized they could go further without him as their coach and became hockey players. Prior to becoming an attorney, Doug worked as a sommelier.

Chuck Thompson

Charles Thompson serves as the Co-Chair of the firm's Labor & Employment Wage & Hour Class and Collective Action Litigation group. He focuses his practice on employment litigation and counseling representing clients through all phases of Class Actions and Single Plaintiff cases. Charles has wide-ranging experience litigating employment-related issues for public and private companies, having handled over 1,000 employment matters for clients ranging from Fortune 500 companies to Silicon Valley startups. He has tried employment, commercial, and professional liability cases to verdict and directed verdict, has litigated and appealed cases from California State Courts to the United States Supreme Court, and is a Fellow of the prestigious College of Labor and Employment Lawyers.Charles represents employers in wage and hour cases, as well as EEOC class actions, in state and federal courts across the United States and has broad experience appearing before the California Department of Fair Employment and Housing, the Division of Labor Standards Enforcement, the Employment Development Department, and the United States Equal Employment Opportunity Commission and the Department of Labor.

In addition to his trial and counseling work, Charles serves as a private and judicial mediator and arbitrator, and has acted as a pro-tem judge upon request of the court. He has broad experience in binding arbitrations and trial. He has taught trial advocacy, diversity, employment and substance abuse to clients and industry organizations.

Throughout his career, Charles has been a champion for diversity and has served on the Executive Committee of the board of Directors for the Justice & Diversity Center of The Bar Association of San Francisco. He actively supports and promotes diversity efforts and collaborates with clients on diversity issues.

Emilio Varanini

Emilio Varanini is Supervising Deputy Attorney General, Healthcare Rights and Access Section, Public Rights Division, at the California Attorney General's Office.

He has the honor of serving as President of the California Lawyers Association, following in the footsteps of the organization's first President, Heather Rosing. As President, his aim is to help CLA achieve its mission by expanding its presence and deepening its commitment on diversity, equity, and inclusion issues, both within CLA and with external stakeholders. He also seeks to help CLA deepen its presence on access to justice and civic empowerment issues to enable it to meet its commitment to the rule of law. And he focuses on helping CLA continue its commitment to providing value to the profession and to its members, through helping the Sections continue and expand their offerings, through supporting its arm for young and emerging attorneys, the California Young Lawyers Association, and through the initiation of the Future of the Profession Task Force. He also has continued to build and strengthen CLA's ties with the Legislature, the State Bar, the Judicial Council, and the judiciary - including the California Judges Association. Previously, he served as CLA's Vice President.

He also served as a Delegate to the ABA House of Delegates, leading CLA's first-ever delegation to the Mid-Year Meeting in February of 2019..

Hon. Brian C. Walsh (Ret.)

Judge Walsh served on the Santa Clara County Superior Court for 20 years prior to his retirement on November 30, 2020. Currently, he is a mediator and arbitrator with JAMS, working out of its Silicon Valley office in San Jose.

Judge Walsh is a member of the California Lawyers Association Civility Task Force. Also, he is a member of the California Judges Association, the Santa Clara County Bar Association, and the Board of Governors of ABTL's Northern California Chapter and co-editor of its ABTL Report.

As President of the Santa Clara County Bar Association in 1992, Judge Walsh was the architect of that bar's Code of Professionalism, which was used as a model for the California Attorney Guidelines of Civility and Professionalism adopted by the State Bar in 2007.

While a lawyer, Judge Walsh was the President of the California Association of Local Bars and the Chair and Founder of the California Bench-Bar Coalition. He was named his county's Professional Lawyer of the Year in 1999, given its Byrl Salsman Special Award for Contributions to the Community and the Profession in 2002, and honored with the State Bar's Professional Responsibility Award in 2016.

Judge Walsh was Presiding Judge of his Court in 2013 and 2014 and Chair of the State Trial Court Presiding Judges Advisory Committee. Judge Walsh was twice a member of the Judicial Council of California and was a member of the California State-Federal Judicial Council for 16 years. He was a member of the Supreme Court Judicial Ethics Advisory Committee from 2002-2013 and of the State Bar Attorney Civility Task Force from 2006 to 2008.

During his last 4 years on the bench, Judge Walsh presided in the Court's Complex Civil Litigation Department. His previous judicial assignments included Civil Trials, Family Law, and Felony Trials. By appointment of the Chief Justice, he served on the Court of Appeal, Sixth Appellate District for a total of two years

His honors include: ABOTA San Francisco Bay Area Chapter's Trial Judge of the Year in 2019, Santa Clara County Bar Association Outstanding Jurist in 2014, Trial Lawyers' Judge of the Year in 2012, and the 2011 Santa Clara County Bar Association Diversity Committee Unsung Hero.

Judge Walsh received his J.D. from UC Berkeley School of Law, and his B.A. from the University of Notre Dame. He was admitted to the California State Bar in 1972 and was also admitted to the bars of the U. S. District Court (N. D. Cal), the U. S. Court of Appeals for the Ninth Circuit, and the United States Supreme Court

Daniel L. Warshaw

Daniel L. Warshaw is a civil litigator and trial lawyer who focuses on complex litigation, class actions, and consumer protection. Mr. Warshaw has held leadership roles in numerous state, federal and multidistrict class actions, and obtained significant recoveries for class members in many cases. These cases have included, among other things, antitrust violations, high-technology products, automotive parts, entertainment royalties, intellectual property and false and misleading advertising. Mr. Warshaw has also represented employees in a variety of class actions, including wage and hour, misclassification and other Labor Code violations.

Mr. Warshaw played an integral role in several of the firm's groundbreaking cases. In the In re TFT-LCD (Flat Panel) Antitrust Litigation, he assisted in leading this multidistrict to trial and securing $473 million in recoveries to the direct purchaser plaintiff class. After the firm was appointed as interim co-lead counsel in In re Credit Default

Swaps Antitrust Litigation, Mr. Warshaw along with his partners and co-counsel successfully secured a $1.86 billion settlement on behalf of the class.

Mr. Warshaw's cases have received significant attention in the press, and Mr. Warshaw has been profiled by the Daily Journal for his work in the digital download music cases. In 2019 and 2020, Mr. Warshaw was named as one of the Daily Journal's Top Plaintiff Lawyers. And in 2020 he was also named one of the Daily Journal's Top Antitrust Lawyers. Additionally, Mr. Warshaw has been selected by his peers as a Super Lawyer (representing the top 5% of practicing lawyers in Southern California) every year since 2005.

Mr. Warshaw has assisted in the preparation of two Rutter Group practice guides: Federal Civil Trials & Evidence and Civil Claims and Defenses. Mr. Warshaw is the founder and Chair of the Class Action Roundtable. The purpose of the Roundtable is to facilitate a high-level exchange of ideas and in-depth dialogue on class action litigation and encouraging civility from within the plaintiff bar.

Neil J. Wertlieb

Neil J. Wertlieb is an experienced transactional lawyer, educator and ethicist, who provides expert witness services in disputes involving business transactions and corporate governance, and in cases involving attorney malpractice and attorney ethics.

Mr. Wertlieb is the current Co-Chair and a Founding Member of the Ethics Committee of the California Lawyers Association, and a member of the Civility Task Force of the California Lawyers Association. He is a former Chair of the Ethics Committees of both the California State Bar and the Los Angeles County Bar Association, and a former Chair of the Business Law Section and both its Corporations Committee and Business Litigation Committee.

Mr. Wertlieb is a Special Deputy Trial Counsel, appointed by the California State Bar to investigate and prosecute attorney misconduct when the State Bar's Office of Chief Trial Counsel may be conflicted.

Mr. Wertlieb has practiced transactional law for over three decades, most recently as a Partner at Milbank LLP, where his practice focused primarily on acquisitions, securities offerings and restructurings. He also served as the

Chair of the firm's Ethics Group responsible for Milbank's California practices.

He is currently an Adjunct Professor at UCLA School of Law, where for the past two decades he's been teaching transaction skills. He is also a visiting adjunct lecturer at UC Berkeley School of Law, Santa Clara School of Law and USC Gould School of Law, and a Senior Advisor, Milbank@Harvard, at Harvard Law School Executive Education.

He is the General Editor of *Ballantine & Sterling: California Corporation Laws*, a 7-volume treatise on the laws governing corporations and other business entities in California, and an Editor of both *Litigating and Judging Business Entity Governance Disputes in California* and *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel*.

Mr. Wertlieb received his law degree in 1984 from the UC Berkeley School of Law, and his undergraduate degree in Management Science from the School of Business Administration also at the University of California at Berkeley. He also served as a Judicial Extern for Justice Stanley Mosk on the California Supreme Court. He is admitted to practice in California, New York and the District of Columbia.

Christopher P. Wesierski

Christopher Wesierski has been vetted and approved for 6 trial organizations all of which are difficult to get into and require nomination and thorough vetting: American Board of Trial Advocates; American College of Trial Lawyers; International Society of Barristers; Litigation Counsel of America; International Academy of Trial Lawyers; and Federation of Defense and Corporate Counsel. He was selected as CAL-ABOTA Trial Lawyer of The Year in 2019. Chris Wesierski has spoken on multiple occasions about civility to many groups including the Association of Southern California Defense Counsel (ASCDC). He has also received the Angelo Palmieri award for maintaining the legal profession's highest tradition of professionalism and civility by the Robert Banyard Inn of Court. The Orange County Council, Boy Scouts of America, recognized Christopher Wesierski as its 2018 Man of Character. The Character Award honors excellence in personal character as displayed through positive ethics, high integrity, and community impact. He was the 2020 President of CAL-ABOTA.

Judge Monica F. Wiley

The Honorable Monica F. Wiley was appointed to the San Francisco Superior Court Bench on September 1, 2009 by Governor Arnold Schwarzenegger. Judge Wiley is the second African American female judge appointed to the San Francisco bench. During her tenure with the San Francisco Superior Court, Judge Wiley has presided in the civil, criminal, family, delinquency and dependency departments in both trial and calendar courtrooms. Judge Wiley is currently the Supervising Judge of the Unified Family Court and serves as a member of the Court's Executive Committee, the Alternative Dispute Resolution Committee, the Personnel Committee, the Public Outreach Committee, the Technology Committee, and the Events/Collegiality Committee. Judge Wiley is a member on the 2019-2021 Judicial College Steering Committee, a member of the faculty for the California Center for Judicial Education (CJER) for New Judges Orientation (NJO), and a faculty member for the B.E. Witkin Judicial College. She serves on the CJER Juvenile Curriculum Committee and is an Adjunct Professor at U.C. Hastings College of the Law where she teaches an advanced Trial Advocacy course.

Prior to her appointment, Judge Wiley was a senior associate at the law firm of Carlson, Calladine & Peterson LLP in San Francisco handling catastrophic personal injury and wrongful death cases for individual and corporate defendants. Before joining the private sector, Judge Wiley worked as a Deputy City Attorney in the San Francisco City Attorney's Office for over ten years litigating complex personal injury matters and civil rights actions. She served as lead trial counsel in 27 jury trials both in state and federal court.

Judge Wiley earned her J.D., cum laude, from Howard University School of Law. She received her bachelor's degree in Political Economies of Industrial Societies from the University of California at Berkeley and is a four-year letter winner as a member of the women's intercollegiate basketball team. Go Bears!

As a practicing attorney, Judge Wiley was admitted to the United States District Court, Northern District of California, and the Ninth Circuit Court of Appeals. Judge Wiley currently serves as a task force member on statewide committees focused on civility and the elimination of bias in the legal profession and on the advisory committee of Centro Legal De La Raza's Youth Law Academy. Judge Wiley is a life member of the California Association of Black Lawyers (CABL), the Association of African American

California Judicial Officers (AAACJO) and is the past Chair of the Judicial Council of CABL.

Judge David Wolf

David Wolf is currently the Supervising Judge for North Kern and helped open and is assigned to Kern County's Prison Court. Judge Wolf has been working with the Public Defender's Office, the DA's Office, CDCR and others to make certain that state prison inmates have access to justice. Prison Court coordinates with all of these justice partners to allow inmates to appear in court via video appearance and meet with their lawyers by video. The bulk of requests to use the system come from the inmates themselves. Inmates have requested to use the video appearance system for numerous reasons including for health, programing (not missing college classes etc.) and safety reasons. The program, according to statistics provided by CDCR, is saving tax payers over a million dollars annually, all while providing greater access and service.

In addition to volunteering on the Civility Task Force, Judge Wolf is also the co-chair for the Kern County Elimination of Bias committee, works with the Prison Crimes Council, and volunteers with the Academic Decathlon, Mock Trial and We the People, and with prelaw and law school programs. He is the chair of the Bench and Bar committee, and a member of the Technology/Facilities and Felony/Criminal committees. Currently, he is working to develop a state-wide judicial Prison Crimes committee to help address improving state-wide access to justice and to provide a resource to judges for this unique area of the law.

Appendix 2: ABTL Report, Los Angeles Chapter, Summer 2019

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SUMMER 2019

‘“[T]he necessity for civility is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.’”

— Lasalle v. Vogel (2019) 36 Cal.App.5th 127, 141,
quoting Chief Justice Warren E. Burger, The Necessity for Civility
(Address to the American Law Institute), 52 F.R.D. 211.

PRESIDENT'S MESSAGE

Sabrina H. Strong

Civility among lawyers is a topic I have wrestled with both inside and outside the courtroom. In this age of coarseness and division, the standards that we aspire to—that we're held to—have never been more important. As incoming president of the ABTL's Los Angeles Chapter a year ago, I recognized an opportunity and a responsibility to put these concerns into action. My goal: Find new, meaningful ways to promote civility.

I know that this cause is hardly new. I've lost count of how many lawyer organizations and courts have adopted civility guidelines—unfortunately to little effect, as best I can tell. But giving up is not an option.

So, as part of assembling the 2018-2019 officer and committee team, I created a new Civility Committee. I invited Michael Mallow to serve as chair and Celeste Brecht to serve as vice-chair, and they eagerly accepted. When they in turn invited board members to participate, about a third of our board volunteered—a sign, I think, of just how many of us take this issue to heart. By the end of the committee's first meeting, they already had a long list of projects to pursue.

You are reading one of those projects: a special, extra-long issue of the Los Angeles Chapter's ABTL Report devoted entirely to civility. The diverse, distinguished authors here explore the sources of incivility, address the problems it causes, ask whether it works (spoiler: it doesn't), place it in the context of lawyer well-being and mindfulness, provide judicial perspectives, and suggest ways to counter it with civility.

We have no illusions that this issue, or any of our other projects, will suddenly tame our profession's worst excesses. We know that some lawyers are fundamentally unwilling to display—or may be incapable of displaying—the kind of professionalism we take for granted in ABTL members. But we firmly believe that there are many other lawyers, particularly younger lawyers, who may yet be willing to examine whether they want to live their professional lives mired in toxicity. As you read this issue, we hope you will think of ways that you can help us reach them.

No matter how quixotic this quest may be, we must stand up and be counted among those who wish to preserve an ethical code that makes us proud to be lawyers.

Please read, think, and speak about this. The future of our profession depends on it.

***Sabrina H. Strong** is a partner at O'Melveny & Myers LLP and the 2018-2019 President of the Los Angeles Chapter of the ABTL.*

ASSOCIATION OF BUSINESS TRIAL LAWYERS
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CIVILITY REPORT INTRODUCTION

Michael L. Mallow

We have all encountered incivility. And if we reflect honestly, most of us can think of a time when we were uncivil. What can we do about incivility? The answer is: a lot. But like many good things in life, civility begins at home.

Some years ago, I had a very important case for a very important client, and my behavior was less than a model of civility. I was outraged that opposing counsel—call him Paul—berated two of my associates during a discovery conference. The next day, there was a conference call between our two teams, including both sides' associates. Going into the call, I had a full head of steam. I was going to be the protector and champion of my associates. I quickly lashed out at Paul for how he treated my team the day before. From that less-than-auspicious start, tempers escalated, and civility quickly diminished to a point where the crosstalk was so severe that neither Paul nor I could hear what the other said.

But although Paul and I weren't listening to each other, our associates were surely listening. For reasons I can't now explain, at some point during the call it hit me that I was acting horribly and that I was being anything but the role model I wanted to be. I asked Paul if he was willing to put the conference call on hold and speak directly with me on a private line, just the two of us, with no associate audience. During that private call, I shared my epiphany: Paul and I were being jerks, and we owed our associates far better than that. He agreed. We decided to get back on the conference call, apologize to each other's associates for our behavior, and have a "do-over" of the call—this time as professionals rather than as bickering children.

The litigation against Paul and his team lasted for another five years. During that time, there were many hard-fought issues, dozens of depositions, and numerous contentious hearings, including class certification and summary judgment. But Paul and I never had a negative word to say to or about each other for the remainder of the litigation, and we would often have lunch or dinner together when we were on the road for depositions. It was a tough case, and Paul and I were tough adversaries for our clients' positions, but we kept the litigation in perspective—and we ended up becoming friends. It was one of the highlights of my career, not for the result, but for how Paul and I were able to conduct the litigation after that horrible conference call.

Civility is not about being soft, or giving in, or selling your client short. To the contrary, approaching the practice with civility is always in a client's, and in our own, best interest. Being civil is being able to listen, with intent and thoughtfulness; making an effort to understand the other side's point of view; and using what one learns to the client's best advantage. Being civil promotes efficiency and reduces cost because it obviates needless and wasteful arguments and disagreements. Being civil enhances the enjoyment of the profession for all because it reduces unnecessary adversity and enhances well-being. It allows us to focus on the issues that are the most important and material to our clients and the litigation.

Civility is much more than merely exchanging pleasantries. Nothing makes that clearer than this issue of the ABTL Report. The articles in this issue touch on the complexity and importance of civility. From what civility is, to what causes incivility, to ways of promoting civility and combating incivility, as Chair of the ABTL's Civility Committee, I hope that this issue of the ABTL Report can serve as a resource for enhancing professionalism in our profession.

Deep thanks go to the authors who dedicated substantial time and effort to the kaleidoscope of articles that makes up this special issue of the ABTL Report. And a very appreciative tip of the hat to our ABTL Report Editors—Robin Meadow, John Querio, and Jessica Stebbins Bina—whose vision, perseverance, and guidance made this issue a reality.

Michael L. Mallow *is a partner at Shook, Hardy & Bacon L.L.P. and is the Chair of the Los Angeles Chapter's Civility Committee.*

A CIVILITY ROUNDTABLE
THE 2019 ABTL BOARD RETREAT

Robin Meadow

At this year's Joint Board Retreat, hosted by the Los Angeles Chapter, nearly 100 lawyers and judges devoted Saturday morning to discussing the problem of incivility—what it is, why it exists, and what to do about it. Justice Brian Currey guided the free-flowing conversation. This article summarizes some of the key points that emerged.

What Is Incivility?

The image that probably comes to mind when someone complains about incivility is overt abuse—name-calling, physical threats, ad hominem attacks in briefing, and the like. But the meeting participants focused more on the wide variety of contexts in which incivility arises.

For example, incivility can surface when a lawyer conveys disrespect of another lawyer's area of practice—maybe a lawyer whose practice focuses on big-ticket commercial class actions acts condescendingly toward someone who handles collection cases. Another breeding ground for incivility is age difference—experienced lawyers sometimes abuse newer lawyers who are struggling with their first depositions or trials.

It wasn't until late in the meeting that one participant said, "Any conversation about civility must talk about gender and people of color." This kind of incivility often goes unnoticed by those who are not subjected to it, but it's widespread. One participant described how, during a break from a panel she was on, a long line of women waited to ask her and her co-panelists how to respond to gender/color bias. Surprising to at least some at the meeting was that not even bench officers are immune. (See Edmon & Jessner, *Gender Equality is Part of the Civility Issue,* in this issue.)

The causes of incivility are not always obvious. Discovery disputes and rapid-fire email exchanges were consistently recognized as common settings for incivility, but they are more symptoms (or perhaps facilitators) than causes. One participant suggested that, while business clients don't necessarily want lawyers to be uncivil, high billing rates create high client expectations, which in turn may ratchet up the lawyers' perceived need to be "tough." Another noted that it's a fact of law firm life that junior lawyers are rewarded not for civility, but for the number of hours they bill—and incivility generally means more hours billed. And sometimes the nature of a particular case itself may create tension that leads to incivility: One or both sides may feel insecure about a difficult issue, and that insecurity may trigger combativeness.

The way the discovery statutes work may also be an inducement to incivility: One can burden an opponent with a long, drawn-out discovery dispute and then, at the last minute, give in and avoid sanctions.

There was less consensus when the discussion turned to the strategy of villainizing an opposing party, as distinguished from that party's counsel. Some felt that this kind of conduct pushed the bounds of civility; others felt that, at least depending on the nature of the arguments made, it could be legitimate advocacy.

Why Be Civil?

In an era of coarsened discourse and hyper-partisanship, the advantages of civility may not be readily apparent. And, some may ask, if incivility furthers a client's cause, is it a virtue rather than a vice?

Not surprisingly, no one at the meeting agreed with that sentiment. The consensus was that any short-term advantage from incivility will ultimately be offset by long-term loss, either in the case itself or in damage to the uncivil lawyer's reputation. But most of the discussion focused on civility's advantages. (See Kuhl, *Winning Through Cooperation*, in this issue.)

Several participants talked about how civility furthered their own business development. Why? Because business development thrives on personal relationships, and civility fosters good personal relationships.

• One participant described a case in which he and his counterpart on the opposing legal team—both the most junior lawyers—were the only ones who could have a civil conversation. They developed a sufficiently good relationship that some years later, after one had taken an in-house position,

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A Civility Roundtable...continued from Page 5

he hired the other to represent his company.

• An in-house lawyer described consulting different firms about a new case. Several firms talked about how tough they would be with the lawyer on the other side. She hired the firm that described its experience working effectively with that lawyer.

• Another in-house lawyer said, "When I hear fighting and villainizing, I hear dollars." Incivility costs money, and business clients generally don't like that.

Another casualty of incivility—and a beneficiary of professional behavior—is one's reputation. There were repeated comments about how your reputation follows you—how judges have long memories and talk to each other. Among other client benefits, the lawyer with the reputation for civility and reasonableness will get the benefit of the doubt.

And anyone interested in going on the bench needs to cultivate his or her reputation for civility. As one participant put it, those with judicial aspirations should behave every day as if their opposing counsel is going to fill out an evaluation form—because that's exactly what will happen.

Finally, participants appeared to agree that a civil environment promotes lawyers' well-being and general job satisfaction. (See Buchanan, *Breaking the Cycle of Incivility Through Well-Being*, and Bacigalupo, *Mindfulness*, both in this issue.)

Being Civil

There is no lack of guidance about how to be civil. The Los Angeles Chapter has long had civility guidelines, which, along with numerous other guidelines, can be found on the ABTL website: http://www.abtl.org/la_guidelines.htm. But these are more in the nature of guiding principles than practical advice. The meeting participants focused on the latter.

In one participant's words, "Litigation should go back to being a contact sport." There appeared to be universal agreement that the best way to promote civility is through personal contact and communication. For example:

• Start the case with a phone call to introduce yourself.

• When doing out-of-town depositions or hearings, invite opposing counsel to dinner—not to discuss the case or settlement, but just to spend time together.

• Pick up the phone: Conversations, rather than emails, make it harder to be uncivil.

• One judge has a strategy of ordering disputing lawyers to go share a cup of coffee without saying anything about the case.

• Invite opposing counsel to an ABTL event.

(See Segal, *A Civility Checklist*, in this issue.)

Civility in letters and emails should be easier because they aren't—or at least shouldn't be—spontaneous: Just pause (or wait a few hours) to read what you've written before hitting "send." Civility in court filings should be easier still. One suggestion was to write memoranda in a way that encourages the judge to copy your language into the resulting order—a technique that will quickly weed out invective and ad hominem attacks.

Going deeper, participants talked about the importance of modeling civil behavior for others, most importantly junior colleagues: In one participant's words, "Don't just perform civility, practice it." It's not enough just to be civil to opposing counsel in front of a judge or other observers, but not elsewhere. You don't promote civility when you finish a civil telephone conversation and then, after hanging up, say to others in the room, "What a jerk." Language always matters, regardless of where or when you use it. In short, good mentoring breeds civility. (See Lanstra, *Teaching Civility,* in this issue.)

On the teaching front, Michael Mallow, chair of the Los Angeles chapter's Civility Committee, noted that one of the committee's projects—in which it hopes to enlist state-wide ABTL support—is to make civility a required MCLE subject. After all, the California Attorney Oath now requires lawyers to affirm that "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."

Others noted that being civil requires more than just being neutral. You can foster civility by affirmatively showing respect for the other side. And you might thank opposing counsel when you're able to resolve an issue cooperatively.

One's mental attitude matters, too. Generalizations and stereotypes—not just gender-based or racial, but professional attributes like plaintiff/defense, big/small firm, liberal/conservative—are counterproductive. Every opposing

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counsel—and every judge—is an individual human being. There will be more civility when you think of them that way.

The Judicial Perspective

The judicial officers at the meeting offered a wide range of experiences with incivility—not surprisingly, with discovery as the primary theme.

The most frequent comments focused on the benefit of early, hands-on involvement by judges, principally in face-to-face informal conferences with follow-up. Last year saw the enactment of Code of Civil Procedure section 2016.080, which authorizes courts to hold "informal discovery conferences" to resolve issues the parties are unable to resolve by themselves. But some judges had already discovered this technique and were using it with great success. One judge essentially stopped hearing discovery motions, and instead brought the lawyers into chambers to discuss their disputes. As he put it, "Emails don't count, letters don't count. At the end of the day, everyone is going to get what they need for trial."

Both judges and lawyers at the meeting stressed the highly positive impact of direct judicial participation in disputes. One judge who sometimes agrees to be available during depositions reported that, in many cases, the lawyers never call—they resolve the dispute rather than getting the judge involved. Likewise, when someone requests an informal conference, often the dispute magically disappears and the conference is never held.

But informality doesn't always work, and several judges spoke about the need to impose civility in some cases. This can range from simply ordering lawyers to be civil, to requiring lawyers to affirm the California Attorney Oath's commitment to "dignity, courtesy, and integrity," to more coercive measures (ordering the lawyers into the jury room to talk), to—of course—sanctions.

There was some discussion about whether judges should have the kind of flexibility with sanctions that Family Code section 271 provides: "[T]he court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." But judges who spoke on this topic generally felt that the discovery statutes provide sufficient flexibility, that sanctions should be a last resort, and that generally they're not needed when the judge gets personally involved.

But rules do help. One federal judge noted that the amendment to rule 37 of the Federal Rules of Civil Procedure to cover spoliation issues very significantly reduced motion practice in that area.

Other judges spoke of positive reinforcement techniques, particularly complimenting lawyers for good behavior—on the record, so that clients can see it.

There was also a recognition that there are some controversies that all the goodwill in the world can't resolve—the parties need the judge to make a decision so they can move on. And, as one participant put it, sometimes the lawyers need a judge to "save us from our worst impulses." (See Currey & Brazile, *What Judges Can Do*, in this issue.)

Meeting participants recognized the reality that they were preaching to the choir—organizations like the ABTL tend to attract lawyers and judges for whom civility is a priority and the norm. But the hope is that by spending time together probing what civility really means and how we can improve our efforts to achieve it, the participants left the meeting with a better appreciation of the value of being civil and of inspiring civility in others.

***Robin Meadow** is a partner at Greines, Martin, Stein & Richland LLP and is a co-editor of the ABTL Report.*

BREAKING THE CYCLE OF INCIVILITY THROUGH WELL-BEING

Whatever the causes, the first step toward a real remedy to the incivility pandemic is recognition of the deeply destructive impact of uncivil conduct on individual lawyers who engage in it, on those subjected to it, on the bar as a whole, and ultimately on the American system of justice. It begins with recognition that civility is, and must be, the cornerstone of legal practice.

Bree Buchanan

As the old saying goes, "What goes around, comes around." Uncivil, unprofessional, and downright hostile behavior invariably induces distress and diminished well-being of those subjected to it. Those who are low on the well-being scale can find that their distress becomes the driver of uncivil, or at least unprofessional, behavior. Throughout my years as director of a lawyers assistance program, I witnessed how substance abuse, depressive episodes, severe anxiety, misplaced aggression, and inability to sleep are routine responses by lawyers who are victimized by the bad behavior of others. (Given that you are reading this article, I expect that you could add to that list.) The distress of callers seeking our services triggered painful recollections of my earlier years as a litigator, when my own level of well-being—so often weighed down by extreme stress, alcohol abuse, and depression—impacted my level of professionalism with other lawyers.

Now, thirty years into my career and a decade into recovery from alcoholism, I find myself a leader in our country's nascent lawyer well-being movement. Launched by the National Task Force on Lawyer Well-Being in 2016, this initiative defines well-being as a condition of health that exists on a continuum, from the absence of impairments, such as substance use and mental health disorders, to robust thriving across six dimensions that include occupational, intellectual, spiritual, emotional, social, and physical. With the benefit of hindsight gained from hard-earned personal experience and a systemic view of the profession, I see that incivility and well-being (or the lack of it) are intrinsically linked.

My first decade as a lawyer coincided with the 1980's, a time when Gordon Gekko's adage, "greed is good," represented the general "win at all costs" ethos of the era. I began my career as a family law attorney at legal aid, defending victims of domestic violence with a righteous vengeance. While I was on the receiving end of intimidation tactics by opposing counsel and parties, including verbal bullying, I was committed to dishing right back whatever was dished out to me. I also incorporated this behavior into my view of what, who, and how a lawyer should "be."

Emblematic of this attitude was my century-old photograph, small yet prominently placed over the entrance to our conference room, of an abattoir in which two butchers in their bloody gear smiled ghoulishly up at the camera. At the time, I was greatly amused by this stunt and never gave a thought to what it communicated about my professionalism. Instead, I felt that I was playing along with the ethos of family law litigation's strategic incivility in which late Friday filings with three-day notices were routine, along with mind-numbing loads of discovery intended to abusively weigh down and kill the spirit of opposing parties and their lawyers. Achieving my client's objectives should have sufficed, but "grinding my opponent down to a fine dust" was my internal modus operandi. Predictably, what I gave, I got in return. I missed more than one Christmas during my son's early years because of expedited deadlines or last-minute hearings scheduled the following day.

What of the toll that this behavior took on me? As someone subjected to incivility, and even outright bullying, I took home with me the distress, exasperation, anger, and fear

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Breaking the Cycle of Incivility...continued from Page 8

that resulted from these experiences. I used our profession's most time-honored means of handling stress overload—alcohol. At first, it was two glasses of wine most nights. But consistent heavy usage, combined with a strong genetic propensity, ultimately led to an alcohol use disorder, mixed with multiple bouts of serious depression.

Having been in recovery for over nine years, I can now look back and see that I also used drinking to handle the internal distress I felt from being in "warrior mode." It allowed me to continue acting in a manner that conflicted with my inherent nature and internal values. Additionally, my drinking resulted in a diminished capacity to practice law to the best of my ability. Suffering from a hangover or dealing with the deflated energy that is a hallmark symptom of depression, I was left with a shortened fuse and lessened ability to function.

A pivotal point in my road to recovery was my experience with my state's lawyers assistance program. (This free and confidential service can be found through this directory: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/.) In recovery, I've learned how to better care for myself. In working towards this goal, I have also become better (but not perfect) at taking care of, and treating well, those around me. While incivility still plagues the profession, a new mindset that highly values the physical and emotional well-being of its members is on the cusp of gaining widespread support. As part of that movement, the promotion of civility and professionalism is being put forth as a valid means of improving well-being among lawyers. I believe that the promotion of well-being can also be an effective way to intervene in the cycle of incivility. Treating one another better will result in each of us—not to mention the profession as a whole—being better .

The National Task Force on Lawyer Well-Being was formed in response to back-to-back studies that demonstrated the dismal state of well-being in lawyers and law students. Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,* 10 J. Addiction Med. 46 (2016); Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns,* 66 J. Legal Educ. 116 (2016). In 2017, it published a comprehensive report that laid out 44 recommendations for bringing about systemic change in how the profession as a whole addressed the well-being of its members. Bree Buchanan, et al., *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017), available at www.lawyerwellbeing.net. In recognition of the integral relationship between civility and well-being, the authors put forth in Recommendation 6 the imperative that members of the legal profession "foster collegiality and respectful engagement throughout the profession." *Id*. at 15. In support, the Task Force wrote that interactions among members "can either foment a toxic culture that contributes to poor health or can foster a respectful culture that supports well-being." *Id*. Their words echoed what I found in my own years as a litigator and, later, as a lawyers assistance program director: "Chronic incivility is corrosive. It depletes energy and motivation, increases burnout, and inflicts emotional and physiological damage." *Id*. Overall, it reduces our sense of well-being and, as I found, sets the stage in too many cases for the onset of impairments that ultimately lead to the degradation of our profession.

Chronic stress and distress are natural responses to living in the crucible of high stakes, "take no prisoners" litigation and legal practice, where sarcasm, rudeness, hostility, belittlement, and even downright bullying are characteristic. These strategies are intentionally used to wear down the opposing side, and they often have the result of doing just that. Living with the resulting uncomfortable feelings can be too painful; reaching for some means to self-medicate is all too common.

The 2016 nationwide study of 13,000 lawyers mentioned above found that between 21 and 36 percent qualify as "problem drinkers." Organ, *supra,* at 129. In the survey of law students, researchers revealed that one-quarter fell into the category of being at risk for alcoholism. As a lawyers assistance program director, I found that alcohol was the "drug of choice" for 90 percent of the individuals experiencing a substance abuse problem who called our program. In 2019, alcohol consumption is still the most widely accepted way

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to reduce stress, celebrate success, mourn losses, and often, simply end (or get through) each day. Over time, the anger, egotism, and selfishness experienced during inebriation begin to take over the alcoholic's personality through all hours of the day. Brain changes begin to occur that promote impulsive and uncivil behavior. The alcoholic's elaborate and impenetrable defense system renders impossible any insight into their actions—and any willingness to change absent the most egregious ramifications.

Lawyers are Type A, driven to succeed, and up against equally intense opposition. Attempting to achieve perfection in the midst of this dog-eat-dog world is also a perfect set-up for depression and anxiety. The lawyer study mentioned above found that more than one in four lawyers were struggling with some degree of depression. A frequent, but less recognized, manifestation of a depressed mood disorder—especially with men—is aggression, irritability, and anger. Hypersensitivity to others' actions can lead to lashing out and over-the-top reactions to what superficially appear to be minor slights. Depression in this guise may avoid detection until the person's condition worsens. Throughout this time, toxic incivility may become routine.

Many in the legal profession are concerned about what has been referred to as an "incivility pandemic." Breaking this cycle of incivility requires, as Jayne Reardon rightly states, "a recognition that civility is . . . the cornerstone of legal practice." Jayne Reardon, *Civility as the Core of Professionalism*, American Bar Association, Business Law Today, September 19, 2018, available at: https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/. Recognition alone, however, is simply the beginning. Throughout the country, hortatory civility codes have been adopted, and these are an excellent step in that they serve to call our attention to the situation. I do believe, however, that we as a profession must look more deeply at what lies at the root.

In addition to adopting standards that promote professionalism, we must pay attention to the well-being of individual lawyers—a rising concern of firms, courts, bar associations, regulators, and law schools. While I don't propose that maintaining consistent professionalism is a curative for alcoholism or depression, I do believe that a more civil work world can create an environment in which these disorders are less prevalent, and all lawyers can experience a heightened sense of well-being.

In our cover letter to the National Task Force's Report, my co-chair, James Coyle, and I wrote:

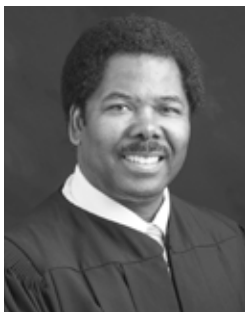
> We are at a crossroads. To maintain public confidence in the profession, . . . and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

Well-being is intrinsically connected to collegiality, civility and professionalism. When one is diminished or improved, so follows the other. The current systemic efforts to enhance the well-being of lawyers will, I believe, have a positive impact on improving the civility of the profession. In turn —what goes around, comes around—that improved civility will foster enhanced well-being.

Bree Buchanan, *JD, MSF, is a Senior Advisor for Krill Strategies, LLC. She also serves as a founding co-chair of the National Task Force on Lawyer Well-Being and chair of the ABA Commission on Lawyers Assistance Programs.*

SEVEN THINGS JUDGES CAN DO TO PROMOTE CIVILITY OUTSIDE THE COURTROOM

Justice Brian S. Currey



Presiding Judge Kevin C. Brazile

What can judges do to promote increased civility and professionalism among civil litigation lawyers outside the courtroom? We don't claim to have all the answers, and would welcome suggestions from colleagues, both on and off the bench. As a way of getting that discussion started, we offer seven things judges can do—and in many instances, are already doing—to promote civility:

1. Care about civility outside the courtroom and commit to doing something about it.

We define civility as treating others with dignity, respect, and courtesy—treating others as you would like them to treat you. This includes conduct such as punctuality, preparedness, accommodating opposing counsel's reasonable requests, and communicating politely, both orally and in writing. In short—acting professionally.

As former U.S. Supreme Court Justice Sandra Day O'Connor said, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Thus, increased civility offers benefits for all of us. Legal careers are too long for lawyers to spend them sniping with opposing counsel. Incivility drags lawyers down, increases their stress levels, and keeps them from doing their best work. It also gums up the wheels of justice, causing delays and unnecessary work for lawyers and judges. This in turn costs clients time and money. Uncivil conduct also interferes with settlement, increasing both client costs and judicial workloads. The animosity built up between counsel in interchanges outside the courtroom often spills over into the courtroom, needlessly consuming time and tax dollars. As one author has observed, despite indications from social science that people are more easily persuaded by those they like, "oftentimes counsel enter settlement negotiations with a genuine hostility towards opposing counsel. Because disputants generally dislike each other due to their conflict, it is essential that opposing counsel maintain a respectful and cooperative relationship that creates this 'liking' social obligation. Counsel should work together to grant discovery extensions and accommodations, when feasible, and to avoid toxic communications. By doing so, counsel can create a 'liking' dynamic that will increase the chances of getting what they ask for during litigation and settlement negotiations." (S. Feldman Hausner, *Psychology and Persuasion in Settlement* (2019) 32 Cal. Litigation 31, 34.)

Incivility also is bad for judges. It interferes with our shared goal of fair, timely, and efficient resolution of cases. It slows cases down and increases judicial workloads by fomenting needless discovery disputes and other unnecessary motions. It erodes the judicial process and the public's perception of it. And let's face it: Dealing with lawyer incivility can be unpleasant. We believe that justice is a serious business that demands professionalism and mutual respect. We don't relish supervising or disciplining lawyers who act like truculent children.

Incivility is equally bad for juries. Lawyers who fail to accord respect to one another almost always fail to honor and respect the citizens drafted to serve on juries. They keep them waiting. They bore them with overly-long, uninspired, or ill-prepared trials. They don't respect jurors' time or appreciate their service. Consequently, many people would rather have a root canal than serve on a jury. That's a shame, because most who serve on juries in cases tried by competent, professional, and respectful lawyers and judges enjoy the experience, and look forward to returning.

Finally, incivility erodes public support for the legal system and as Justice Arthur Gilbert noted, "debases the legal profession." (*Crawford v. JPMorgan Chase Bank, N.A.* (2015) 242 Cal.App.4th 1265, 1266.) At a time when we must fight to preserve court budgets, we need our constituents to value and respect the legal process.

So, as judges we have good reason to commit to reducing or eliminating incivility in the profession.

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2. Understand the problem.

As we communicate with lawyers, we hear increasing complaints about incivility. Perhaps more lawyers behave badly now, or perhaps lawyers complain more about it. Either way, incivility is a problem that needs to be acknowledged, studied, and remedied.

We encourage more rigorous study of incivility in the legal profession. Most of what we have seen and heard is anecdotal. But we are trained to resolve issues based on evidence, and here we admittedly have seen little professional literature on the nature, scope, and methods of remediating the problem. Incivility in the workplace generally may be better understood than incivility in the legal profession. Psychologists and human resources professionals who study workplace incivility have useful information to share. Bar groups could recruit some of those experts to develop research-based programs to reduce incivility among lawyers.

Based on what we've heard from lawyers and our own experiences, we know uncivil lawyers come in many unappetizing flavors. We've borrowed or adapted some of the following non-exclusive categories from another author (Futeral, *How to Deal with a Difficult Lawyer*, available at https://www.charlestonlaw.net/dealing-difficult-opposing-attorney) and have added some of our own:

- **Bullies.** These lawyers are rude to opposing counsel, witnesses, and opposing parties. They make threats and demands. Bullies may hurl insults or make snide comments. They may threaten opponents with unwarranted sanctions and include sanctions requests in most of their many motions. In court and in motion papers, these lawyers will accuse opposing counsel and parties of every imaginable misdeed. At their most extreme, they will display extreme anger management issues, invade others' personal space, and ask to "take it outside."
- **Obstructionists.** These lawyers make everything difficult. Phone calls and emails go unanswered. Depositions go unscheduled. Routine interrogatories and document demands are met with objections and without any substantive responses. Document production slows to a crawl. Meeting and conferring is unproductive. At depositions, they make long speaking objections. Time drags on and costs escalate.
- **Paper Tigers.** These lawyers generate frequent letters and emails, all of them unproductive. Their opponents' interrogatories receive lengthy responses containing no new information. Despite reams of correspondence, little gets resolved between the lawyers. Left unchecked by the judge, these lawyers will file repetitive discovery motions, and every other imaginable motion, all of which baselessly accuse the other side of misdeeds it did not commit.
- **Other "Bad Apples."** This catchall category includes pathological liars, racists, misogynists, and others who simply cannot get along with others. We cannot ignore reports that new lawyers, women lawyers, LGBTQ lawyers, and lawyers of color are victimized by incivility at least in part because of their youth or inexperience, gender, race, gender identity, and/or sexual orientation. As guardians of justice, this is something we cannot abide.
- **The Misguided.** These lawyers received little training, or were trained by members of the previous four groups. Perhaps they watched too many "lawyer" TV shows glorifying slickness over substance, or implying that the ends justify the means. Perhaps they are emulating the proliferation of incivility in the political sphere. Bad as they are, we view these lawyers with some optimism. These folks are our targets. They are the ones we will proselytize with the gospel of civility. Perhaps they can be saved.

Although the last category may be our targets, we cannot ignore the others. We should not give up hope that they are ultimately teachable—but if they aren't, we must be diligent in our efforts to keep them from contaminating the profession for others and interfering with the administration of justice.

3. Model, inspire, and set expectations for good behavior.

Common experience and social science research confirm that, left unchecked, incivility begets more misconduct in an unfortunate downward spiral of unpleasantness. (See, e.g., Andersson & Pearson *Tit for Tat? The Spiraling Effect*

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of Incivility in the Workplace (1999) 24 Acad. Mgmt Rev. 452, available at https://journals.aom.org/doi/full/10.5465/amr.1999.2202131.) Judges have unique abilities to help stem the tide by modeling good behavior, inspiring collegiality and professionalism, and demanding good behavior by lawyers working on cases on the judges' dockets.

Judges model good behavior by treating lawyers, jurors, witnesses, litigants, court staff, and others with respect. We are obligated to do so by the California Code of Judicial Ethics because appropriate judicial demeanor "is essential to the appearance and reality of fairness and impartiality in judicial proceedings." (Rothman, Cal. Jud. Conduct Handbook (3d ed. 2007) § 2.46, p. 93.) "Maintaining decorum and dignity, and being courteous and patient, sets the gold standard in the courtroom for everyone . . . and provides all with a greater level of satisfaction with the outcome and, obviously, improves the public's confidence in the judicial institution." (*Ibid*.)

Modeling good behavior is a start, but isn't enough. Judges can and do inspire and overtly demand professionalism and civility outside the courtroom. For example, judges may express their expectations in the "Courtroom Information" posted for each civil department on the Los Angeles Superior Court's website. This document also may be made available to lawyers at counsel tables. Here's an excerpt from the guidelines Justice Currey used in his courtroom when he was a superior court judge:

> The Court's goal of fair, timely, and efficient resolution of cases can only be achieved with the assistance and cooperation of counsel and self-represented parties. Knowledgeable, well-prepared lawyers who cooperate with each other and the Court streamline the litigation process, thereby conserving client and judicial resources. Therefore, the Court expects and requires the highest degree of professionalism from counsel appearing in this department, including knowledge of, and strict compliance with, the Code of Civil Procedure, the California Rules of Court, the Los Angeles County Court Rules, and the California Attorney Guidelines of Civility and Professionalism. The Court intends to treat everyone with respect and courtesy, and expects all those involved . . . to do the same. Uncivil or unprofessional behavior will not be tolerated.

The judge may repeat these exhortations at initial status conferences and hearings, using a shorthand version: "I intend to treat lawyers who appear before me with respect. In return, I expect lawyers to treat the Court and each other with respect and professionalism."

4. Facilitate civility.

Incivility can be reduced through positive interactions among lawyers. It is harder (but admittedly not impossible) for lawyers to be nasty to someone they know. Judges can encourage lawyers to meet productively early in the case and perhaps reduce potential future conflict. For example, at an initial status conference, the judge might suggest that counsel immediately go for coffee to discuss the case further—or even to discuss anything but the case. The judge could emphasize his or her expectation that counsel work cooperatively, treat each other courteously and respectfully, and collaborate to schedule and complete discovery.

Most lawyers behave well in court. Generally, incivility happens out of the judge's view. Usually, it has something to do with discovery, because that is the context in which lawyers most frequently interact outside the courtroom. A judge can communicate—early and often—high expectations for good attorney conduct in discovery and intolerance of incivility. Among other things, a judge may communicate distaste for unnecessary discovery disputes. California has a detailed Code of Civil Procedure and various practice guides that take virtually all the mystery out of what is required in the discovery process. A judge may express an expectation that attorneys will research and understand their discovery obligations, and work cooperatively to complete discovery with minimal court intervention. At the same time, the judge may make clear to the parties that he or she is available to help with difficult issues requiring judicial assistance (such as thorny privilege issues), or with finding ways to exchange information while reducing burden and expense. And the judge may also want to emphasize an intention to rein in incivility and any shirking of discovery obligations.

More and more judges require parties to have both meaningful lawyer-to-lawyer discussions (not a cursory exchange of emails) and an informal discovery conference with the court before a discovery motion may be filed. In effect, these

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judges opt to conduct an informal discovery conference "on [their] own motion" in every case. (Code Civ. Proc., § 2016.080.) How best to conduct these sessions is beyond the scope of this article, but we have several suggestions with respect to civility.

First, the informal discovery conference provides an opportunity for the judge to gauge how the parties interact. Do they work together professionally and productively? Have they held productive meet and confer sessions that narrow the issues? If not, the informal discovery conference is a good opportunity for the judge to restate ground rules and reinforce expectations about professionalism and common courtesy. The judge should call out and express disapproval of any incivility, whether revealed in "meet and confer" correspondence or personal interactions. If you see something, say something. Say "Stop it."

Second, the judge can model a pragmatic approach to discovery aimed at eliminating gamesmanship. Discovery is not a game of "Gotcha." It is intended to facilitate an exchange of relevant information and to avoid surprise at trial. At the informal discovery conference, the judge can underscore the goal of working together to reduce discovery costs and burdens—while stressing that everyone will get what they need for trial.

Finally, the parties should leave the conference with instructions from the judge to conduct further in-person meetings to narrow or eliminate disputes, requiring them to meet and accomplish something. The "something" might be a detailed schedule for all remaining depositions, or a document production schedule, or anything else that is useful and requires cooperative interaction. By emphasizing the need to meet rather than exchange email, the judge gets the participants to work together.

5. Be a good coach— help lawyers be civil to one another.

We often are asked by exasperated lawyers how to deal with an uncivil opponent. Obviously, judges cannot give ex parte tips to one side or another, but they can share suggestions with counsel at initial status conferences and similar occasions. Because these suggestions come from the judge, lawyers need not worry that their professional courtesy will be mistaken as a sign of weakness. Here are some thoughts a judge could share with lawyers:

a. Be proactive. At the start of a new case, reach out to opposing counsel. Introduce yourself. Perhaps offer to go to the other lawyer's office to meet, or meet for coffee or lunch. Make clear you are not arranging a meeting to seek settlement, serve papers, or make demands. The meeting may be short. It may even be awkward. But it will show your respect and help set a courteous tone.

b. Rudeness is contagious and spreads. Don't bite. Don't catch the disease.

c. Stay calm and be mindful. Equanimity is defined as mental calmness, composure, and evenness of temper, especially in a difficult situation. Display equanimity.

d. If you encounter incivility, say something. Label it. Be direct. "John, you are being rude. Can we discuss this in a professional manner?"

e. Use humor.

f. Fight rudeness with kindness. While rude behavior may be a misguided way to assert control, it also might be a response to stress, pressure, frustration, or some other form of unhappiness. (See *Five Ways to Deal with Rudeness in the Workplace*, available at https://www.mindtools.com/pages/article/five-ways-deal-with-rudeness.htm.) Be sympathetic and solution-driven.

g. Be a good role model. Demonstrate civility. Lead by example.

h. Defend colleagues. If you witness incivility directed at another lawyer, politely ask the offending lawyer to rephrase or otherwise act in a more courteous manner. Remember, "the most effective tools for erasing incivility in the profession may be the judges and lawyers willing to tamp down uncivil behavior the moment it emerges." (Filisko, *You're Out of Order! Dealing with the Costs of Incivility in the Legal Profession* (2013) ABA Journal, available at http://www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal.) Step in. Know the rules. (See, e.g., Super. Crt. L.A. County Local Rules, Chap.. 3, App. 3.A *Guidelines for Civility in Litigation*,

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available at https://www.lacourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PDF.) "Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility." (*Id*., § (l)(2).)

i. Enlist help from colleagues. Have a plan. If need be, bring serious episodes to the court's attention.

j. Join and support bar organizations that promote civility.

6. Be a problem solver.

Judges can and should tailor their approach to individual cases. For example, if a party brings to the judge's attention that one or more lawyers disrupts depositions by making uncivil remarks or lengthy, intemperate speaking objections, the judge could devise a plan for dealing with that particular issue.

The judge might offer to be available by telephone so that deposition exchanges can be read back by the reporter, or other issues can be resolved in real time. Judges committed to reducing incivility will give these calls priority, even briefly recessing a trial to take the call. (Most judges have found that merely being available to take a call usually causes lawyers to act more reasonably and work through their problems rather than call the judge.) Or the judge might order the next several depositions to be taken in her jury room, and make herself available to monitor the situation. Or require an additional camera in the deposition room that captures lawyer misconduct if the complaint is unprofessional conduct like making faces or placing feet on the table.

If the problem is that "nasty" correspondence has replaced meaningful dialogue, the judge might order the parties to conduct the next meet and confer session in person in her jury room, and offer to sit in for some period.

Some of these options may seem unappealing or unduly time-consuming, but dealing with incivility is worth the effort in the long run.

7. Apply sanctions as a last resort.

"Sanctions are a judge's last resort. At bottom, they are an admission of failure. When judges resort to sanctions, it means we have failed to adequately communicate to counsel what we believe the law requires, failed to impress counsel with the seriousness of our requirements, and failed even to intimidate counsel with the fact we hold the high ground: the literal high ground of the bench and the figurative high ground of the state's authority. We do not like to admit failure so we sanction reluctantly." (*Interstate Specialty Mktg., Inc. v. ICRA Sapphire, Inc*. (2013) 217 Cal.App.4th 708, 710.) And imposing sanctions against a lawyer seems a poor first response to incivility, because sanctions are unlikely to build bridges between warring counsel.

And yet, sanctions serve their purpose when other methods fail. They "can level the playing field. If we do not take action against parties and attorneys who do not follow the rules, we handicap those who do. If we ignore transgressions, we encourage transgressors." (*Ibid*.) And sanctions provide a way for clients to recover some of the added costs incivility can cause.

♦

No doubt, our seven suggestions are just a few of the things judges might do to promote civility, and hopefully our colleagues will chime in with others. In addition, many judges already lend their voices in support of efforts to promote courtesy and professionalism. For example, they participate in bar association civility training sessions, write articles like this one, and discuss the topic at bench/bar events. Nevertheless, the scourge of incivility persists. Whatever we may be doing as a profession, it seems we need to do more.

Hon. Brian S. Currey *is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Four.*
Hon. Kevin C. Brazile *is Presiding Judge of the Los Angeles County Superior Court.*

INCIVILITY AS A PROBLEM OF LAW FIRM RISK MANAGEMENT

T. John Fitzgibbons

There was a plaintiff's lawyer who was so famous among the defense bar that his last name became a verb. Let's call him Mr. Niceguy. His strategy was to accommodate his opponent's every wish throughout discovery. Whatever extension was requested would be granted; whatever the opponent wanted in discovery would be given. Time and time again, adversaries found themselves lulled into complacency and unprepared for trial. When the time for trial arrived, the friendly lawyer would use that situation to his client's advantage, either to extract a favorable settlement or to win a jury verdict. All with a smile on his face, and a twinkle in his eye. Other defense lawyers familiar with this lawyer would nod knowingly and say, "You got Niceguyed."

Contrast that strategy with the behavior of the bullies and obstructionists who are the reason for this edition of the ABTL Report. When faced with one of them, most among us redouble our efforts. We are going to beat this person, even if it kills us. It boggles the mind that such people would want to motivate their opponents to turn over every rock and investigate every argument. But that is what happens—they act badly, and we suffer increased stress and sleepless nights, consumed in an effort to beat the uncivil lawyer.

This human dynamic explains why incivility presents a risk management issue. Incivility makes bad case outcomes more likely. And that reality often leads to a later malicious prosecution claim, an order imposing sanctions or referring for discipline, or a legal malpractice claim or fee dispute.

Malicious prosecution. Incivility towards an adversary makes it more likely that after the matter is over, that adversary will pursue a malicious prosecution case against the uncivil lawyer.

To prove malicious prosecution, a plaintiff must show that (1) the defendant (lawyer or client) initiated or continued to prosecute an action against the plaintiff that resulted in a termination favorable to the plaintiff; (2) the defendant lacked probable cause to prosecute the action; and (3) the defendant prosecuted the action with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.)

A lawyer's incivility is relevant to the third element: "Malice 'may range anywhere from open hostility to indifference.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 (*Soukup*).) Though it generally requires a showing that an action is brought for an improper purpose (such as to harass or to force a settlement of meritless claims), evidence of antagonistic threats and "bad blood" between lawyers also can show malice.

Evidence of a lawyer's hostile, unsupported threats can satisfy a malicious prosecution plaintiffs' burden of showing probability of success to defeat an anti-SLAPP motion. In one case, the evidence included physical threats for refusing to accept a settlement offer, as well as evidence that the lawyer told the plaintiff that his client had named her in the lawsuit "to prevent her from making trouble for him in the future." That incivility, coupled with a refusal to dismiss the plaintiff once the evidence was indisputable that there was no plausible claim against her, led the court to conclude that the plaintiff could show malice. (*Soukup, supra*, 39 Cal.4th at pp. 295-296.)

In another case, the court held that a lawyer's admission that there was "bad blood" between himself and his adversary supported the court's decision that the plaintiff could show malice. The lawyer's client testified at length about how much she hated the adversary. The court observed that the lawyer did not dissociate himself from his client's comments; to the contrary, without performing any research on the applicable law, the lawyer accused his adversary of ethical violations. That sufficed to show that when the lawyer pursued the meritless case, he acted with malice. (*Lanz v. Goldstone* (2015) 243 Cal. App.4th 441, 467-468.)

Sanctions. The most common risk of incivility is the imposition of sanctions. Case law is replete with examples of sanctions for incivility. Some of the more egregious examples have made it into the legal press or the blogosphere.

In one case, a lawyer was sanctioned for her conduct at a deposition, which included throwing iced coffee towards her opposing counsel. Though the lawyer claimed that she

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accidentally spilled the coffee, the district court found that unpersuasive in light of evidence from the deponent (her own client): "[T]he deponent confirmed that [the lawyer] threw her coffee in opposing counsel's direction, and that he saw coffee on opposing counsel's bag, computer, and person." (*Loop AI Labs Inc. v. Gatti* (N.D.Cal. Mar. 9, 2017, No. 15-cv-00798-HSG) 2017 WL 934599, at p. *17 (*Loop AI Labs*).) The court reporter also provided an affidavit that corroborated the deponent's account. (*Ibid.*)

The court then noted that rather than apologize—as most people would had the spill been accidental—the lawyer "sought to justify her behavior and called the resulting sanctions motion 'outrageous' and 'baseless.'" (*Loop AI Labs, supra,* 2017 WL 934599 at p. *17.) The court's opinion of this conduct was crystal clear: "No excuse (not even [the lawyer]'s belief that [opposing counsel] 'insulted her' by telling her to 'be quiet') can justify [the lawyer]'s on-the-record use of profanity and the ensuing outburst that resulted in her hurling her coffee in opposing counsel's direction." (*Ibid.*)

The coffee incident and other conduct led the court to conclude that a terminating sanction was appropriate and necessary, a decision affirmed by the Ninth Circuit. (*Loop AI Labs Inc. v. Gatti* (9th Cir. 2018) 742 Fed.Appx. 286.) In addition to revoking the attorney's pro hac vice admission in that case, the court said that it "will not grant such admission in any future cases before the undersigned." (*Loop AI Labs, supra*, 2017 WL 934599 at p. *18.) The lawyer's misconduct destroyed her client's case—putting her at risk for a malpractice claim—and ruined her reputation.

Referral for discipline. Incivility isn't just reserved for interactions with opposing counsel; it sometimes appears in court filings and can subject the uncivil lawyer to a referral to the State Bar. In a recent appellate case, a lawyer was reported to the State Bar for potential discipline for describing the trial court's ruling as "succubustic." The court pulled the definition of "succubus" from Webster's Dictionary: "'a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus; demon, fiend; strumpet, whore.'" (*Martinez v. O'Hara* (2019) 32 Cal.App.5th 853, 857 (*Martinez*).)

The appellate court concluded that this description of the female trial judge's ruling "constitutes a demonstration, 'by words or conduct, [of] bias, prejudice, or harassment based upon . . . gender.'" (*Martinez, supra,* 32 Cal.App.5th at p. 858.) The court's ire over the lawyer's choice of words was apparent: "We cannot understand why plaintiff's counsel thought it wise, much less persuasive, to include the words 'disgraceful,' 'pseudohermaphroditic misconduct,' or 'reverse peristalsis' in the notice of appeal." (*Ibid.*)

In referring the lawyer to the State Bar, the court invoked Business and Professions Code section 6068, subdivision (b), which requires lawyers to "maintain the respect due to the courts of justice and judicial officers." The court also noted that the conduct could violate new Rule of Professional Conduct 8.4.1, which prohibits lawyers "from unlawfully harassing or unlawfully discriminating against persons on the basis of protected characteristics including gender." (*Martinez, supra,* 32 Cal.App.5th at p. 858, fn. 9.)

In other jurisdictions, ABA Model Rule 3.2 has been invoked to discipline lawyers for incivility on the basis that the conduct needlessly increased the cost of litigation or wasted judicial resources. (See, e.g., *Attorney Grievance Com'n of Maryland v. Mixter* (Md. 2015) 109 A.3d 1, 60; *Obert v. Republic Western Ins. Co.* (D.R.I. 2003) 264 F.Supp.2d 106, 110-112.)

California has adopted a modified Rule 3.2, which prohibits a lawyer from "us[ing] means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." (Rules Prof. Conduct, rule 3.2.)

Other jurisdictions also have invoked ABA Model Rule 8.4(d) to discipline uncivil behavior; that rule provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." (See, e.g., *In re Abbott* (Del. 2007) 925 A.2d 482, 484-485; *The Florida Bar v. Norkin* (Fla. 2013) 132 So.3d 77, 87; *Disciplinary Counsel v. Cox* (Ohio 2007) 862 N.E.2d 514, 517.)

California has adopted Rule 8.4(d) verbatim. (Rules Prof. Conduct, rule 8.4(d).)

Legal malpractice and fee disputes. Perhaps not surprisingly, there are fewer examples in the case law for what appears anecdotally to be true: Uncivil lawyers face more claims

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for legal malpractice than civil lawyers. Certainly, a lawyer whose client's case is dismissed on a terminating sanction based on the lawyer's conduct would likely face a legal malpractice claim. But in addition to that situation, there are at least four reasons that uncivil conduct increases malpractice risk.

First, incivility contributes to legal malpractice claims because the most common response among competitive lawyers when faced with incivility is to increase their efforts to beat the uncivil lawyer. Those extra efforts add up—the opposing lawyer's performance improves. That improvement makes an adverse result in the matter the uncivil lawyer is handling more likely.

Employing the opposite strategy, "Mr. Niceguy" was much more successful—he lulled his opponents into a false sense of security and advanced his client's interests. Lawyering is hard: Why motivate adversaries to do more than they are already doing?

Second, overheated lawyers often suffer from poor judgment. Those who fight over every issue, big or small, lose the perspective needed to distinguish between issues that matter and those that don't. That can lead to time spent on trivial issues to the neglect of the critical ones. That, in turn, can increase the risk of losing the case and having the client second-guess the failure to focus on what mattered.

Third, incivility between counsel makes a later legal malpractice case more difficult to defend. In any legal malpractice case, the opposing counsel in the underlying case can be a key witness. It is hardly surprising that those defending a claim would prefer to have those key witnesses be friendly—or, at the very least, neutral—towards the lawyer being sued.

This is especially relevant in cases in which a former client has settler's remorse and sues the lawyer who handled the settlement. In those cases, a central issue is whether the client's adversary in the underlying case would have offered a better settlement—and that evidence often comes from opposing counsel.

Finally, an uncivil lawyer may struggle with client relationships because there is a tendency among lawyers who are not civil to mistreat everyone around them. For many lawyers, this isn't a switch that they can turn on for adversaries and turn off for clients and colleagues. It is ingrained in them to treat others disrespectfully.

Again and again, we see legal malpractice claims in which the lawyer has been rude to the client, the client becomes dissatisfied with the lawyer, and the client then pursues a claim against the lawyer. This can happen through a standalone legal malpractice case or as a cross-claim in an action to collect unpaid fees. And it can happen in a matter in which the lawyer did not make obvious mistakes, such as when the client has settler's remorse or second-guesses the lawyer's judgment calls.

Even when these cases lack merit, they are embarrassing, disruptive, and expensive to defend. The lawyer's emails with colleagues criticizing the difficult client—emails the lawyer thought the client would never see—become discoverable. They then show up as evidence that the lawyer was doing a poor job for the client.

But even when lawyers reserve their bad conduct only for their adversaries, scorched-earth tactics can backfire because clients later balk at the cost. That can lead to a malpractice case that is a fee dispute in disguise: The client's true complaint is that he or she paid a lot but received little of value in return.

For Mr. Niceguy, civility was a strong weapon in his arsenal—and if he finished last, that wasn't the reason. He would undoubtedly agree that incivility creates significant risks:

- Incivility increases the likelihood that a lawyer will face a malicious prosecution claim or sanctions.
- Incivility may violate the rules of professional conduct. Though lawyers are expected to zealously represent their clients, the rules forbid bullying and abusive conduct because that conduct delays or prolongs the proceedings and results in needless expense.
- Incivility increases the likelihood that a lawyer will face a legal malpractice or fee dispute claim, and it makes those claims harder to defend.

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TEACHING CIVILITY

Allen Lanstra

As the type of attorney who is reading a volume of the ABTL Report on civility, you are probably not experiencing an awakening about whether you practice civility. But our responsibility doesn't end with ourselves. Teaching others is essential. So here are some suggestions for fostering a culture of civility around you—from senior attorney, to junior associate or law clerk, to summer associate and law student. If enough of us appreciate the impact that good mentoring can have on the civility of those we mentor, it may help reverse the erosion of civility.

• Civility is not a performance. The discussion about civility in our profession often examines the issue in the vacuum of conduct between litigation parties, where we frequently witness the most outrageous acts. But civility transcends mere politeness and courtesy in bilateral relations. If you speak poorly of opposing counsel when you hang up the phone, you are treating civility like an acting performance and suggesting to your colleagues that being civil is fake. Notwithstanding the frustration, stress, and competitiveness of our profession, try implementing civility as part of the entire practice.

• Do not assign the worst motives. You are not a bad person for thinking that opposing counsel may be doing something improper—you're an attorney responding to the environment you were raised in. But pause and apply your analytical skills and think objectively. If we condition younger attorneys to presume that most opposing counsel are proceeding improperly and with malice aforethought, we lead them to believe that we operate in a system where courtesy and professionalism are exceptions, not the rule.

• Do not ask younger attorneys to do uncivil acts just so you don't have to. Don't force younger attorneys to do something that you would rather not do yourself—particularly without arming them with authority to resolve the issue any way they see fit. If you have a good reason to do the unusual, such as refusing a scheduling request or deadline extension because it hurts your client's interests, then picking up the phone and discussing that with opposing counsel yourself shouldn't be that hard. Don't send a messenger just to deliver an uncomfortable message, because doing so tends to breed incivility.

• Teach that civility is not weakness. Because it's not. You can still stand up for your clients. You can still make the arguments that are necessary. You can still be an advocate and use your persuasive skills. You can even still become upset about the way opposing counsel is acting. But civility and effectiveness are not mutually exclusive.

• Be accommodating. If a request really prejudices your client, ok. But I'm pretty certain that nearly every judge will tell us that she couldn't tell the difference between a brief written in 40 days versus 30 days. Good attorneys will do what they need to do in 30 days, regardless whether you jam them. All you've done is jam them (which is not civil). Treating scheduling as a game is petty.

• Set your own tone. As competitive, type-A, proud overachievers, lawyers probably find this the hardest task to execute. When opposing counsel lacks civility, your choices are to jump in the mud or maintain the high ground. Follow your better instincts.

• Opposing counsel is not your annoying sibling. Don't start stuff. Re-read and re-read your communications to opposing counsel before you send them to eliminate those shots across the bow, the passive-aggressive verbiage, and most of all, the unnecessary threats to seek sanctions.

• Encourage new attorneys to get to know people. It's undeniable that we treat our friends differently than strangers, and we aren't so anxious to assign malfeasance to someone whom we know and understand. The organized Bar—and the ABTL in particular—provide great opportunities for young/new lawyers to get to know people. It's hard to be uncivil to someone with whom you just completed a collaborative project that benefited the profession.

• Encourage new attorneys to pick up the phone. It's not as good as meeting in-person, but the phone works—if only because we want to get off the phone. It's a tremendous tool to cut through confusion or break down the presumption that the other side has the worst motives. Talk

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it out. Email's convenience and speed aren't well suited for resolving difficult issues, and email is more likely to foster misunderstanding than resolve it.

• Force them to write a letter. When a young attorney is amped up and wants to act back, challenge him or her to put it in a letter. The formality of letters carries with it a certain expectation of civility that often pauses our emotions and stops us in our tracks.

• Make them wait. Teach them to avoid reacting. Act after thinking. That usually means not responding immediately to that upsetting email. And make them re-read the email and re-read it again before sending it.

• Disclose your own stories, mistakes, and development. We all make mistakes. Some we pay for, and some we just regret. If you learned anything, share it. The best trial lawyers say they learn from what they did wrong, not from what they did correctly.

• Include younger attorneys. Even if the client won't pay for it, have younger lawyers shadow you as often as you can, whether it's a deposition or hearing, or just a phone call. Just as nothing teaches lawyering skills better than watching an accomplished lawyer in action, so too can you model civility.

• Treat everyone with respect. This is where it all starts. Make sure your young attorneys respect everyone they interact with—not just opposing counsel, but everyone within your firm, from the messenger up to the most senior partner.

• The listener has the power, not the speaker. As much as most of us ended up here because we like to talk or were told that we could dominate a debate, most of us prosper as attorneys because of our listening skills and patience. And you can't be uncivil when you're really listening (listening with eye-rolls doesn't count). Teach your younger lawyers this indispensable skill.

• Don't take yourself too seriously. Show your younger lawyers a healthy sense of self-deprecation, which will help them—as it helps you—shrug off perceived slights or rudeness from others.

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GENDER EQUALITY IS PART OF THE CIVILITY ISSUE

Justice Lee Smalley Edmon

Judge Samantha P. Jessner

At a recent ABTL joint board retreat, there was a session dedicated to a discussion of civility in the legal profession. Toward the end of a several-hour discussion, it was posited that any discussion of civility in the legal profession must include a discussion about the very different treatment that women receive compared to their male colleagues. While gender discrimination is obviously a serious issue in society as a whole, the legal profession should lead in the effort to eliminate gender bias. Rather than viewing gender discrimination as an entirely separate issue, we treat it here as a subcategory of incivility in the legal profession. With that in mind, we explore the persistence of unequal treatment of women in the law and make suggestions for promoting civility and respect in the profession.

Gendered Incivility in the Legal Profession

Despite the record numbers of women graduating from law school and entering the legal profession in recent decades, as well as the increase in women judges and women in leadership positions—not to mention the "Me Too" movement—women in the legal profession continue to encounter unfair treatment. In a 2018 survey of more than 7,000 women in the profession, half reported that they had been bullied in connection with their employment, and a third reported that they had been sexually harassed in the workplace. In addition, unequal treatment does not cease once a woman joins the judiciary. For example, a 2017 study conducted at the Pritzker School of Law at Northwestern University concluded that female United States Supreme Court justices are interrupted three times as often as their male counterparts.

Incivility can take many forms. The most common category consists of disrespectful behaviors, ranging from mild discourtesy to extreme hostility. Examples include condescension, interruption, profanity, and derogatory comments of a gendered nature, such as comments about an attorney's pregnancy or appearance.

Common complaints by women lawyers include being interrupted inappropriately or "talked over" while speaking, jokes and comments that are sexist, and comments that trivialize gender discrimination.

Other common examples reported by women lawyers include being professionally discredited. The misbehavior includes implicit or explicit challenges to their competence, being addressed unprofessionally (such as with terms of "endearment"), being critiqued on their physical appearance or attire, and being mistaken for nonlawyers (such as court reporters or support staff). A judge reported, "People tell me all the time I don't look like a judge even when I'm in my robe at official events." An attorney recalled an incident in which, when she stated her appearance on behalf of a shopping mall owner, the judge remarked that she was dressed as though she had just come from a shopping trip to the mall.

Less frequent—but still reported with regularity—are the most obvious forms of gender-based incivility, such as sexually suggestive comments or sexual touching.

The conclusion is inescapable that sexism is alive and prevalent in the legal profession, and that sexism finds its expression in incivility. The underlying reasons for sexism are varied, but among the obvious culprits with respect to the practice of law are that women remain underrepresented, particularly in leadership roles; there are fewer women than men on the bench; and there are enduring stereotypes with respect to the proper role of women in society.

The Costs of Incivility

The ramifications of incivility must not be trivialized as just part of the fabric of everyday life. Research shows that incivility makes people less motivated and harms their performance. One study showed that medical teams

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exposed to rudeness performed worse not only in all their diagnostics, but in all the procedures they did. This was mainly because the teams exposed to rudeness didn't share information as readily as others, and they stopped seeking help from their teammates. There is no reason to believe this dynamic is limited to the medical field.

Incivility causes individuals to feel less satisfied with their work, to cut back on their efforts at work, and to experience greater job stress. Incivility siphons energy away from workplace tasks, and sometimes it causes employees to leave their jobs.

When incivility shows up in the courtroom, in the presence of jurors and others who pass through the court system, it diminishes respect for and confidence in the legal system. To quote Justice Sandra Day O'Connor, "When people perceive gender bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."

Promoting Civility in the Profession

While the demographics of the bench and bar have evolved over recent decades, sexism has proved difficult to dislodge. After all, the Rules of Professional Conduct proscribe sex discrimination, but it persists anyway. Working toward gender parity will help eliminate disparate treatment of women in the law, and will lead to enhanced civility in the profession.

On a more personal level, there are things each of us can do, through our own actions and in setting expectations with those around us. We can begin by simply being mindful. When someone makes an inappropriate casual remark or joke, we can simply refuse to engage. But we should not just be silent. While there is no need to turn every situation into a cause célèbre—it's probably counterproductive to do that—if you have a personal rapport with the individual who behaved unprofessionally, a private moment together can be a powerful way to advocate your values of civility.

If you are subjected to abusive behavior, or are a witness to it, come forward. The primary deterrent of reporting is fear—fear of damaging one's professional image, fear of harming a client's case, or fear of antagonizing a judge. It takes courage to blow the whistle, particularly when the wrongdoer wields power. Thankfully, however, we have seen a sea change in recent years, and women are now less reluctant to come forward. The courts and law firm leadership should strive to provide attorneys with safe and effective mechanisms to report mistreatment.

While we need to address uncivil behavior, it is also essential to recognize and take note of the civil behavior that we want to promote. If a colleague handled a difficult situation with grace and restraint, commend them on how well they handled it, and point it out to others. In doing so, you will help promote a culture of civility.

The Benefits of Civility

Apart from basic decency, there are other benefits to civility. Lawyers who behave with civility report higher personal and professional rewards, and conversely, lawyer job dissatisfaction is often correlated with unprofessional behavior by opposing counsel. Also, in the Internet era, a lawyer's reputation for civility is more vital than ever—a single uncivil outburst may haunt an attorney for years.

Lest you worry, nice guys do not finish last. In a biotechnology firm, a study showed that those who were seen as civil were twice as likely to be viewed as leaders, and they performed significantly better. Individuals who were viewed as civil were also seen as being important, powerful, and competent. If you're civil, you'll also be more effective.

Each of us can be more mindful and can act, when the opportunity arises, to promote civility. In doing so, we can help eliminate general incivility—as well as gender-related incivility—in the legal profession. At the same time, we also enhance our own well-being and sense of satisfaction with our chosen field.

Hon. Lee Smalley Edmon *is the Presiding Justice of the California Court of Appeal, Second Appellate District, Division 3.*
Hon. Samantha P. Jessner *is the Supervising Judge of the Civil Division of the Los Angeles Superior Court.*

WINNING THROUGH COOPERATION

Judge Carolyn B. Kuhl

"Winning through intimidation" became a catchphrase in the 1970s after a book by that title caught on and eventually became a New York Times bestseller. It was written by a formerly disgruntled real estate agent who eventually became successful enough to buy a Lear Jet. It includes such insights as, it isn't what a person says or does that matters but what his "posture" is when he says or does it. Not exactly the kind of attitude a judge appreciates in a lawyer.

Not everything about the digital age has been an improvement, but computer simulation has given us some evidence-based approaches to problems that previously had been left to self-proclaimed motivational experts. We now know that in many realms of human endeavor, cooperation yields better success for both parties even when they operate in an adversary setting. That is, adversaries each may be able to achieve a better result through cooperation than either could obtain by trying to win at the expense of the other. This conclusion is demonstrated in the work of Professor Robert Axelrod, Professor of Political Science and Public Policy at the University of Michigan, and a recipient of the National Medal of Science.

In his book, *The Evolution of Cooperation*, Professor Axelrod sets up a game based on the "Prisoner's Dilemma," a classic game theory exercise. In Axelrod's variation of the game, a player obtains: (1) the biggest payoff for winning at the expense of the other player, meaning that one player takes an aggressive position and wins when the other adopts a cooperative strategy; (2) an intermediate payoff when both sides choose to cooperate; and (3) the lowest payoff when both players attempt to win at the expense of the other player, meaning that both are made worse off by mutual combat. Axelrod announced an online tournament in which participants were challenged to develop a strategy to obtain the highest score when the game was played over and over indefinitely. Participants in the tournament included computer scientists, mathematicians, economists, psychologists, sociologists and political scientists.

The winning strategy was surprisingly simple. The best strategy was to cooperate with the other player and thereafter to attempt to win at the other's expense only when the other player had refused cooperation in the previous move. Professor Axelrod discerned four properties that tended to make a game strategy successful: (1) avoiding unnecessary conflict by cooperating as long as the other player does; (2) responding in kind to an uncalled-for provocative act by the other; (3) "forgiveness" (returning to cooperation) after responding to a provocation; and (4) clarity of behavior so that the other player can adapt to your pattern of action. "Nice" strategies—those that started with cooperation and responded to conflict without perpetual punishment—achieved higher scores.

Axelrod's findings do not suggest that we abandon the adversary system of litigation. Nothing is more conducive to finding the truth than cross-examination. Nothing is more helpful to a correct determination of a legal issue than briefing by opposing, well-informed advocates.

However, the choices available to litigation adversaries in their use of pretrial procedures fit the circumstances described by Axelrod in his game. Litigation adversaries are likely to have an indefinite number of interactions in the course of litigation. The rules of civil procedure should be directed toward allowing presentation of legal and factual issues to the decisionmaker (judge or jury) in a fair manner. But we all know that those rules also can be used as a tool for one party to attempt to obtain an advantage at the expense of the other r*egardless of the underlying merits*.

In the "game" of pretrial litigation, a provocative act might be use of the rules by one side to attempt to achieve an advantage without reference to the merits or the substance of the case. Think of propounding overbroad discovery for

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the sole purpose of burdening the other side. The proponent of the discovery might attempt to achieve a "high score" by increasing the other side's litigation costs. But if the other side responds in kind, both sides lose; that is, both sides get the low score in the "game." If the overbroad discovery yields only objections, both sides' litigation costs are increased with no countervailing benefit to either. Each side could do better by cooperating (i.e., propounding and responding to discovery in accordance with a fair understanding of the rules.)

To take another example, counsel for a party might refuse an extension of time to respond to discovery in an attempt to force the other side to lose all of its objections. The counsel who refuses the extension hopes for an advantage that is not warranted by the merits of the case—a "high score." However, the other side may convince the judge to forgive the late objections. In that case, both sides have incurred expense to no good end—a "low score" for both (and the counsel that refused the extension likely will incur an additional penalty by annoying the judge). If the refusal to grant an extension leads to a "tit-for-tat" response, neither side gains an advantage.

In litigation, procedure should be the servant of substance. That is, the goal of the rules of civil procedure is not for one side or the other to "win." Rather, procedural rules are intended to create an even playing field so that each side can obtain the facts underlying the dispute and present those facts and applicable law effectively to a decisionmaker. The purpose of civil litigation is fair dispute resolution. Judges focus on deciding cases based on the substantive merits of each side's position. Not surprisingly, judges are impatient with gamesmanship and lawyers' short-sighted procedural gimmicks.

Winning at the "game" of litigation should be about both sides presenting their best case on the merits. As Axelrod advises:

> Asking how well you are doing compared to how well the other player is doing is not a good standard unless your goal is to destroy the other player. In most situations, such a goal is impossible to achieve, or likely to lead to such costly conflict as to be very dangerous to pursue.

Axelrod's analysis demonstrates that starting with cooperation and returning to mutual cooperation as soon as possible helps both sides. He also concludes that when adversaries believe they are likely to see each other again, and when they have the ability to inform themselves about the prior actions of an opponent, cooperation is more likely to emerge. These conclusions are consistent with the observation that, in litigation specialties (for example, construction defect) or other close-knit practice groups, lawyers tend to find ways to cooperate on procedural aspects of a case. Axelrod's conclusions also suggest why organized bar associations are useful to their members. Opportunities to interact and develop personal relationships in ways that build trust reduce incentives to provocative behavior and increase expectations that cooperation will be reciprocated.

Axelrod's work demonstrates that, while it might "feel good" to win a procedural point now and then at your adversary's expense, in the long run the probabilities are against you and you are likely to end up a loser. The evidence shows that "winning through intimidation" is oxymoronic.

Hon. Carolyn B. Kuhl *is a Judge of the Los Angeles County Superior Court and sits in its Complex Civil Litigation Program.*

STRENGTHENING RESILIENCE THROUGH MINDFULNESS

Judge Paul A. Bacigalupo

How often do you feel mentally drained before you've even started your day? Perhaps it's because you've made dozens of mental decisions, thinking about something in the past and anticipating a future event, meeting, or deadline. While this is part of being human, this article will address how you can use the core strength of what we call resilience to lift the cognitive and emotional load of life. You can also use tools, such as mindfulness, to practice becoming more resilient in your professional and personal life.

Resilience is the ability to "bounce back" from difficult experiences and deal with life's challenges, even when those events are overwhelming or devastating. "If you are carrying an excessive load, you can either decrease the load or increase the capacity to lift the load," says Amit Sood, M.D., author of the Mayo Clinic *Handbook for Happiness*.

Some people are born with characteristics of resilience or a more positive outlook. But the rise of resilience research demonstrates that it isn't necessarily a trait that people either have or don't have. Resilience involves behaviors, thoughts and actions that can be learned and developed. Research also demonstrates that people's resilience is enhanced by training and makes a measurable difference in the experience of stress, anxiety, chronic fatigue and mindful attention.

The practice of resilience changes the structure of our brains, a process called neuroplasticity. Dan Siegel, M.D., in his groundbreaking book *Mindsight, The New Science of Personal Transformation,* explains that neuroplasticity involves the capacity for new neural connections and growing new neurons in response to experience. It can occur throughout our lifespan.

Having been on the bench since 2000 as a judge of the State Bar Court, the Supervising Judge of the Southern California Alternative Discipline Program, and for the last 17 years as a judge of the Los Angeles Superior Court, I've seen my fair share of attorneys who are burned out. Not all lawyers are prepared for the high conflict surrounding client relationships, the belligerency of opposing counsel, the wrangle of the courtroom and personal crises. When lawyers bring the baggage of unmanaged stress—professional and personal—into the courtroom and their work environment, it can lead to avoidable adverse consequences.

Chronic incivility—rudeness, disrespect, belittling others, speaking in a condescending tone—is unhealthy. No judge or member of the courtroom staff looks forward to dealing with lawyers in this condition. At the same time, there are plenty of judges who already feel overburdened by heavy dockets, weighty decisions, repeated exposure to disturbing evidence and traumatized parties and victims, anxiety over time limits, social isolation, false and misleading public attacks and the threat of recall and election challenge. We are all vulnerable and susceptible to stress and burnout. Given the destructive nature of incivility, we all need to be able to recognize these problems in ourselves so as to keep them from interfering in our relationships with others and improve our well-being.

Do you wonder if you need to increase your resilience? Dr. Sood suggests asking yourself a simple question. "Over the last month, how stressed have I felt on a scale of 1—being not at all—to 10?" He says, "If you are above a 5, you can be helped by resilience."

Many resources are available to improve resilience, including the Mayo Clinic resilience training program. On-line courses can also be found at Berkeley's Greater Good Science Center in partnership with Rick Hanson, Ph.D., at *The Resilience Summit*. Some of the fundamentals of resilience training are: **Social**—having good nurturing relationships to help you better withstand life's challenges; **Spiritual**—live a life full of meaning; **Physical**—getting regular exercise, sleep and a healthy diet; **Emotional**—boosting your ability to sustain positive emotions and recover quickly from negative ones; **Mental**—heightening focus and improving mindset through mindfulness, meditation and yoga.

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What exactly is mindfulness and meditation? These terms are often used interchangeably, but they're not the same. "Mindfulness is awareness that arises through paying attention, on purpose, in the present moment, non-judgmentally," says Jon Kabat-Zinn, Ph.D., Professor of Medicine Emeritus at the University of Massachusetts Medical School, founder of the Mindfulness-Based Stress Reduction (MBSR) Clinic (in 1979), and best-selling author of *Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain and Illness* and *Wherever You Go, There You Are: Mindfulness Meditation in Everyday Life*.

Mindfulness involves focusing on the breath to cultivate attention on the body and mind as it is moment to moment. You allow your thoughts to come and go and not get attached to them. Mindfulness is about retraining your brain (neuroplasticity). When you are being actively mindful, you are noticing and paying attention to your thoughts, feelings and behaviors and how you react to them. This is a practice and requires both consistency and time.

Many say they can't sit still with their thoughts and feelings for more than a few minutes because their mind won't stop wandering. Some research suggests that mind-wandering comprises as much as 50% of waking life. We can all relate to mind-wandering and having off-task thoughts during an on-going task or activity, something that impacts our sensory input and increases errors in the task at hand. Paying attention and noticing and being in the moment reduces mind-wandering and helps you achieve equanimity, especially while under stress. The beauty of mindfulness is that you can practice it anytime, anywhere, and with anyone. Just a few minutes of mindfulness every day can clear away distracting thoughts, storylines and emotional baggage.

Mindfulness and meditation embody many similarities and can overlap. Meditation can be an important part of a mindfulness practice. It typically refers to a formal, seated practice that focuses on opening your heart, expanding awareness, increasing calmness and concentrating inward.

Mindfulness is associated with calm, and that's all the more reason why the U.S. Army has initiated mindfulness training for its soldiers to intensify mental focus, improve discernment of key information under chaotic circumstances, and increase memory function. Likewise, Fortune 500 companies such as Apple, Google, Nike, Procter & Gamble and Aetna incorporate meditation practice into their work environments, believing that meditation helps employee mental health and well-being, reduces stress, and improves listening and emotional intelligence.

Kabat-Zinn says, "The best way to capture moments is to pay attention. This is how we cultivate mindfulness. Mindfulness means being awake. It means knowing what you are doing." Making mindfulness part of your daily routine isn't a lot of work and can be integrated into many repetitive activities. Exercise like walking, hiking, and yoga are excellent times to cultivate mindfulness. Cooking, art, and music are opportune moments. Even gardening, housework, and doing chores are activities when, instead of letting your mind go somewhere else, you can use the time to focus on the task at hand.

Mindfulness is broadly accepted as a mainstream strategy with positive scientific results to improve resilience and well-being. It helps you maintain a realistic sense of control and choices, especially how to react in a given situation. It helps you maintain a positive outlook and perspective and accept change. It can literally impact your mind and body, your professional and interpersonal relationships, your career and daily life.

And all the benefits are free.

Hon. Paul A. Bacigalupo *is a judge of the Los Angeles Superior Court and President of the California Judges Association.*

A CIVILITY CHECKLIST

Judge Suzanne H. Segal

Checklists are often easier to follow than general advice. Why not a checklist for civility? This list is organized loosely according to the Federal Rules of Civil Procedure and the Central District of California Local Rules. While these suggestions follow the federal rules, the underlying concepts apply equally to practice in state court.

1. Initiate the rule 26 meeting with a diplomatic e-mail.

The Rule 26(f) meeting is a unique opportunity to set a positive and respectful tone for the entire life of the case. Start with a diplomatic email—or better still, call—using language that conveys a sincere interest in working cooperatively with your opponent. Of course, you may also include references to your client's view of the case, to allow the other side to understand your client's perspective. Just use diplomatic language—language really matters when trying to work cooperatively with an opponent.

Rule 26(f) requires that parties confer "as soon as practicable" or at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). It is easy to take the Rule 26(f) meeting for granted, perhaps as an annoying obligation, but it is truly an opportunity. You can use it to establish an expectation of civility for the entire case, particularly in the way you approach the "easy gives," i.e., the time, place and manner of the meeting. When and where the meeting takes place will not change the outcome of the case, but if you offer to meet in person at your opponent's office, on their schedule, at their convenience, you will begin the relationship with your opponent in a positive way. Offering to meet on your opponent's schedule communicates that you respect them. Rule 26 does not dictate who initiates the meeting. You will enhance the likelihood of a good relationship with the other side by starting off with a professional and diplomatic call or email at the earliest possible moment with an invitation to meet.

2. Educate your client on the benefits of civility.

Clients may complain that if you are too accommodating from the outset, you will be seen as not truly "fighting" on their behalf. The possibility of this concern suggests a need for a different type of early meeting—an early meeting with the client. From the beginning of the case, your client should have a clear understanding of how you intend to interact with your opponent. Emphasize to the client that you expect to advocate fiercely on their behalf, but that it is important for you to remain civil and professional at all times. You may need to explain that it is always in the client's best interest that correspondence or emails (which often become exhibits in discovery disputes) are phrased in a respectful manner, even when disagreements with the other side arise.

Approaching the Rule 26 meeting with diplomacy in mind does not mean sacrificing advocacy. The best lawyers make their Rule 26 initial disclosures as complete as possible, prior to the early meeting, and use the Rule 26 meeting to demonstrate their level of preparation and command of the case. The message from your first email and the early meeting disclosures should be that, although you are very interested in a cooperative relationship with opposing counsel, you are more than prepared for the adversarial battle that may lie ahead.

3. Discovery for the purpose of discovery.

It is easy to approach discovery practice as a less meaningful aspect of a case, or as a necessary evil to be dealt with by using form interrogatories or form requests for production. However, when you draft your discovery requests carefully, with focus and purpose, you can advance your case without antagonizing your opponents. This kind of discovery is proportional to the case, limited to the essential information necessary to resolve the issues in dispute, and served in a manner that is consistent with civility. In addition to developing useful information earlier than if you invite opposition, appropriate discovery can open the door to productive settlement discussions—by serving targeted but not abusive discovery, you force your opponent to reflect on aspects of the case that might prompt settlement. However,

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A Civility Checklist...continued from Page 27

if discovery is used exclusively as a weapon, to inflict pain on an opponent by the burden imposed or served in a manner that would antagonize any reasonable party, it is likely to impede any effort to get along with opposing counsel and may interfere with efforts to settle. It will also be transparent to the court that you are using discovery for improper purposes. Use discovery for the purpose of discovery, and your opponent and the court will recognize your efforts as legitimate investigation and pretrial preparation.

4. Avoid the "drive-by" meet and confer.

Like the Rule 26(f) conference, approach the Rule 37 meet and confer as an opportunity to create more goodwill. Avoid the "drive-by" meet and confer, even if your opponent seems to prefer that approach. As with the Rule 26 meeting, pick up the phone or send a diplomatic email to initiate the meet and confer, and be cooperative regarding the date and location of the meeting. You will earn goodwill from your opposing counsel by reducing the stress in their life—show up in person and on time, and go to your opponent's office when it is convenient for them. Although Local Rule 37 requires opposing counsel to attend the meet and confer at the moving counsel's office, the rule also provides that the parties may agree to meet "someplace else." Provide whatever responses you can to demonstrate that you intend to fairly and honestly litigate the case. At the very least, you will narrow the discovery issues in dispute, reducing the cost of the litigation for your client and allowing the court to focus on the most difficult disputes. At best, you might settle the case.

5. Take advantages of informal discovery conferences with the court.

In 2015, Rule 16 was amended to include the following language: "The scheduling order may: . . . (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court." The Advisory Committee notes discussing the amendment observed: "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion . . . ." These "informal discovery conferences" are now required by almost every Magistrate Judge in the Central District prior to the filing of a discovery motion, and are also used by many state court judges. Take advantage of the opportunity to have a judge participate in your discovery meet and confer, helping you and your opponent find reasonable solutions to your discovery disagreements. Start the conference by saying something positive about your opponent in front of the judge. This will set an optimistic tone for the conference and may increase the likelihood that your opponent will work cooperatively with you. By using the informal discovery conference, you may resolve discovery disputes in a less combative environment and avoid potential friction with your opponent.

6. Always rise above.

Lawyers often suggest that they were "dragged" into a conflict by their opposing counsel's combative or abusive behavior. While opposing counsel's conduct should not be condoned, it is best to "rise above" it and not sink down to the level that someone else may want you to sink to. If your opposing counsel is antagonizing you, remember that the more respectful and polite you are in the face of such behavior, the better you and your client will look before the court.

7. Focus on meaningful motion practice.

Are Rule 12 motions to dismiss (demurrers in state court) simply delay tactics? Or do they actually move the case forward? The answer is probably yes and yes. Sometimes early motion practice is for the purpose of delay, but on other occasions, a Rule 12 motion is necessary to resolve a fundamental legal question. To increase the likelihood of civility (and to improve your relationship with the court), avoid the "delay tactic" motions, even if your client wants you to file them.

Local Rule 7 requires that parties hold a meet and confer prior to filing any motion. Some lawyers may be skeptical of this requirement. Why would an opponent change a significant position in the case, simply because of a meeting? It is true that the Local Rule 7 meeting may be most effective for motions involving non-dispositive relief, i.e., motions that

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A Civility Checklist...continued from Page 28

do not resolve ultimate issues in a case. However, even if you are meeting to discuss an issue that you do not believe your opponent will compromise on, the meeting can be yet another opportunity to develop a productive relationship with your opponent. View the Local Rule 7 meeting as another diplomatic mission: Even if you do not resolve the motion, you may lay the foundation for settlement.

8. Set yourself up to settle well.

I once had a supervisor who frequently reminded me that, in his view, I had only two goals as a litigator—to win or settle well. As a judge who has conducted hundreds of settlement conferences, I can comfortably say that personal animosity between clients or lawyers is one of the most common impediments to "settling well." Strong feelings of anger or resentment, which sometimes increase over the life of a case, greatly interfere with the logical decision-making necessary for effective negotiations. If civility has not been your priority from the outset, or if civility was lost along the way, it is difficult to recover a cooperative working relationship with your opponent when you attempt to settle a case.

9. Improve your trial preparation experience with cooperation.

Possibly the most painful phase of a case, if lawyers are not getting along, is the trial preparation phase. No other phase requires more cooperation between the lawyers than preparation of the pretrial documents. Local Rule 16 requires joint exhibit lists, joint jury instructions, joint witness lists, and a joint pretrial conference order, among other things. The requirement that documents, exhibits, orders, jury instructions, and other items be prepared jointly means that your life will be far simpler if you have already established a cooperative relationship with opposing counsel. At the end of the trial, remember to either win with humility or lose with grace. Whatever the outcome, you want the judge, the jurors, your opponent and your client to view you as someone who knows how to handle the situation with professionalism and dignity.

10. Forgive yourself, forgive others.

Following this checklist does not mean that you will never have bad days. You will make mistakes. You will make decisions you regret. You might lose your temper or say something you wish you could take back. Or you might take a position in a case that antagonizes someone, even if your position is completely justified.

When you make a mistake, fix it; apologize if appropriate; learn from it; forgive yourself; and move on. If you took a position that aggravated your opponent, look for an opportunity to repair that relationship.

Forgiveness is powerful. Try to recall a moment where someone forgave you for a mistake or showed you that they were willing to forget a past conflict. Remember how positive that experience was and apply it to your professional life. Putting aside past conflict, moving on, and seeking to develop new friendships are the building blocks for civility to spread. Start your case with diplomacy, maintain civility and professionalism throughout and forgive mistakes and it's possible that, win or lose, you may end the case with a new professional colleague or at least a respectful opponent.

Hon. Suzanne H. Segal *is a United States Magistrate Judge in the Central District of California.*

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Appendix 3: Key California Civility Cases

- *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635.
- *Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407
- *People v. Chong* (1999) 76 Cal.App.4th 232.
- *Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407.
- *Pham v. Nguyen* (1997) 54 Cal.App.4th 11.
- *D.M. v. M.P.* (Nov. 30, 2001, G023935) [nonpub.opn.].
- *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158.
- *In re S.C.* (2006) 138 Cal.App.4th 396.
- *Ahanchian v. Xenon Pictures, Inc.* (9th Cir. 2010) 624 F.3d 1253.
- *Marriage of Davenport* (2011) 194 Cal.App.4th 1507.
- *Kim v. Westmoore Partners, Inc.,* (2011) 201 Cal.App.4th 267.
- *Wong v. Genser* (Nov. 30, 2012, A133837) [nonpub. opn.].
- *People v. Whitus* (2012) 209 Cal.App.4th Supp. 1
- *Interstate Specialty Marketing Inc. v. ICRA Sapphire Inc*. (2013) 217 Cal.App.4th 708.
- *In re Marriage of Lewis,* (Nov. 3, 2015, B255900) [nonpub. opn.].
- *Martinez v. Dep't of Transportation* (2015) 238 Cal.App.4th 559.
- *Sullivan v. Lotfimoghaddas* (June 18, 2018, B279175) [nonpub. opn.].
- *Fridman v. Beach Crest Villas Homeowners Ass'n,* No. (Mar. 19, 2018, G052868) [nonpub.opn.].
- *Flack v. Nutribullet, L.L.C.* (C.D. Cal. 2019) 333 F.R.D. 508.
- *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127.
- *La Jolla Spa MD, Inc. v. Avidas Pharms., LLC* (S.D. Cal. Aug. 30, 2019, No. 17-CV-1124-MMA(WVG)) 2019 WL 4141237.
- *Briganti v. Chow* (2019) 42 Cal.App.5th 504.

- *Martinez v. O'Hara* (2019) 32 Cal.App.5th 853.
- *Block v. Bramzon,* (Jan. 22, 2021, B292129/ B297198) [nonpub. opn.].
- *In re Mahoney* (2021) 65 Cal.App.5th 376.
- *Karton v. Ari Design & Construction* (2021) 61 Cal.App.5th 734.
- *Mayorga v. Mountview Properties Ltd. P'ship* (Apr. 9, 2021, B298284) [nonpub. opn.].
- *Karton v. Ari Design & Constr., Inc.,* (2021) 61 Cal.App.5th 734.
- *In re Mahoney* (2021) 65 Cal.App.5th 376.

MEMORANDUM

To: Justice Brian Currey, California Civility Task Force
From: Amy Lucas, Larson Ishii
Date: September 10, 2021
Re: Civility Caselaw Research

In preparation for the Task Force's civility report recommending the adoption of a California state bar MCLE civility requirement, this memorandum serves as a summary catalog of California cases addressing civility (and the lack thereof). For this memo's purposes, analysis of the orders and opinions below focuses primarily on the issues of civility involved and not necessarily the relevant legal holdings. Cases are divided into three broad categories of incivility and subcategories within each: Part I outlines incivility directed at opposing counsel, Part II involves incivility related to different biases, and Part III details incivility aimed at the judiciary.

I. Incivility Directed at Opposing Counsel

A. Rude Behavior

1. *La Jolla Spa MD, Inc. v. Avidas Pharms., LLC*, No. 17-CV-1124-MMA(WVG), 2019 WL 4141237 (S.D. Cal. Aug. 30, 2019)

The district court granted sanctions against defendant's counsel in the amount of $28,502.03 for atrocious acts of incivility and unprofessional conduct primarily relating to a deposition. At the deposition, defendant's counsel "continuously interrupted, lodged frivolous objections, improperly instructed [her client] to not answer questions, and extensively argued with [opposing counsel]." *Id.* at 3. The court examined numerous examples of defendant's counsel's inappropriate comments on the record including:

- "You know what? While there's no question, I'm going to ask you to speed this up and say: Are there any products on that list that they did not manufacture? Can we do it quicker? . . . Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time." *Id.* at 10.
- "Objection; there's been no foundation laid for the fact it's an email. Do you want to do that first? . . . No, that's not the way to do it. Come on, Counsel." *Id.* at 11.
- The court described the following exchange as a "troubling tirade" in which "the cold, typed words of the transcript truly do not do justice to the tone and tenor of [defendant's counsel's] sustained harassment of [plaintiff's counsel]":
    - [Defendant's counsel]: No, the Court didn't say anything about timing. The witness – the witness is doing the best she can. And we moved this precisely for your convenience. Don't start doing that game. You've wasted plenty of time.
    - [Plaintiff's counsel]: Do you need to take a break?
    - [Defendant's counsel]: No, don't talk to my witness, ever. Don't you ever talk to my witness. Do you understand how threatening that is?
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: And how unprofessional that is?
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: Because you're a male exercising male privilege and talking to my witness in a situation where she's already nervous. And you're talking to her directly? That's, first of all, a violation of the ethical rules, as you know.
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: We're going to take a break. Come on, Margie, let's take a break.
    - [Plaintiff's counsel]: You're leaning over the table.

    - [Defendant's counsel]: Yes, because of your threatening nature . . . Because you threatened my witness just now. Don't you ever talk to her directly. *Id*. at 18.
- "[Defendant's counsel] disparaged [plaintiff's counsel] and his case throughout the deposition, calling the case 'garbage' or maligning him personally and the nature of his questioning (see, e.g., 'Again, you're belaboring the witness, you have so many 'belief' questions.'); ('If you keep asking questions that are objectionable, we're really not getting anywhere. So let's go, come on Counsel. Ask questions that are good ones.'); ('Ask a real question with a noun, a topic and date.')). *Id*. at 21. (internal citations omitted).

Altogether, the court found defendant's counsel had "violated the basic standards of professionalism expected of all attorneys . . . was not courteous or civil; acted in a manner detrimental to the proper functioning of the judicial system; disparaged opposing counsel; and engaged in excessive argument, abusive comments, and delay tactics at [client's] deposition. The sheer volume of [defendant's counsel's] antics belie any notion of mistake or negligent conduct on her part but rather disturbingly reveal a systematic effort to obstruct [opposing counsel] for no good or justifiable reason or purpose. [Defendant's counsel] undeniably acted in bad faith." *Id.* at 23.

After lamenting the current state of the legal profession in which attorneys engage in scorched-earth tactics to make litigation as painful as possible, the court found itself obligated to act. Remarking that unchecked incivility "erodes the fabric of the legal profession," this case was such an extreme example of misconduct that required sanctions. *Id.* at 3. The court concluded: "Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. [Defendant's counsel's] atrocious conduct at the [client] deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but [defendant's counsel] trampled that line long before barreling past it." *Id.* at 25.

2. *In re Marriage of Davenport*, 194 Cal. App. 4th 1507 (2011)

The appellate court affirmed the trial court's order awarding sanctions and attorneys' fees under Section 271 of the Family Code in part due to incivility by petitioner's counsel. The court observed that the record was replete with inappropriate correspondence by counsel "that contained

abusive, rude, hostile, and/or disrespectful language." *Id.* at 1534. The court went on to highlight a few particular instances of incivility including:

- In a letter regarding nonappearance for a deposition: "Once again, you offer the same tired, old, and shopworn excuse. Your continued blustering about mutually agreeable dates, efficiency and promptness, and convenience is pathetic when your client's actions negate any semblance of cooperation. Talk is cheap. Actions speak louder than words. Your credibility is at stake here." *Id.*
- In a separate letter: "Enough already with the delays . . . . We don't accept your implication that you didn't already have [the Request to Inspect] . . . Perhaps you didn't look hard enough, because we filed a Motion to Compel . . . in which I attached RTI Set one to my Declaration. Or you weren't counting that copy. . . . Your last paragraph rings hollow." *Id.* at 1534-35.
- In another letter: "We've noticed that, in the past, you have had some trouble keeping things straight. We also noticed that you tend to stretch things somewhat too far in the name of appearances. . . . It's no surprise, then, that your letter of 8/7/08 appears to be an attempt to create a false and misleading exhibit for use at a later law and motion hearing so that your client can sit in court with a halo over his head, and so you can say 'look how many times Ken offered to settle!' That wouldn't surprise us at all, given your practice of attaching a large pile of exhibits to your declarations without any testimony from you concerning their truth." *Id.* at 1535.

The court noted counsel's comments violated California Attorney Guidelines of Civility and Professionalism that reminds attorneys of their obligations to act professionally with opposing counsel and instructs attorneys to avoid hostile, demeaning, or humiliating words. The court concluded that effective advocacy does not require incivility and reminded all counsel: "Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." *Id.* at 1537.

3. *DeRose v. Heurlin*, 100 Cal. App. 4th 158 (2002)

The appellate court imposed sanctions in the amount of $6,000 against appellant's counsel for filing and prosecuting a frivolous appeal to delay an adverse judgment and cover up his dishonesty and mishandling of client trust funds. While the sanctions were for bringing and maintaining a frivolous

appeal, in chronicling counsel's misconduct, the court recounted numerous instances of rude and offensive behavior made by appellant to opposing counsel. Appellant's counsel had not responded to opposing counsel's repeated attempts to obtain documents, prompting opposing counsel to suggest his lack of cooperation constituted unprofessional conduct. Counsel told opposing counsel to "educate himself" on attorney liens, he would "see [him] in court," and "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." *Id.* at 162.

In response to statutory offers to compromise, appellant's counsel had replied "Let me ask: from what planet did you just arrive. It is my full intent to take judgment against Mr. DeRose on July 11, 2000 when my motion for summary judgment is heard, move for sanctions against you and your firm and do all in my power to see that you, and your firm, suffer to [the] full extent possible through a subsequent claim for malicious prosecution and, very likely, a malpractice action by your ex-client Mr. DeRose when he is presented with a fee demand for thousands of dollars. . . . [Y]ou can take [the American Board of Trial Advocates] Code of Professionalism and shove it—where this case is concerned. When all is said and done, you, Mr. Day and Mr. DeRose will be so very, very sorry this course was pursued." *Id.* at 165. Counsel's incivility continued as he later described opposing counsel as "a frightened Brier [sic] Rabbit who is now stuck to a tar baby of a case in which his client is on the hook for significant damages, attorney's fees, costs, etc.," and a "scared man looking for any way to avoid significant personal liability." *Id.* at 166. The court was clear in remarking that appellant's counsel's "conduct ha[d] been disgraceful" and published their opinion as a reminder and lesson to the bench, bar, and public. *Id.* at 161.

4. *Mayorga v. Mountview Properties Ltd. P'ship*, No. B298284, 2021 WL 1326695 (Cal. Ct. App. Apr. 9, 2021)

In a footnote affirming the trial court's decision to set aside a default judgment for respondent's reasonable mistake, the appellate court noted incivility in respondent's counsel's briefing. In a dispute over an apartment, appellant as tenant had filed an action against respondent landlord alleging uninhabitable conditions, while respondent had initiated eviction proceedings. Given the eviction proceeding was dismissed, respondent did not file a response to the uninhabitable conditions complaint, alleging his attorneys led him to believe it had been dismissed as well. The court noted that respondent's counsel's reference to appellant's "sloth and stealth" and having "extreme lack of hygiene" was "unnecessary to the resolution of the issues on appeal, and violate[d] the 'civility oath' as well as [California's]

civility guidelines." *Id.* at n. 4. However, the court did not "take further action in light of counsel's apology at oral argument." *Id.*

5. *In re Marriage of Lewis*, No. B255900, 2015 WL 6692239 (Cal. Ct. App. Nov. 3, 2015), *as modified on denial of reh'g* (Dec. 1, 2015)

In affirming the lower court's settling of a marital estate, the appellate court noted to both parties "attacks on the character of opposing counsel are not well-received in this court, and pejorative adjectives, including those directed towards the parties and the trial court, do not persuade." *Id.* at 2. While appellant's counsel disputed the trial court's findings of certain assets as community property, charging appellant for inappropriate transfers of money, and awarding more than $25,000 per month in support, the court held appellant's counsel had failed to meet his burden by not adequately pleading his argument or citing to the record.

In a footnote, the court highlighted the inappropriate attacks on opposing counsel in both parties' briefing. Respondent's brief improperly used the word "mantra" in claiming why appellant did not pay respondent and asserted "[appellant] does not believe that the rules apply to him and that he is one of those people who takes his anger and greed beyond the bounds of reason." *Id.* at n. 3 (internal quotations omitted). Appellant's brief accused opposing counsel of "'[t]aking the low road,' of characterizing [respondent's counsel's] argument as a 'a vain effort to make up for the deficiencies in her proof,' of describing an expert's testimony as 'gibberish.'" *Id.* Appellant's briefing also improperly criticized the trial court as having "commit[ed] a 'whopping' miscarriage of justice, of paying 'lip service' to a legally recognized distinction, and of having 'plucked [numbers] out of thin air' . . . 'The trial court has no discretion to use overblown financial figures to determine spousal support. As with all computer programming, garbage in, garbage out.'" *Id.*

6. *In re S.C.*, 138 Cal. App. 4th 396 (2006)

In affirming the orders of the juvenile court declaring a 15-year old minor with Down syndrome dependent and finding it detrimental to return to her mother's custody after being sexually abused by her stepfather, the appellate court referred the opinion to the California State Bar due to the gross misconduct contained in appellant's briefing. The court noted that appellant's 202-page opening brief was "a textbook example of what an

appellate brief should not be." *Id.* at 400. The court further described appellant's brief as "failing to provide meaningful legal analysis and record citations for complaints raised," (*Id.* at 408) and "an unprofessional and, in many respects, virulent brief." (*Id.* at 401.)

The court commented that appellant's brief "attack[ed] the character and motives of a social worker in this case" by gross exaggeration of the facts. *Id.* at 413. Appellant's counsel mischaracterized a physical examination as providing zero support of penetration when the examination was in fact inconclusive as it never occurred. Second, appellant's counsel mischaracterized the interviews by social workers with the minor as showing she "cannot distinguish between truth and fantasy," when the interviews actually showed "a developmentally disabled girl who clearly understood the difference between being truthful and telling a lie." *Id.* Appellant's counsel also misrepresented: (i) orders by the juvenile court regarding visitation, which were clearly refuted by the record; (ii) holdings of appellate decisions cited, which were clearly refuted by the court's review; and (iii) quoted expert authorities, which upon examination were not expert statements, but a recasting of her cross-examination questions.

The court took great issue with "the uncivil, unprofessional, and offensive advocacy employed by appellant's counsel" in attacking the mental ability of the minor, as "[t]he attack [was] stunning in terms of its verbosity, needless repetition, use of offensive descriptions of the developmentally disabled minor, and misrepresentations of the record." *Id.* at 420. Appellant's counsel "*attribute[d] to the judge* a statement that the minor, 'with an IQ of 44' and 'test results . . . in the moderately retarded range in all areas, is more akin to broccoli, than to a single celled amoeba,'" when in fact those were appellant's counsel's words. *Id.* at 421. Appellant's counsel also mischaracterized the expert witness in saying, "Dr. Miller think[s] [the minor is] pretty much a tree trunk at a 44 IQ." *Id.* Appellant's counsel belittled the minor's testimony about being sexually molested by accusing the minor of having "several more versions of her story, worthy of the Goosebumps series for children, with which to titillate her audience." *Id.* Appellant's counsel additionally described the minor's testimony as "jibber jabber," "meaningless mumble," "mumbles, in a world of her own," and "little more than word salad." *Id.*

The court also admonished appellant's counsel for disparaging the trial judge by making unsupported assertions the judge acted out of bias. Appellant's counsel claimed the trial judge pressed the minor into saying words the judge wanted and mischaracterized the judge's words to claim he admitted he was biased. In examining the record, the court noted the judge had asked questions to understand the minor's testimony and "no reasonable

attorney could interpret the judge's questions of the minor as a biased effort to help DHHS prove its case." *Id*. at 423. Next, the court remarked appellant's counsel had taken one statement by the trial judge out of context: "So that whole process is one in which I was very active, and I wasn't just an impartial person sitting on the sidelines evaluating the child." *Id.* In the proper context it was not an admission of bias, but "an observation that because of the minor's developmental disability, the judge was unable to just sit back to hear and observe her testimony; instead, he was required to get involved in the questioning in order to ensure that he understood the minor's answers." *Id.* at 424.

7. *D.M. v. M.P.*, No. G023935, 2001 WL 1527713 (Cal. Ct. App. Nov. 30, 2001)

The appellate court reversed the trial court's sanctions against (i) the mother's counsel in the amount of $368,000 and $16,200, and (ii) the ex-husband's counsel in the amount of $297,000 holding the lower court had abused its discretion. The underlying case involved a paternity suit for increased child support brought by the mother against the father, whom she had a child with while married to her husband (whom she later divorced, i.e., ex-husband). The father had previously recognized the child as his own, paying monthly child support, as it there was little doubt he was the father given the ex-husband had previously had a vasectomy. However, when confronted with a paternity suit, the father resisted a DNA-test and the mother's suit and requests for attorneys fees claiming she must first overcome the statutory presumption the ex-husband was the father given their marriage. After a drawn out litigation, the father was eventually found to be the rightful father, but the trial judge awarded sanctions against counsel for the mother and ex-husband for over-litigating the case, bad-faith tactics, and general incivility.

The appellate court held the trial court erred in finding the mother's counsel over-litigated the case by "acting frivolously in trying to obtain pendente lite support and fees." *Id.* at 6. Instead, the court noted "[t]he main reason that this paternity case took such a ridiculously long time to try was the father's insistence on litigating the issues of the nature of the ex-husband's relationship with the child and the reason for the mother's delay in bringing suit." *Id.* Under the basic facts of the case, there was "enough there for a 'preliminary determination' of paternity," meaning the mother's counsel's requests for fees was not frivolous. *Id.*

The appellate court also held that trial court abused its discretion in awarding sanctions for perceived bad faith tactics delaying the litigation and general incivility. The lower court had stated "this case has not been a pleasant one for the court," warned "many of the behaviors that [the court] observed could conceivably be career threatening," and laid a trap "to confirm that counsel had continued to engage in bickering, accusation and miscommunication between the parties and their counsel" after being instructed otherwise. *Id.* at 3-4. The trial court found inappropriate behavior among all parties' counsel: (i) mother's counsel had filed frivolous motions to obtain fees and lied about delaying the filing because of fear; (ii) ex-husband's counsel had frivolously attacked the integrity of opposing counsel while also giving false testimony about an abortion; and (iii) father's counsel had insinuated opposing counsel were "padding the bills" or "milk[ing] the case." *Id.* at 4. The appellate court disagreed held that the mother's counsel's attempts to gain fees and support were not frivolous given the facts of the case, the sanctions for false statements contravened traditional due process, and that the ex-husband's counsel's attacks on the integrity of opposing counsel were not frivolous given the record.

While the court noted the "growing incivility among attorneys has commanded considerable attention," the court remarked this appeal "presents a textbook case of incivility among attorneys, but unfortunately also presents a textbook case in how not to go about correcting it." *Id.* at 8. In reversing the sanctions, the court remarked: "No doubt the trial judge's motive here was a worthy one. Civility in the profession ought to be promoted by a strong hand from the bench. But sanction orders (particularly large ones) must surely be a disfavored means of doing so. Given the intense competitive pressures facing lawyers today, the opportunity *to have your opponent pay part of your client's bill* has become too much of a temptation: Judges have the duty to curb counsel's temptation in that regard." *Id.* Further, the court noted the danger in waiting to oppose sanctions at the end of case, as well as the unsuitability of laying a trap, because it risks "all kinds of conduct, ranging from lack of professional courtesy to something really bad will be[ing] jumbled together," so that "the relationship between the bad conduct and the amount of sanctions will be attenuated." *Id.*

8. *Sullivan v. Lotfimoghaddas*, No. B279175, 2018 WL 3017190 (Cal. Ct. App. June 18, 2018)

The appellate court affirmed the judgment of the trial court and denied appellant's motion for a new trial based in part on inappropriate arguments made by respondent's counsel to the jury. Appellant's counsel had requested

a new trial after the jury found respondent was not negligent concerning a car crash between the parties. The court denied appellant's counsel's motion because any misconduct was not prejudicial and appellant's counsel had not properly objected at trial. In affirming the lower court, the court did note two instances of unprofessional and uncivil conduct by respondent's counsel when addressing the jury during closing arguments.

Respondent's counsel had improperly appealed to the jury's self-interest by arguing the community's time and resources were being wasted for two trials "all based upon lies." *Id.* at 7. Respondent's counsel continued stating "if as a community we allow that type of misuse of scarce resources and good people's time, that maybe Shakespeare was right: First thing, let's kill all the lawyers." *Id.* The court noted respondent's counsel's argument was an improper and troubling argument to be made, especially because it was unsupported by any evidence.

Further, the court admonished respondent's counsel's "questionable advocacy" in commenting on the fact appellant's son was present during appellant's cross examination. *Id.* at 8. Respondent's counsel had said, "the plaintiff chose to allow his son to sit in this courtroom while he was cross-examined and shown to have lied at a public forum by his own testimony. He allowed his son to observe him in an attempt to misuse and manipulate this process for financial gain. That's wrong. That's really wrong. And killing all the lawyers won't fix that." *Id.* The court noted in making a "jury argument that attacks a litigant's personal integrity, impugns his parenting decisions, and gratuitously suggests the exercise of his constitutional right to petition the courts is worse than murdering attorneys, falls below the level of acceptable advocacy and civility that courts and bar associations are striving to restore in our profession." *Id.* Citing the ABTL civility guidelines, the court issued a reminder that "[e]ven when advocating zealously, counsel must recognize there are lines that are not to be, and need not be, crossed." *Id.*

9. *Fridman v. Beach Crest Villas Homeowners Ass'n*, No. G052868, 2018 WL 1373398 (Cal. Ct. App. Mar. 19, 2018)

In a protracted litigation between a couple and their homeowner's association, the appellate court concluded by urging the parties to return to civility. The original dispute was regarding the alleged improper installation of air conditioners in which the Fridmans were successful in their arbitration and were awarded attorneys' fees. As the homeowners association had no assets, to be awarded the money a writ of mandate was needed to compel a special assessment to pay the fees. While the Fridmans received this, they also lost a subsequent suit against the homeowners association president,

declared bankruptcy, and assigned the right to the fees to their attorneys. During bankruptcy, the Fridmans attempted to enforce their writ of mandate, but were denied as they no longer had a beneficial interest.

As the court concluded its denial of Fridmans' motion, they "strongly urge[d] all sides to quickly and civilly resolve the litigation between them before even more attorney fees are expended." *Id.* at 8. The court noted that various other courts had chronicled the rampant incivility among the parties: "The amount of energy which the parties have devoted to this litigation, and the extraordinary degree of venom they have poured on each other, make it clear that this case is more of a personal vendetta than a rational attempt by the parties to protect their legitimate interests. To say that either of these parties is acting in 'good faith' stretches the common meaning of that phrase to the breaking point." *Id.* (internal citation omitted). The trial court commented, "Finally, this Court notes the lack of professional civility and courtesy displayed by counsel in this action. The Motion, Opposition, and Reply are replete with harsh accusations, personal attacks, and unsupported tirades. Such attacks have no place in litigation." *Id.*

10. *Block v. Bramzon*, 2021 WL 223154 (Cal. Ct. App. Jan. 22, 2021)

This unpublished decision is included here due to the conduct and statements at issue in the decision.

Dennis P. Block dba Dennis P. Block & Associates ("Block") is a leading landlords attorney, and his firm handles unlawful detainer matters through employee attorneys, including co-Plaintiffs Gold, Rahsepar, and office manager Riesen. (Collectively Block and co-plaintiffs are referred to as "Plaintiffs"). *Id.* at *1. BASTA is a tenant rights law firm, founded by Bramzon, and defends unlawful detainer actions through employee attorneys. *Id.*

Block sued BASTA, Bramzon and another BASTA attorney Schulte, alleging that Defendants created, administered, and maintained a website, "dennisblock.com", and a twitter handle "@dennispblock" with the name "not Dennis Block", and the author named "Very Stable Genius Not Dennis P. Block," all without Block's permission. *Id.* at *1-2. Both the website and twitter account were alleged to post defamatory and derogatory comments, as well as post Block's personal cell phone number, home address, and photos of Plaintiffs and family members. *Id.* Defendants were also alleged to spam Block's law firm with, at times, thousands or more solicitations per day. *Id.* at *2.

Defendants filed anti-SLAPP motions to the complaint, contending that the twitter statements were statements made in connection with an issue of public interest, arguing that Block had made himself a public issue and the twitter account was merely a parody of Block's actual twitter feed. *Id.* at *3. The Court of Appeal disagreed. While eviction is an issue of public interest, Defendants' tweets were too tangentially related to constitute protected speech. *Id.* at *5. As to the allegedly libelous statements, Block's "trustworthiness" is also too tangentially related. *Id.* "A majority of the statements consist of vulgar and/or adolescent personal insults, misogynistic, racist, and xenophobic comments, and other slurs having nothing to do with any reasoned discussion of trustworthiness, competence, or any other 'public issue or an issue of public interest.'" *Id.* (*See, e.g.* "Dennis Block & Associates is helping to #MAGA by evicting one latino at a time!"; "My associate Nasti Hasti really needs to start wearing longer skirts to court. Or underwear. Or [omitted]"; "A client called to complain that our Manisha Bajaj was 'dressing like a prostitute'. I told him until wait until he sees 'Nasti Hasti' Rahsepar!"). [Further example tweets at quoted at page 5 and in the footnotes.]

The Court also found the tweets not to contribute to a public debate. *Id.* at *6. Recognizing the parties as frequent opposing counsel, the purpose of the tweets were to slam an adversary. *Id.* Finally, non-communicative acts, like the website's redirection of visitors from "dennisblock.com" to another firm website, or spamming Block's firm, are not protected acts. *Id.* The Court concluded with a comment on civility, and required the parties to brief the issue of whether or not the comments were a string of incivility (which Defendants conceded) but also, questioned whether they constituted an ethical violation. *Id.* at *7. The matter was remanded to the trial court to make this determination, and to determine sanctions, if appropriate. *Id.*

The author of this summary opines that the appellate court's question highlights the limitations of California's ethics rule as compared to the Model Rule on antidiscrimination. Some of the tweets openly sexually harassed and/or commented on an opposing counsel's gender and ethnicity in a sexually harassing way, and/or appeared directed towards inciting racial or national hostility. However, under California Rules of Professional Conduct Rule 8.4.1, discipline would not likely be prohibited, because although they are about opposing counsel, they are not made "in the representation of a client." By contrast, those same tweets would be a violation of Model Rule 8.4(g), which covers conduct "related to the practice of law," without requiring a nexus to a client matter. California expressly rejected the broader scope of the Model Rule. (*Compare Martinez v. O'Hara* (2019) 32 Cal. App. 5th 853, where counsel's reference to the female judicial officer's ruling as

"succubustic" and accusing the trial court of intentionally refusing to follow the law as conduct justifying referral to the State Bar.)

B. Unfounded Accusations or Representations

1. *Karton v. Ari Design & Constr., Inc.*, 61 Cal. App. 5th 734 (2021), *as modified on denial of reh'g* (Mar. 29, 2021), *review denied* (June 23, 2021)

The appeals court affirmed the trial court's decision to award only $90,000 in attorney fees to appellant of the $292,140 sought, in part due to the incivility of appellant's briefing. Appellant had successfully represented himself in an underlying action concerning the construction of his home by respondents, who were shown to have been unlicensed. After winning the award, appellant (with another counsel) asked for a large amount of attorney fees, but the trial court found the request excessive and awarded a lower amount.

The lower court noted that appellant's briefing for attorney fees "was replete with attacks on defense counsel such as that defense counsel filed 'knowingly false claims of witness tampering,' 'her comments were frivolous,' something was 'typical of the improper tactics employed by defendants and their counsel,'" and contained around 300 pages of extra documentation that went "so far beyond what was necessary on this matter." *Id.* at 741-42. The lower court attributed some of the over-litigation to appellant seeming "agitated about this case" as it was "your personal matter, and . . . you have strong feelings about this case and strong feelings about the course of this litigation and how it has proceeded." *Id.* at 742.

In affirming the lower court's fee amount, the court noted that attorney skill is a factor in deciding whether to adjust a fee amount, and "civility is an aspect of skill" where "excellent lawyers deserve higher fees, and excellent lawyers are civil." *Id.* at 747. The court highlighted the importance and desirability of civility for litigation for multiple reasons. First, civility "is an ethical component of professionalism." *Id.* Second, civility lowers the costs of dispute resolution by making it more efficient by "allowing disputants to focus on core disagreements and to minimize tangential distractions." *Id.* In contrast, incivility acts as "sand in the gears" and "can rankle relations and thereby increase the friction, extent, and cost of litigation . . . turn[ing] a minor conflict into a costly and protracted war" where "[a]ll sides lose, as does the justice system." *Id.*

The court further observed that when appellant's counsel was questioned about his incivility, appellant "respond[ed] to criticism of their personal attacks by attacking." *Id.* Counsel "continued to assert opposing

counsel was a liar," despite the record "not finding someone knowingly made false statements." *Id.* at 748. Next, counsel defended calling opposing counsel's comments frivolous despite not being able to cite any finding of fault from the letter in question. Finally, counsel claimed "denigrat[ing] the actions of opposing counsel as 'typical of the improper tactics employed by defendants and their counsel,'" was within the scope of approved advocacy. *Id.* Appellant's counsel continued attacks on appeal demonstrated that the lower court was "within its discretion to conclude the [appellant] conducted litigation that was less than civil" and reduce the requested attorney fees. *Id.* The court remarked that all counsel should be mindful that in fee-shifting cases, "low blows may return to hit them in the pocketbook." *Id.* at 747.

2. *Kim v. Westmoore Partners, Inc.*, 201 Cal. App. 4th 267 (2011)

The appellate court sanctioned respondent's counsel in the amount of $10,000 regarding inappropriate conduct on appeal. Under false pretenses, counsel received an extension to file their response brief and ultimately submitted a brief that was almost identical to another brief counsel had filed in another case. As part of the duplicate brief, counsel included identical accusations against opposing counsel of professional misconduct in "falsely arguing the case" and "that the appeal is frivolous, and a request for sanctions in the amount of $20,000." *Id.* at 291. Even more egregious, counsel had reduced such accusations to boilerplate by simply redacting the facts of the earlier brief.

While the court took issue with much of counsel's conduct, it was especially troubled by counsel's use of boilerplate accusations: "It is difficult for us to express how wrong that is. Sanctions are serious business. . . . A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic." *Id.* at 293. The court then recognized the unfortunate reality that the legal profession is "rife with cynicism, awash in incivility." *Id.* However, the court resolved: "It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." *Id.* The court was clear that sanctions should be reserved only for serious and significant instances of misconduct and incivility such as dishonesty and bullying.

C. Litigation Tactics Unbefitting the Profession

1. *Ahanchian v. Xenon Pictures, Inc.* 624 F.3d 1253 (9th Cir. 2010)

Ahanchian filed a complaint against Defendants for copyright infringement, breach of an implied contract, and unfair competition in violation of the Lanham Act. *Id.* at 1256. During the trial, Defendant sought an extension and Ahanchian exhibiting "professional courtesy expected of officers of the court" agreed. *Id.* But the district court rejected the extension. The district court set the trial date for November 18, 2008. *Id.* The discovery cutoff date was September 2, 2008, and the last day for hearing motions was on September 15, 2008. *Id.* August 25, 2008 was the last date to file any motion for summary judgment. *Id.*

On August 25, 2008, Defendants moved for summary judgment seeking dismissal of all Ahanchian's claims, and for terminating sanctions resulting from a discovery dispute, with roughly 1,000 pages of supporting exhibits and declarations. *Id.* Under the local rules governing briefing schedules, September 2, 2008—the day after Labor Day— was the deadline for Ahanchian to file his opposition, i.e., he had eight days, three over the Labor Day weekend, to draft his oppositions to the motions. *Id.* Ahanchian asked the Defense counsel to stipulate a week's extension, so they could review the voluminous documents and because the lead attorney on the case was out of town on a pre-planned engagement. *Id.* Defense counsel refused. *Id.* at 1257. The next day, Ahanchian filed a motion with the court to grant an extension and defense counsel opposed it. *Id.* The Court denied the extension. *Id.* at 1258.

On September 5, 2008, Ahanchian filed his opposition, three days late, with an ex parte application seeking permission to make the late filing. *Id.* at 1257. Defendant also opposed this motion. *Id.* On September 10, 2008, the district court granted Defendant's summary judgment while simultaneously denying Ahanchian's ex parte application. *Id.* Additionally, the district court also awarded the Defendants attorney fees. *Id.* at 1258. Ahanchian appealed. *Id.*

The Ninth Circuit Court of Appeals reversed and found the district court had abused its discretion. *Id.* at 1260. As it pertains to the initial request for an extension to file the opposition, the Court found Ahanchian's counsel had a good cause for requesting the extension and thus it should have been granted. *Id.* There was no proof that Ahancian's counsel was acting in bad faith or that granting the extension would have made it unfair to Defendants. *Id.* The trial court, had it had doubts about either "should have held an evidentiary hearing or sought more information, instead of summarily denying the request." *Id.* By its order, the trial court "doom[ed]"

Ahanchian's case "on the impermissible ground that he had violated a local rule." *Id.* Turning next to the request to allow the late filed opposition, the Court again found the district court had abused its discretion by applying an impermissible *per se* rule instead of the equitable balancing test required by circuit precedent. *Id.* at 1262.

The Court next turned to defense counsel, who contributed to the district court's errors, and who "disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case." *Id.* at 1263. Finding that counsel had taken knowing advantage of the time constraint created by local rules, the federal holiday, and lead counsel's out of state obligation, and further compounded the prejudice to Ahanchian by fiercely opposing Ahanchian's efforts to rectify the situation, the Court cited to the California Attorney Guidelines of Civility and Professionalism, §1:

> "The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice."

Id.

2. *Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508 (C.D. Cal. 2019)

In a footnote ruling on an *ex parte* motion, the court generally cited the ABTL "Civility" report as reminder of counsels' professional obligations to one another. In the course of scheduling medical examinations of the plaintiff, defendant's counsel sent an email on November 13, 2019, to plaintiff's counsel requesting parties to formally stipulate plaintiff would attend the examinations once physicians were secured. Plaintiff's counsel did not respond to the email, prompting defendant's counsel to file an *ex parte* motion. In the footnote, the court noted that while plaintiff's counsel may have been extremely busy and had a good explanation for not responding, "the better practice is to promptly respond to communications from opposing counsel, even if only to acknowledge receipt of a request, to demonstrate respect for one's opponent." *Id.* at n. 1.

3. *Lasalle v. Vogel*, 36 Cal. App. 5th 127 (2019)

In reversing a $1 million default judgment against appellant related to a legal malpractice claim, the appellate court grounded their justification on

basic standards of professionalism in Section 583.130 of the Code of Civil Procedure, which mandates cooperation among the parties. Appellant had been sued by respondent's counsel for legal malpractice and appellant did not respond to the complaint within 35 days, or after respondent's counsel's letter on the 36th day threatening to enter a default judgment if appellant did not respond by the close of the next day. Two weeks after respondent's counsel had requested an entry of default, appellant retained counsel and filed a motion to set aside default, explaining her failure to file an answer as a result of being a single mother practicing law while also taking care of her family, going through a divorce, and receiving notice her property and residence had gone into default. The lower court denied appellant's motion and entered a default judgment. Under its analysis of Section 583.130, the court accepted appellant's explanation for delay as adequate and rejected respondent's counsel's tactics of unreasonably short deadlines to reach default judgment as unethical and contrary to law and legislative policy. The court hoped in future situations, "opposing counsel [would] act with 'dignity, courtesy, and integrity.'" *Id.* at 141.

The court also used its opinion as a warning that the legal "profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130" and "urge[d] a return to the professionalism it represents." *Id.* at 130. Its analysis began by addressing the history of California courts battling incivility and unprofessionalism over the past 30 years by advising the bench and bar to practice with more civility. The court remarked: "Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success." *Id.* at 134. Citing the California state bar's attempts to fix the problem with a civility requirement, the court observed that "the problem is not so much a personal failure as a systemic one." *Id.* Finally, the court ended their opinion by citing remarks by former Chief Justice Warren Burger that "[L]awyers who know how to think but have not learned how to behave are a menace and a liability . . . to the administration of justice . . . [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best." *Id.* at 141.

4. *Pham v. Nguyen*, 54 Cal.App.4th 11 (1997)

Pham sued Nguyen for dental malpractice. *Id.* at 14. Four days before trial, both parties requested a continuance claiming they did not have time to

depose their expert witnesses. *Id.* The trial court denied their request. *Id.* On the day of trial, Nguyen requested a continuance, arguing that her expert witness would be unavailable. *Id.* The trial judge denied the continuance and at the conclusion of the trial, the judge found in favor of Pham. *Id.*

Ngyuen appealed contending it was an abuse of discretion to deny the continuance, particularly in light of Code of Civil Procedure §595.2, which states: "In all cases, the court shall postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed thirty (30) days, when all attorneys of record of parties who have appeared in the action agree in writing to such postponement." *Id.* The Court of Appeals affirmed the trial court's decision to deny the continuance finding the statute was "directory." *Id.* at 15. Even if both parties sought a continuance. *Id.* The Court emphasized that the courts should respect the legislative policy and grant continuances under CCP §595.2 when it is practical. *Id.* But when the accommodation is "impractical, the judicial control reposed in the court by the Constitution must prevail." *Id.*

However, the Court cautioned against being too strict on granting continuances, stating the Court aims to provide a more respectful environment for litigation. *Id.* at 17. "The law should also encourage professional courtesy between opposing counsel—which is precisely what the Legislature did in section 595.2. The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today. Bitterly fought continuance motions are not particularly productive for either the administration of justice generally or the interests of the litigants particularly. When opposing counsel needs a continuance, courts should look to section 595.2 as a statement of policy in favor of professional courtesy, not churlishness." *Id.*

Ultimately, the Court affirmed the decision to deny the continuance because Nguyen failed to provide any substantial explanation as to why the expert was unavailable. *Id.* at 18. Furthermore, there was no indication that Nguyen's witness was under subpoena. *Id.*

5. *Green v. GTE California, Inc.*, 29 Cal.App.4th 407 (1994)

Green sued defendant for wrongful termination. *Id.* at 408. On June 23, 1993 defense counsel was to conduct Plaintiff's deposition. *Id.* at 408-09. Plaintiff's attorney had a history with defense counsel and believed that defense counsel used "intimidation tactics" during depositions. *Id.* at 409.

Hoping to capture the "intimidation tactics" Plaintiff's counsel brought his own video camera. *Id.* Defense counsel objected and told Plaintiff's counsel he had not given proper notice to use the video camera under Code of Civil Procedure 2025. *Id.* Plaintiff's counsel agreed not to tape defense counsel, unless he perceived her to be using "intimidation tactics." *Id.* On the second day of the deposition, defense counsel refused to allow plaintiff's counsel to film at all. *Id.* Both counsels then engaged in what the court called a "verbal altercation, so lacking in civility, that we decline to repeat it here." *Id.* Following the altercation, the defense counsel refused to continue with the deposition. *Id.* Both parties then filed sanctions against one another. *Id.*

Plaintiff's counsel filed a motion to terminate the Plaintiff's deposition and obtain sanctions against defense counsel. *Id.* At the hearing on the motions, the plaintiff said his motion was designed to move discovery along. *Id.* The court responded by saying, "you were wrong in the first instance and you are wrong now and what's worse, you know you are wrong." *Id.* As a result of plaintiff's counsel's actions the trial court sanctioned him $950. *Id.* at 408. Plaintiff's attorney appealed the sanctions. *Id.*

The Court of Appeals agreed with the trial court. *Id.* The Court's exasperation is evident from its first sentence: "If this case is an example, the term 'civil procedure' is an oxymoron." *Id.*

The Court said Plaintiff's counsel's belief that his opposing counsel acted improperly in past cases cannot be a basis for relief. *Id.* at 410. "Plaintiff's counsel's attempted novel use of the video camera ran afoul of the notice requirements of Code of Civil Procedure section 2025, subdivision (l)(1). He did not give the 3–day notice required by the statute." *Id.* Furthermore, there was doubt on whether CCP §2025 applies to videotaping opposing counsel instead of the witness. *Id.* The court said the sanctions were warranted and that "cases like this one clutter our courts." *Id.* Moving forward, such an order was not appealable. *Id.* at 409-10. The Court concluded: "[b]oth the legal profession and the courts would be better served if litigation arose from legitimate disputes between the litigants instead of wasteful bickering between their attorneys." *Id.* at 410.

6. *Wong v. Genser*, No. A133837, 2012 WL 6028626 (Cal. Ct. App. Nov. 30, 2012)

In dismissing an appeal as untimely filed, the appellate court also imposed sanctions in the amount of $8,500 against appellant's counsel for

prosecuting a frivolous appeal and his dishonesty and lack of remorse to the court. On November 28, 2011, appellant's counsel appealed the denial of a motion to set aside a dissolution of marriage issued some six months earlier, on May 31, 2011. The appeal was not immediately dismissed for untimeliness because the court clerk had not maintained a copy of the fax serving notice of the May 31 order to appellant, and so the court was unaware of the order. After diligent investigation, respondent's counsel filed a motion to dismiss raising the issue of timeliness for appellant and the court.

Appellant's counsel was asked by the court clerk to produce a copy of the May 31 order if they had received it. A junior lawyer for appellant's counsel told the clerk he had found a copy, but it had privileged notes written on it, so he did not send a copy of it. Appellant's counsel then filed an opposition brief without addressing the question of timeliness raised by respondent's counsel. Despite refusing to produce the fax in a phone conversation with respondent's counsel, appellant's counsel filed a supplemental brief claiming respondent's counsel had "incorrectly and disingenuously" alleged the appeal was untimely. *Id*. at 3. Respondent's counsel again emailed appellant's counsel asking for a copy of the fax, this time threatening sanctions if it was withheld, and appellant's counsel refused. Upon a later request, appellant's counsel sent a copy of the fax to the court clerk. Respondent's counsel was notified and then filed it along with a request for sanctions. In his opposition, appellant's counsel again ignored the timeliness issue and refused to acknowledged he "did anything inappropriate relative to the issue of the document in question." *Id.* at 5.

The court held it was unquestionable that appellant's appeal was frivolous as it was untimely filed. Next, the court imposed sanctions on appellant's counsel because he either knew, or should have known, that the appeal was untimely, but still persisted. Further, appellant's counsel "impliedly represented to [the court] that no such notice had been given, although by then he was well aware that it had." *Id.* at 10. The court was left to infer that appellant's counsel "was attempting to prevent [the court] from learning of the existence of the notice." *Id.* at 11. The court noted it was "especially disturbing [appellant's counsel's] steadfast refusal to acknowledge his breach of his duty to provide us with a document bearing on our jurisdiction and to express any remorse for that breach." *Id.* at 8. The court concluded with a final word on civility and how everyone "would have been spared much effort if [appellant's counsel] had accorded [respondent's counsel] the simple courtesy of providing a copy of the fax notice when he requested it." *Id.* at 14. The court further condemned appellant's counsel's uncivil attacks on opposing counsel in calling his arguments "disingenuous"

and a "smokescreen." *Id.* The court hoped appellant's counsel's "lack of professionalism and respect" was not common, as "it demeans the profession as a whole and our system of justice." *Id.*

7. *Interstate Specialty Mktg., Inc. v. ICRA Sapphire, Inc.*, 217 Cal. App. 4th 708 (2013)

The appellate court reversed an order by the trial court for sanction's on appellant's counsel in the amount of $5,076.16 and noted simple acts of civility could have avoided the situation. In filing their complaint, appellant's counsel had attached an incorrect copy of the contract between the parties, a fact that was raised by respondent's counsel soon after but not corrected. Months later, after receiving admissions the contract was not the final version, respondent's counsel filed a motion for summary judgment. It was only at this time appellant's counsel sought to amend their complaint with the correct contract version. The trial court denied the motion for summary judgment, allowed the complaint to be amended, but then initiated sanctions against appellant's counsel for their mistake. The court reversed the trial court as appellant's counsel had filed their amendment within the safe-harbor allowed by the order to show cause for sanction and the sanctions were unsupported by law.

In reversing the trial court, the court specifically commented that "[a] little civility on [respondent's counsel's] part could have resolved the problems in this case early on, saved everyone a lot of time, money, and toner, and spared us the unpleasant role of judicial scold this case has forced upon us." *Id.* at 711. Respondent's counsel should have resisted "the temptation to exploit an adversary's gaffe so as to deny him a hearing on the merits," and "picked up the telephone or written a letter and simply explained that [appellant's counsel] had the wrong document, expressed a willingness to stipulate to an amendment, and only if Interstate had persisted in doing nothing, brought some sort of motion or other proceeding to correct the mistake. That would have been the civil and professionally correct thing to do." *Id.* at 715. Instead, defendant's counsel "evidence[d] a disturbing predisposition to pick up the sword before the plowshare," a practice that should be "turn[ed] away from." *Id.*

The court also pointed out that "[t]his case illustrates what happens when we turn to sanctions too quickly." *Id.* at 710. Sanctions can "serve a purpose other than punishment. If we cannot convince attorneys to conduct themselves honorably and ethically by appealing to their character, we can sometimes bring them into line by convincing them that obeying the rules is the route of least resistance—the less expensive alternative." *Id.* However,

"[s]anctions are a judge's last resort. At bottom, they are an admission of failure. When judges resort to sanctions, it means we have failed to adequately communicate to counsel what we believe the law requires, failed to impress counsel with the seriousness of our requirements, and failed even to intimidate counsel. . . . We don't like to admit failure so we sanction reluctantly." *Id.*

8. *Lossing v. Superior Ct.*, 207 Cal. App. 3d 635 (1989)

The court of appeals reversed the trial court and held that a malicious prosecution action brought against defendant's counsel should be dismissed. Defendant's counsel had been unable to obtain depositions of plaintiffs and unsuccessfully filed an order to show cause re contempt for plaintiffs refusal to comply. Plaintiff's counsel then filed an action for malicious prosecution and intentional inflection of emotion distress against defendant's counsel.

After holding the malicious prosecution action could not be maintained, the appellate court noted there were numerous other malicious prosecution actions pending in their court, and made concluding comments to remind all attorneys of their professional responsibilities with respect to civility:

> "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." *Id.* at 641.

II. **Incivility Relating to Bias**

A. *Briganti v. Chow*, 42 Cal. App. 5th 504 (2019), *reh'g denied* (Dec. 11, 2019)

The appellate court dedicated a specific section of its opinion to serve as a lesson on civility within the legal profession. In the appeal from the partial denial of an anti-SLAPP motion, counsel for appellant made highly inappropriate and sexist comments regarding the trial judge in their reply brief. Counsel's opening paragraph stated that the trial judge was "an attractive, hard-working, brilliant, young, politically well-connected judge on

a fast track for the California Supreme Court or Federal Bench," but "with due respect, every so often, an attractive, hard-working, brilliant, young, politically well-connected judge can err! Let's review the errors!" *Id.* at 510-11. When questioned at oral argument about the statements, counsel noted it was intended as a compliment.

The appellate court noted that counsel's brief "reflects gender bias and disrespect for the judicial system." *Id.* at 511. The court explained that calling a woman judge attractive is both irrelevant and sexist, whether intended as a compliment or not, and would not have occurred with a male judge. This type of gender discrimination is a part of the larger issue of incivility affecting the legal profession and demeans the seriousness of judicial proceedings. The court specifically cited their responsibility to "take steps to help reduce incivility . . . by calling gendered incivility out for what it is and insisting it not be repeated." *Id.* at 511-12. While the court reminded counsel that more serious incivility would demand a report to the state bar, the court's intention was "not to punish or embarrass, but to take advantage of a teachable moment." *Id.* at 510.

B. *Martinez v. O'Hara*, 32 Cal. App. 5th 853 (2019), *reh'g denied* (Mar. 22, 2019), *review denied* (June 12, 2019)

The appellate court noted plaintiff's attorney had committed misconduct in manifesting gender bias in reference to the trial judge and reported counsel to the state bar. In filing his notice of appeal, plaintiff's counsel referred to the female judge's ruling as a "disgraceful order," "succubustic," and "resulting [in] validation of the defendant's pseudohermaphroditic misconduct." *Id.* at 857. The court noted that "succubus" is defined in the dictionary as "1: a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus 2: demon, fiend 3: strumpet, whore." *Id.* The court stated that plaintiff's counsel referring to a female judicial officer in such a way "constitutes a demonstration 'by words or conduct, bias, prejudice, or harassment based upon ... gender' (Cal. Code Jud. Ethics, canon 3B(6)) and thus qualifies as reportable misconduct." *Id.* at 858. The court further noted that many of the other words and phrases in the notice have no place in a court filing. In addition to reporting counsel's conduct to the state bar, the court chose to publish only the portion of the opinion admonishing counsel "to make the point that gender bias by an attorney appearing before us will not be tolerated, period." *Id.* at 855.

C. *Martinez v. Dep't of Transportation*, 238 Cal. App. 4th 559 (2015)

The appellate court reversed the judgment of the trial court due to prejudicial attorney misconduct on the part of defendant's attorney and also referred the opinion to the California state bar. Plaintiff had been injured in a motorcycle accident and sued the California Department of Transportation (Caltrans) for use of a dangerous road barrier. In the course of a successful defense, defendant's attorney committed "egregious attorney misconduct." *Id.* at 561. Defendant's counsel made inappropriate statements alluding to the dire financial situation of Caltrans, repeatedly violated the trial court's in limine orders even after sustained objections, and "gratuitously besmirching the character of plaintiff." *Id.*

The lower court had barred any references to plaintiff's dismissal from a previous job and references to the ministerial motorcycle group "Set Free Soldiers," of which plaintiff was an ordained minister. During multiple cross-examinations, defendant's counsel repeatedly referenced plaintiff's job dismissal in violation of court order "to insinuate [plaintiff] was lazy and irresponsible . . . [and] was using the accident to scam the legal system for money." *Id.* at 567. Further, at trial, defendant's counsel attempted to show the jury the skull and WW2 helmet symbol of the "Set Free Soldiers" during a cross-examination, but the judge put it under consideration. In response, defendant's counsel asked, "At the time of the accident, the motorcycle that your husband was riding had a skull picture on it wearing a Nazi helmet; right?" *Id.* at 565. At closing arguments, plaintiff's counsel attempted to correct the Nazi reference, but that allowed defendant's counsel to double down and use "the word "Nazi" six times in rapid succession . . . not just referring to an article of clothing but to [plaintiff] himself." *Id.*

The court stated that "[t]he law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Id.* at 566. The court explained that rule "prohibit[s] irrelevant ad hominem attacks" and "a defense attorney commits misconduct in attempting to besmirch a plaintiff's character," even if the personal attack is "by insinuation." *Id.* The court found defendant's counsel particularly egregious as the Nazi reference was irrelevant and because "she admitted she wanted to besmirch [plaintiff's] character because some positive evidence had come in (his church work) which tended to put him in a good light and—though she did not say this explicitly—counteract the easily exploitable image of plaintiff as a stereotypical low-life biker." *Id.* at 568.

III. **Incivility Directed at the Judiciary**

A. *In re Mahoney*, 65 Cal. App. 5th 376 (2021)

Attorney Mahoney filed a petition on behalf of his client for rehearing, in which he impugned the integrity of both the trial court and the Court of Appeal, rather than focusing on the law. *Id.* at 377. The Court of Appeal issued an order to show cause why he should not be held in contempt for that filing, which included statements such as:

> "• 'Our society has been going down the tubes for a long time, but when you see it in so black and white as in the opinion in this case, it makes you wonder whether or not we have a fair and/or equitable legal system or whether the system is mirrored by [sic] ignored by the actions of people like Tom Girardi.' (Pet. at p. 6.)
> "• Insinuation that respondent Consolidated Contracting Services, Inc. (Consolidated) may have prevailed because it had contracts with a third party 'who ... wields a lot of legal and political clout in Orange County.' (Pet. at p. 6.)
>
> "• '... [B]ecause of a judicial slight [sic] of hand with no factual basis, this court has altered the landscape and created a windfall for Consolidated.' (Pet. at p. 8.)
>
> "• Suggestion that this court did not 'follow the law.' (Pet. at p. 11.)
>
> "• Assertion that the court 'ignores the facts' in its opinion. (Pet. at p. 8.)
>
> "• Conclusion that this court 'indiscriminately screw[ed]' Salsbury. (Pet. at p. 11.)"

Id. at 378-79.

Instead of expressing contrition, Mahoney "doubled down", asserting that he had merely "'mentioned the obvious things that go on in Orange County which has a lot to do with The Irvine Company, plain and simple." *Id.* at 379. The Court of Appeal viewed this statement as a further impugning of the integrity of the court. *Id.* The Court further noted that Mahoney also did not recant at the OSC hearing, even though they tried to nudge him towards a more temperate position. *Id.* at 380. "…[W]e are confronted with a member of the bar who, after 52 years of practice, believes this is legitimate argument." *Id.*

"We have elsewhere lamented the fact modern law practice 'rife with cynicism, awash in incivility.' [citation] This kind of over-the-top, anything-goes, devil-take-the-hindmost rhetoric has to stop." *Id.* Contrasting the proper way to advocate, the court denounced Mahoney's method. "'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' [citations]. 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.'" *Id.* (citing *In Re Ciraolo* (1969) 70 Cal.2d 389, 394-95).

After discussing the long history of civility in the courts, the Court concluded:

> "We publish this decision as a cautionary tale. The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are.
>
> We are professionals. Like the clergy, like doctors, like scientists, we are members of a profession, and we have to conduct ourselves accordingly. Most of the profession understands this. The vast majority of lawyers know that professional speech must always be temperate and respectful and can never undermine confidence in the institution. Cases like this should instruct the few who don't.
>
> Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non."

Id. at 381.

The Court found Mahoney to be in direct contempt on two counts and fined him $2,000 total under Code of Civil Procedure §1209 and §1218, along with forwarding a copy of the judgment of contempt to the State Bar. *Id.* at 382.

B. *People v. Whitus*, 209 Cal. App. 4th Supp. 1 (2012)

In affirming the trial court's decision to sanction appellant $750 for failing multiple times to appear at trial readiness conferences, the appellate

court condemned appellant's oral advocacy on appeal as grossly inappropriate and referred the opinion to the California state bar to consider discipline. In the course of appellant's representation of defendant for a charge of driving under the influence, appellant did not appear at multiple trial readiness conferences despite the lower court specifically ordering his presence. The court affirmed the lower court's sanction given the unjustified absences, discretion to control the docket, and inadequate record supplied by appellant.

After deciding the merits, the court addressed appellant's oral advocacy on appeal that "[c]onsist[ed] of repeated tirades and impertinence . . . with a tone wholly condescending and accusatory . . . [that] is a serious and significant departure from acceptable appellate practice, or for that matter, practice in any court of law." *Id.* at 4. The court categorized appellant's oral argument "as a parade of insults and affronts," that "commenced with his demand that the deputy district attorney be removed from counsel table," "culminated with his rude insistence that the court 'state for the record that this is not a contempt proceeding,'" and "in between, the trial and appellate judges were repeatedly disparaged." *Id.* at 11-12. Among the inappropriate comments made by appellant to the judges, with a tone "best be described as confrontational, accusatory and disdainful," (*Id.* at 13) were:

- Describing the appellate division as "the fox [watching] the hen house." *Id.* at 12.
- "But it's common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don't talk like women in a sewing circle about us lawyers. You do. I know you do." *Id.*
- "I don't need to give you the universe of evidence in these proceedings. . . . You don't need a transcript." *Id.*
- "It must have been a while since you read the brief." *Id.*
- "I see a lot of judges that are really quick to bark at defense attorneys. We're always the fly in the ointment. I don't see judges willing to bark at prosecutors quite so readily. Maybe that's because if you upset them one too many times, they'll get one of their [minions to run against you and unseat you. As, I should add,] Michael Kennedy is now running for judge. I'm sure you've heard." *Id.*
- "OK. Well, hereinafter, I will honor your request. But before I proceed to honor your request, I'll tell you that in the 33 years that I've practiced law, I've appeared in front of many great men and women judges, including you three. And I've appeared in front of a few who are an embarrassment to our profession and [first and last name of the trial judge] is one of those people." *Id.*

- "When I came in and ultimately had a hearing, I had listened to the whole proceeding and I heard everything that [the trial court] had to say, and I addressed that in my arguments prior to his reaching his pre-printed ruling. And he said he didn't care. He was the epitome of the completely sealed and closed shut mind. You know . . . a human mind is a lot like a parachute. If it doesn't open, it will get you killed someday." *Id.* at 12-13.

The court chose to highlight appellant's inappropriate conduct because "[i]f left unaddressed, this sort of advocacy demeans the profession, lowers public respect, and conveys the impression that it is acceptable and effective." *Id.* at 4. The court observed: "The foundation of the rule of law is dependent upon lawyers treating judicial officers and each other with respect, dignity and courtesy. The need for civility and dignity is critically important, especially today, with the legal profession and the judicial branch of government under cynical attack from various quarters." *Id.* As officers of the court, professionalism and civility are "demanded of lawyers, at *all times* and at *all stages* of a case, no matter what the stakes involved." *Id.* at 13. The court concluded: "The civility requirements in no way reduce the practice of law to an antiseptic exercise. To the contrary, some of the most passionate and effective advocates for their clients also hold their adversaries, the Court, and its judicial officers in the highest regard. Passion can easily coexist with respect, dignity, and civility." *Id.* at 14.

C. *People v. Chong*, 76 Cal. App. 4th 232 (1999)

The appellate court rejected defendant's claim that the trial court committed prejudicial error by repeatedly admonishing his defense counsel in the presence of the jury. The court affirmed the trial court's decision to not continuously disrupt the trial by excusing jurors to reprimand defendant's counsel for "the many instances of unprofessional conduct in which [defendant's counsel] made disparaging comments to the court, violated court rulings, and repeatedly interrupted the court and witnesses." *Id.* at 235. In the published portion of the opinion, the court highlighted the "insolent and contemptuous conduct" (*Id.* at 243) of defendant's counsel including:

- After having objecting to a document being presented without having been received in evidence: "So in other words, you can put anything you want on the [overhead projector] and later you ask to admit it, is that the ruling?" *Id.* at 239.
- After having interrupted the court when ruling on an objection, the judge said "I don't appreciate the [facetious] remark on your part," and

defendant's counsel responded, "Well, I didn't appreciate the Court's comments on my questioning." *Id.* at 240.

- When responding to a directive not to insert gross prejudice: "Well, I think it's very difficult to — to — to work in an atmosphere where everything is considered not an issue by the Court. So I'm — I'm really trying to stick to the issues, if I could. Only I'm just trying — having trouble seeing what they are." *Id.* at 241.
- "Does the Court think that that's funny? . . . Does the Court think that's funny? I saw you laugh." *Id.* at 242.
- "You show respect for me as well. I've shown unbelievable respect for this Court in the fashion of [the] most unfair trial I've ever experienced in 22 years of practicing law. This place is unbelievable. I've never seen anything like it." *Id.* at 245.

The court noted that the "legal system, indeed the social compact of a civilized society, is predicated upon respect for, and adherence to, the rule of law," and "ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live." *Id.* at 243 (internal citation omitted). Thus, attorneys have "a paramount obligation to the due and orderly administration of justice," and "must not willfully disobey a court's order and must maintain a respectful attitude toward the court." *Id.* (internal citation omitted). The court upheld the trial court's actions as appropriate because: "By mocking the court's authority, an attorney in effect sends a message to the jurors that they, too, may disregard the court's directives and ignore its authority. This type of attorney misconduct must be dealt with in the jury's presence in order to dispel any misperception regarding the credence that jurors must give the court's instructions. Furthermore, when an attorney engages in repetitious misconduct, it is too disruptive to the proceedings to repeatedly excuse the jury to admonish counsel." *Id.* at 244. The court concluded "[i]n our collective 97 years in the legal profession, we have seldom seen such unprofessional, offensive and contemptuous conduct by an attorney in a court of law." *Id.* at 245.

Appendix 4: Selected Civility Resources

Name	Publications / Programs	Biography/ Links to Biography	Contact Information
Allison Buchanan	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics	https://www.hogefenton.com/our-people/alison-p-buchanan/	alison.buchanan@hogefenton.com 408-947-2415
Amee Mikacich	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-4a28-ab2a-c56a3eb4a5e0	https://www.hinshawlaw.com/professionals-Amee-Mikacich.html	AMikacich@hinshawlaw.com 415-743-3705
Ellen Pansky	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics	https://panskymarkle.com/ellen-pansky/	epansky@panskymarkle.com 213-626-7300;
Eric Galton	Summer 2021 Professional Skills Series | Pepperdine Caruso School of Law	https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/	eric@lakesidemediation.com 512-477-9300
Erin Joyce	https://erinjoycelaw.com/2020/10/practice-tips-tales-of-civility-in-the-time-of-pandemic/	https://erinjoycelaw.com/2020/10/practice-tips-tales-of-civility-in-the-time-of-pandemic/	erin@erinjoycelaw.com 626-314-9050
Jean Cha	Civility Matters Panelist, CA American Board of Trial Advocates (CAL-ABOTA), December 2020	https://chalawethics.com/about/jean-cha-c-v/	jean@chalawethics.com 714-242-8588
Jill Fannin (Judge)	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://trellis.law/judge/jill.c.fannin https://cccba.org/for-attorneys/mcle-overview/mcle-self-study/	925-608-1121

Joanna Storey	http://content.sfbar.org/source/BASF_Pages/PDF/G181604materials.pdf "Civility and Communication in a Hybrid World," Bar Association of San Francisco, September 15, 2021 "What Not to Do – Ethics Lessons Learned from Fictional Attorneys," Bar Association of San Francisco (Virtual), May 11, 2021 "How to Ethically Mitigate Risk in Remote Meetings and Depositions," West LegalEdcenter Webinar, January 12, 2021 "Legal Ethics in a Remote World," Bar Association of San Francisco (Virtual), October 14, 2020 "Practical Tips for Solving Ethical Dilemmas in Mediation," Bar Association of San Francisco (Virtual), June 12, 2019 "How to Use Ethics as a Sword and Shield," Bar Association of San Francisco, January 24, 2018 "Who Knew the Courts Adopted Commonsense Professional Guidelines," San Francisco Attorney Magazine, November 27, 2017 "Ethics of Practicing Law in a Digital World," Bar Association of San Francisco, January 9, 2017	https://www.hinshawlaw.com/professionals-joanna-storey.html	jstorey@hinshawlaw.com 415-362-6000
Katie Lachter	https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/essential_qualities_instructors_workbook_final.pdf	https://www.proskauer.com/professionals/katie-lachter	klachter@proskauer.com 212-969-3618
Kendra Basner	"12 Steps to a Healthier Law Practice in 2020: Step 11 – Actions Speak Louder Than Words," California Attorney Ethics Counsel Blog, November, 2020 "12 Steps to a Healthier Law Practice in 2020: Step 2 – Treat Others The Way You Want to be Treated," California Attorney Ethics Counsel	https://oriellyroche.com/attorney/kendra-l-basner/	kendra@oreillyroche.com 415-952-3004

	Blog, February 18, 2020 "Actions Speak Louder Than Words: The Legal Ethics of Equality," The Recorder, February 5, 2016; "Can Zealous Advocacy Go Too Far," The Recorder, January 19, 2016. Presentations: "Charting an Ethical Course Through Perilous Waters," Pacific Admiralty Seminar, San Francisco, California, October 10, 2019; "Cutting Edge Conflicts: Recent Developments in Perilous Times," American Bar Association (ABA) National Legal Malpractice Conference, San Diego, California, September 13, 2019; "The Lessons of History: Are Civility and Professionalism Ethically Compelled?," West LegalEd Center live webcast, June 2008; "A Perspective: The Origins and Future of the Legal Profession," Sherwin Memel Memorial Presentation: Civility and Professionalism in Practice, California Society for Healthcare Attorneys, April 2008.		
Larry Cook	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.cmslaw.com/attorneys/larry-e-cook/	cook@cmslaw.com
Mark LeHocky	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	mark@markslehocky@.com 510-693-6443
Merri Baldwin	N/A	https://www.rjo.com/attorneys/merri-a-baldwin/	mbaldwin@rjo.com 415-956-2828
Niall McCarthy	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-	https://www.cpmlegal.com/professionals-niall-mccarthy-	nmccarthy@cpmlegal.com

	4a28-ab2a-c56a3eb4a5e0	whistleblower-attorney	650-697-6000
Nicole Mills	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	nicolemills@empower-mediation.com 925-351-3171
Philip M. Andersen	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.linkedin.com/in/philipandersen	Philip.Andersen.nx3z@statefarm.com
Rick Darwin (Judge)	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-4a28-ab2a-c56a3eb4a5e0	https://trellis.law/judge/richard.c.darwin	415-551-0309
Robin Pearson	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.ropers.com/our-team/robin-m-pearson	robin.pearson@ropers.com
Scott Garner	https://www.ocbar.org/All-News/News-View/ArticleId/1720/March-2016-Civility-Among-Lawyers-Nice-Guys-Don-t-Have-to-Finish-Last	https://www.umbergzipser.com/profiles/scott-b-garner/	sgarner@umbergzipser.com 949-672-0052
Steven K, Austin (Judge)	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	925-608-1133
Tracy L. Allen	Summer 2021 Professional Skills Series | Pepperdine Caruso School of Law	https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/	tallen@mediate.com; tracy.allen@pepperdine.edu 248-882-4878;
Trisha Rich	Oh No! Attorney Incivility and its Repercussions, ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS / MAY 27, 2021	https://www.hklaw.com/en/professionals/r/rich-trisha-m	trisha.rich@hklaw.com 312-578-6514 212-513-3545
Wendy Chang (Judge)	"CIVILITY AND THE ELIMINATION OF UNPROFESSIONAL CONDUCT TOWARDS WOMEN" (April 2017);	https://trellis.law/judge/wendy.w.y.chang	661-483-5715

	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics		
Wendy McGuire Coats (Judge)	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	925-608-1117
American Board of Trial Advocates - Civility Matters Program (magazine)	http://www.cal-abota.org/pdf/ABOTA_CivilityMatters_Toolkit_1003111.pdf	American Board of Trial Advocates - Civility Matters Program (magazine)	CivilityMatters@abota.org (800) 779-5879
Amir Erez	https://www1.warrington.ufl.edu/departments/mgt/docs/cv_AmirErez.pdf	https://warrington.ufl.edu/directory/person/5084/	amir.erez@warrington.ufl.edu (352) 273-0339
Anna Maravelas	https://www.amazon.com/Creating-Drama-Free-Workplace-Insiders-Incivility/dp/B081S98SPZ/ref=cm_cr_arp_d_product_top?ie=UTF8	http://thera-rising.com/about/	anna@therarising.com
Annette B. Roter	https://www.amazon.com/Dark-Side-Workplace-Managing-Incivility/dp/113855930X	https://www.linkedin.com/in/annette-b-roter-phd-39989110	https://www.linkedin.com/in/annette-b-roter-phd-39989110?challengeId=AQGDpvVhOAafMAAAAXSyjJJasyaAZQjuAhHE9_Esy2JdwWG2fjqVGMT0ptdFX7cwUDLw-t3WXAtPANz6Den5iFKUWMd79ACi-g&submissionId=077ffc60-71e9-3616-

			d085-97b515519d24
Bob Sutton	https://www.amazon.com/Asshole-Rule-Civilized-Workplace-Surviving/dp/0446698202/ref=sr_1_1?dchild=1&keywords=No+Asshole+Rule&qid=1600709488&s=books&sr=1-1	https://www.bobsutton.net/	https://www.bobsutton.net/contact/
Catherine Mattice	https://www.amazon.com/Seeking-Civility-managers-workplace-bullying/dp/1530937728/ref=sr_1_2?crid=OVNS5QME965D&dchild=1&keywords=catherine+mattice&qid=1599933576&sprefix=catherine+mattice%2Caps%2C226&sr=8-2	https://civilitypartners.com/catherine-mattice-zundel/	Info@CivilityPartners.com; 619-268-5055
Christine Pearson	https://www.amazon.com/Cost-Bad-Behavior-Incivility-Damaging-ebook/dp/B002AU7MHM/ref=sr_1_1?dchild=1&keywords=pearson+porath&qid=1600999899&s=books&sr=1-1	https://thunderbird.asu.edu/christine-pearson	christinepearson@thunderbird.asu.edu
Christine Porath	https://www.amazon.com/Mastering-Civility-Manifesto-Christine-Porath/dp/1455568988	http://www.christineporath.com/	christine.porath@gmail.com
Craig Freshley	https://www.amazon.com/Wisdom-Group-Decisions-Craig-Freshley/dp/0978865723/ref=sr_1_1?dchild=1&keywords=The+Wisdom+of+Group+Decisions&qid=1600623762&s=books&sr=1-1	https://www.craigfreshley.com/about-craig/	craig@freshley.com; 207-729-5607
David A. Grenardo	https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1562&context=facarticles	https://law.stmarytx.edu/academics/faculty/david-grenardo/	dgrenardo@stmarytx.edu; 210-431-2127
Diana Damron	https://www.amazon.com/Civility-Unleashed-Survive-Thrive-Workplace/dp/1530312426/ref=sr_1_5?dchild=1&keywords=civility+workplace&qid=1599932597&s=books&sr=1-5	https://dianadamron.com/about/	diana@dianadamron.com; 406-890-8453
Dr. Linnda Durre	https://www.amazon.com/Surviving-Toxic-Workplace-Coworkers-Environments/dp/007166467X/ref=sr_1	http://www.survivingthetoxicworkplace.com/biogra	Linnda.Durre@gmail.com;

	_10?dchild=1&keywords=arsonist+in+the+office&qid=1600285176&s=books&sr=1-10	phy.html	406-890-8453
ELI Civil Treatment Series	https://www.eliinc.com/wp-content/uploads/6-ways-civility-rule-0317.pdf	https://www.eliinc.com/civil-treatment-series/about-civil-treatment/	info@eliinc.com; 800-497-7654
Ellen Burton	https://www.amazon.com/Civility-Project-reverence-wellness-productivity/dp/057843511X/ref=tmm_pap_swatch_0?_encoding=UTF8&qid=1599932091&sr=1-2	http://www.coachellenb.com/the-civility-project.html	coachellenb@gmail.com; 847-721-4694
James E. Lukaszewski	https://www.amazon.com/Decency-Code-Leaders-Building-Integrity/dp/1260455394/ref=sr_1_6?dchild=1&keywords=workplace+incivility&qid=1600378996&s=books&sr=1-6	https://premierespeakers.com/james_lukaszewski/bio	https://premierespeakers.com/james_lukaszewski/bio
Janine Hamner Holman	https://speakerhub.com/sites/default/files/Incivility-presentation-Vistage.pdf	https://jandjcg.com/our-team	Janine@Jandjcg.com; 323-493-6431
Jayne Reardon	https://www.2civility.org/wp-content/uploads/2013/12/surveyonprofessionalism_final.pdf	https://www.2civility.org/people/jayne-reardon/	jayne.reardon@2civility.org; 312-363-6208 or 312-848-0327
Jody J. Foster	https://www.amazon.com/Schmuck-My-Office-Effectively-Difficult/dp/125007567X/ref=sr_1_9?dchild=1&keywords=No+Asshole+Rule&qid=1600204433&s=books&sr=1-9	https://www.med.upenn.edu/professionalism/foster.shtml	ppmed@upenn.edu; 215-662-7677
Judith Bowman	https://www.amazon.com/Dont-Take-Last-Donut-Etiquette/dp/1601630875/ref=sr_1_1?crid=2HOZGIKZB0CO4&dchild=1&keywords=don%27t+take+the+last+donut&qid=1600792339&sprefix=don%27t+take+the+last+donut%2Caps%2C218&sr=8-1	http://www.nationalcivilityfoundation.org/speakers-bureau	judith@nationalcivilityfoundation.org

Lewena (Lew) Bayer	https://www.amazon.com/30-Solution-Increases-Engagement-Profitability/dp/1628652675/ref=sr_1_1?dchild=1&keywords=lewena+bayer&qid=1600624639&s=books&sr=1-1	https://lewbayer.com/	support@civilityexperts.com; 204-996-4792
Michael Lee Stallard	https://www.amazon.com/Connection-Culture-Competitive-Advantage-Understanding/dp/195049652X/ref=sr_1_1?dchild=1&qid=1600533244&refinements=p_27%3AKatharine+P.+Stallard&s=books&sr=1-1&text=Katharine+P.+Stallard	https://www.michaelleestallard.com/about-employee-engagement	mstallard@epluribuspartners.com; 203-550-0360
Michael P. Leiter	https://www.amazon.com/Analyzing-Theorizing-Incivility-SpringerBriefs-Psychology/dp/9400755708/ref=sr_1_4?dchild=1&keywords=workplace+incivility&qid=1600378996&s=books&sr=1-4	https://mpleiter.com/about/	https://mpleiter.com/contact/
Peggy Parks	https://www.theparksimagegroup.com/resources/books/	https://www.theparksimagegroup.com/about/	peggy@theparksimagegroup.com; 404-266-3858
Pete Havel	https://www.amazon.com/Arsonist-Office-Fireproofing-Coworkers-Employees/dp/1948484668/ref=sr_1_1?crid=3004QSPNYUBOF&dchild=1&keywords=the+arsonist+in+the+office&qid=1600183021&s=books&sprefix=the+arsonist+in+the+office%2Caps%2C207&sr=1-1	https://petehavel.com/about/	pete@petehavel.com; 855- NO-ARSON
Robert Danisch	https://www.amazon.com/Beyond-Civility-Obligations-Citizenship-Deliberation/dp/0271087307/ref=sr_1_1?dchild=1&keywords=beyond+civility&qid=1600017948&s=books&sr=1-1#customerReviews	https://uwaterloo.ca/communication-arts/people-profiles/robert-danisch	rdanisch@uwaterloo.ca; 519-888-4567 x 38603
Sharone Bar-David	https://www.amazon.com/Trust-Your-Canary-Workplace-Incivility/dp/0994726406/ref=cm_cr_arp_d_product_top?ie=UTF8	http://www.sharonebardavid.com/about/	info@sharonebardavid.com; 416-781-8132
SHRM,	https://blog.shrm.org/blog/we-need-	https://www.shr	contact via

Society of Human Resources Management	civility-now-more-than-ever	m.org/about-shrm/Pages/default.aspx	online form; 800-283-7476
Steven Michael Selzer	https://www.amazon.com/Civility-George-Washingtons-Rules-Today/dp/1524852449/ref=sr_1_1?dchild=1&keywords=steven+michael+selzer+civility&qid=1600015889&s=books&sr=1-1	https://www.stevenselzerbooks.com/biography	selzerlaw@gmail.com
The State Bar of California	http://www.calbar.ca.gov/portals/0/documents/publicComment/2007/Civility-Guide-Prop-Long-14.pdf	http://www.calbar.ca.gov/	https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1110&context=lawreview
Thomas G. Reio, Jr.	Research areas include workplace incivility	https://case.fiu.edu/about/directory/profiles/reio-thomas.html	reiot@fiu.edu; 305-348-2093
Trevor Foulk	Research areas include "deviant workplace behaviors"	https://www.rhsmith.umd.edu/directory/trevor-foulk	tfoulk@rhsmith.umd.edu; 301-405-8796
Weber Shandwick	https://www.webershandwick.com/wp-content/uploads/2019/06/CivilityInAmerica2019SolutionsforTomorrow.pdf	https://www.webershandwick.com/	Page 18 lists contacts, such as Kate Bullinger, President, United Minds, which is WS's "employee engagement and change management consultancy": kbullinger@webershandwick.com or kate.bullinger

			@unitedmindsglobal.com
Yasmin Anderson-Smith	https://www.amazon.com/gp/product/B005REU0KO/ref=dbs_a_def_rwt_hsch_vapi_tkin_p1_i0	http://kymsimage.com/about/	yasmin@kymsimage.com; 301-792-2276

*The Task Force wishes to thank Elizabeth Caulfield for her assistance.

MEMORANDUM

To: Justice Brian Currey, Civility Task Force
From: Larson Ishii
Date: September 10, 2021
Re: Civility Expert Research

Civility in the Workplace

American Board of Trial Advocates – Civility Matters Program

The Professionalism, Ethics, and Civility Committee of the American Board of Trial Advocates (ABOTA) created "Civility Matters," an educational program designed to promote integrity, honor and courtesy in the legal profession.[3] ABOTA created Civility Matters with the hope the educational programming would be shared at local ABOTA chapters across the country, used for other bar and professional programming, and presented in law schools nationwide.[4] The Civility Matters materials include two publications (*Why Civility and Why Now?* and *Presentation Materials*) along with accompanying DVDs, guidelines, and a toolkit.[5]

Why Civility and Why Now contains a series of articles by judges and practitioners emphasizing the importance of civility in the legal profession and how to promote it.[6] The publication also contains a series of example programs and rules of professional conduct from states and private committees.[7] The *Presentation Materials* and accompanying DVDs serve as a

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[3] *Civility Matters: Presentation Materials*, American Board of Trial Advocates, http://dev.innsofcourt.org/media/12357/civilitymattersmagazinesupplement.pdf.

[4] Civility Matters, American Board of Trial Advocates Foundation Website, https://www.abota.org/Foundation/Lawyer_Resources/Civility_Matters/Foundation/Professional_Education/Civility_Matters.aspx?hkey=7e9beb21-b2ca-41b3-a8e8-132ed045dd96.

[5] *Civility Matters Toolkit*, American Board of Trial Advocates, http://www.cal-abota.org/pdf/ABOTA_CivilityMatters_Toolkit_1003111.pdf.

[6] *Civility Matters: Why Civility and Why Now?*, American Board of Trial Advocates, http://dev.innsofcourt.org/media/12354/civilitymattersmagazine.pdf.

[7] *Id.*

kind of teaching manual for putting on the program, outlining three different example programs to be used, role play scenarios, presentation slides, written materials, and instructional audio and video resources.[8]

Yasmin Anderson-Smith, KYMS Image International

Yasmin Anderson-Smith is an image and branding consultant, trainer, and author focusing primarily on business image, civility, and personal branding.[9] Anderson-Smith is certified as an image professional by the Association of Image Consultants International (AICI) and a Personal Branding Strategist by William Arruda's Reach 360 program.[10] Anderson-Smith is a founding member and former chair of the AICI Civility Counts Project and US Affiliate of Canadian-based, Civility Experts Worldwide.[11] Anderson-Smith is a co-author of two books (*Executive Image Power* (2009) and *The Power of Civility* (2011)) and has had her work featured in other publications.[12] Her notable clientele include Bloomingdales' and Deloitte.

Anderson-Smith's work emphasizes that embracing and promoting civility creates strong personal and corporate image and branding. Civility is defined as a code of conduct emphasizing three principles—Respect, Restraint, and Responsibility—that guide behavior.[13] Brand image consists of three elements—Appearance, Behavior, and Communication—that influence how individuals and organizations are perceived.[14] Civility is the key to shaping a positive image from the inside out and is foundational for building a strong image and brand.[15] This harmonious relationship is shown through Anderson-Smith's "Image and Civility Model," which demonstrates how positive image/brand and smooth harmonious relationships are at the intersection between ethical and considerate conduct and Appearance, Behavior, and Communication.[16]

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[8] *Civility Matters: Presentation Materials*, *supra* note 1.
[9] KYMS Image International Website, http://kymsimage.com/about/.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Civility Counts, An Image Perspective* (white paper), The Civility Counts Project, Association of Image Consultants International, https://www.civilityexperts.com/wp-content/uploads/AICI_WhPaperFINAL.pdf.
[14] *Id.*
[15] *Id.*
[16] *Id.*

Going off of this model, Anderson-Smith argues image and brand consultants are well positioned to influence and promote civility in the workplace. These experts in etiquette, civility, protocol, image and brand management are well equipped to provide the training, education, and awareness for individuals and corporations to create a more positive impression and increase confidence, credibility and worth.[17]

Judith Bowman, National Civility Foundation

Judith Bowman is the founder and president of Protocol Consultants International, as well as the founder and Executive Director of the National Civility Foundation.[18] Bowman works as a consultant, author, and speaker in the field of professional presence and civility. Bowman has written two books on the subject (*Don't Take the Last Donut: New Rules of Business Etiquette* (2007) and *How to Stand Apart @ Work: Transforming Fine to Fabulous* (2014)) and authored many other publications, including a previous weekly etiquette column for the *Boston Herald*.[19]

Bowman's work focuses on teaching nuanced communication and civility practices within a professional setting. Bowman believes that very few people know how to effectively communicate today because they are no longer being taught it at home or in school.[20] Bowman's work seems to try and fill that gap in education by teaching the rules of professional etiquette and mannered conduct.[21] In business, there is nothing little about the little things and proper business etiquette is more than just manners, it forms the pillars of success.[22] Bowman preaches a system of the Four C's—Confidence, Control, Contribution, and Connection—that she pairs with meticulous advice for navigating small talk, networking, e-mails, presentations, dining, meetings, and a variety of other business settings.[23] Bowman asserts these types of practiced respectful behaviors resonate in powerful ways to make

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[17] *Id.*
[18] National Civility Foundation Speaker Bio, Judith Bowman, http://www.nationalcivilityfoundation.org/speakers-bureau.
[19] *Id.*
[20] Judith Bowman Speech, YouTube, https://www.youtube.com/watch?v=pwxuLSSAOGM.
[21] *Don't Take the Last Donut: New Rules of Business Etiquette*, (2nd ed. 2009).
[22] *Id.*
[23] *Id.*

others feel acknowledged and valued to advance critical interpersonal relationships and positively influence the bottom line.[24]

Ellen Burton, E.J. Burton & Associates

Ellen Burton is a personal and professional coach, business lecturer, and motivational speaker. Burton's work focuses on civility in the workplace, diversity, equity, and inclusion matters, inclusive leadership, and efficient business communications and strategy.[25] Burton is the author of the book, *The Civility Project: How to build a culture of reverence to improve wellness, productivity and profit* (2018).[26] Burton's notable clients include the University of Chicago, the City of New York, Northwestern University, and the University of Michigan.[27]

Burton builds on existing research and her own experiences talking to workers to catalog both the costs of incivility and push for different solutions.[28] Burton views civility as showing courtesy in behavior and speech that reflects respect toward the humanity of others.[29] To increase civility, work must be done on a personal as well as organizational level.[30] In the corporate world, Burton highlights wellness, productivity, and profit as the main issues for executive leadership to confront.[31] Workers facing incivility often are psychologically unwell, which leads to being less productive, which in turn leads to a loss of profits. Burton recommends organizations create clear standards and expectations for civil behavior to educate employees and not simply assume people know how to work together.[32] Next, Burton advises training all employees from executives down on civility and business etiquette, tying benefits and rewards to civil behavior, and creating an culture of reinforcement where individuals hold one another accountable.[33] Burton notes that promoting civility will decrease sick days, increase

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[24] Bowman Speaker Bio, *supra* note 16.
[25] Ellen Burton Website, http://www.coachellenb.com/about-us.html.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Workplace Civility with Ellen Burton, Career Tipper Podcast, https://www.youtube.com/watch?v=WehTO2CxlT4.
[31] *Id.*
[32] *Id.*
[33] *Id.*

employee engagement, improve productivity and translate into better customer service, a stronger brand, and increased revenue.[34]

Robert Danisch, University of Waterloo

Robert Danisch is a Professor of Communications Studies at the University of Waterloo.[35] Danisch's research interests concern rhetorical theory and public communication within democratic societies, including extensive work on the relationship between American pragmatism and rhetoric.[36] Danisch's written scholarship include numerous articles, and four books ranging from academic to practical (*Beyond Civility: The Competing Obligations of Citizenship* (2020), *What Effect Have I Had? 100 Communication Practices to be a Better Partner, Teammate, Writer, Speaker, and Leader* (2018), *Building a Social Democracy: The Promise of Rhetorical Pragmatism* (2015), and *Pragmatism, Democracy, and the Necessity of Rhetoric* (2007)).[37]

Much of Danisch's work explores analytical theory and frameworks behind communication and those effects on democratic institutions.[38] Danisch posits that civility is a form of communicative agency where power stems from a person's ability to use language to form relationships, an essential function of stable democratic societies.[39] While civility can form an important framework for communication, Danisch also argues that it's equally important to know when to put aside civility, or to champion uncivil protests and revolution, in order to provide an adequate check on institutions of power.[40] In balancing civil and uncivil forms of communication, civility still provides the best chance of creating durable democratic systems open to political change as it grounds itself in the importance of human relationships.[41]

On a practical level, Danisch tries to re-educate individuals about what it means to communicate. Danisch rejects the transmission model of communication in which effective communicators are those that are best able to take an idea from their mind and send it to another person with the least

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[34] The Civility Project Website, https://thecivilityproject.biz/the-project.
[35] Robert Danisch Faculty Page, https://uwaterloo.ca/communication-arts/people-profiles/robert-danisch.
[36] *Id.*
[37] *Id.*
[38] *Beyond Civility: The Competing Obligations of Citizenship*, (2020)
[39] *Id.*
[40] *Id.*
[41] *Id.*

distortion.[42] Instead of asking "did you get it?", Danisch implores people to ask "what effect did I have?"[43] Danisch emphasizes that focusing on context—that different situations call for different communication processes—and audience—trying to get another person to believe or act in a certain way—are crucial skills to practicing this type of effective communication.[44] Danisch gives 100 practices and tips to become better at achieving your desired effect, rather than just your message, and to become better at communication as a partner, teammate, writer, speaker, and leader.[45]

Sharone Bar-David, Bar-David Consulting

Sharone Bar-David is the president of Bar-David Consulting, a boutique firm that specializes in assisting organizations in creating civil work environments through training, civility tools, coaching, and consulting.[46] Along with workplace incivility, Bar-David specializes in dealing with abrasive leadership and has been accredited as a Boss Whisperer through the Boss Whisperer Institute.[47] Bar-David has worked with over 41,000 people in trainings, consulting, coaching, and speaking events, and has been authored numerous articles and one book (*Trust Your Canary: Every Leader's Guide to Taming Workplace Incivility* (2015)).[48]

Bar-David defines incivility as seemingly insignificant behaviors that are rude, disrespectful, discourteous, or insensitive, where the intent to harm is ambiguous or unclear.[49] Bar-David analogizes incivility in the workplace to a disease that can progress from being a persistent allergy to a chronic infection or acute disease if left unaddressed.[50] Further, incivility can costs companies by making workers less focused and productive, less trusting and collaborative, less healthy and engaged, and more likely to quit.[51] Bar-David

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[42] *What Effect Have I Had?: 100 Communication Practices to Help You be a Better Partner, Teammate, Writer, Speaker, and Leader*, (2018).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Bar-David Consulting Website, http://www.sharonebardavid.com/about/.
[47] *Id.*
[48] *Id.*
[49] *Trust Your Canary: Every Leader's Guide to Taming Workplace Incivility*, (2015).
[50] *Id.*
[51] *Id.*

recommends a multi-pronged approach for tackling workplace incivility: (i) mend broken windows and act quickly and decisively on small acts of rudeness to show commitment to civility; (ii) model civil behavior; (iii) encourage staff to shift from bystanders to upstanders; (iv) identify and address any underlying beliefs that promote incivility as normal; (v) train and build a shared language and competence; and (vi) implement meaningful consequences for incivility to keep others accountable.[52]

Bar-David consulting offers a number of resources, programs, and toolkits for companies including "Team Civility Booster" and "Respect on-the-Go." The Team Civility Booster covers five modules and provides video lessons demonstrating incivility and strategies for boosting civility, planning and implementation guides for facilitated discussions, and resources and guides for sustaining the change.[53] The Respect on-the-Go toolkit provides planning and coaching tools as well as hundreds of tips, phrases, and strategies on easy to access cards for HR, managers, and executives.[54]

Lewena Bayer, Civility Experts Inc.

Lewena Bayer is the CEO of Civility Experts Inc., an international civility training group with 501 affiliates in 48 countries.[55] Bayer is also the Chair of the International Civility Trainers' Consortium, President of The Center for Organizational Cultural Competence, and Founder of the In Good Company Etiquette Academy Franchise Group.[56] Bayer is one of only 26 Master Civility Trainers in the world and has received or been nominated for a number of awards and recognitions; Bayer describes herself as "the leading expert on civility at work."[57] In addition to being a seasoned speaker, Bayer is an 18-time author of numerous works about civility.[58]

Civility Experts defines civility as: a conscious awareness of the impact of one's thoughts, actions, words and intentions on others; combined with, a continuous acknowledgement of one's responsibility to ease the experience of

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[52] *Why Civility Should Matter to You*, Globe and Mail's Leadership Lab, (Jan. 26, 2016), https://www.sharonebardavid.com/wp-content/uploads/2011/12/Globe-and-Mail-Why-Civility-Should-Matter-to-You-Jan-2016.pdf.
[53] Bar-David Consulting website, *supra* note 44.
[54] *Id.*
[55] Lew Bayer Website, https://lewbayer.com/.
[56] *Id.*
[57] *Id.*
[58] *Id.*

others (*e.g.*, through restraint, kindness, non-judgment, respect, and courtesy); and, a consistent effort to adopt and exhibit civil behavior as a non-negotiable point of one's character.[59] Civility Experts provides a host of materials, trainings, consultations, and assessments to help businesses imagine and plan a civil workplace, identify and change organization structure and culture leading to uncivil behavior, and build competency in core areas—continuous learning, social intelligence, systems thinking, and cultural competence—leading to a better workplace.[60] Civility Experts also offers a number of certification courses for individuals to become coaches and civility trainers.[61]

Diana Damron

Diana Damron is a speaker, author, and coach who's work focuses on transforming toxic business environments to trusting civil workplaces.[62] Damron's background is primarily in news and media as a former radio and television anchor.[63] Damron is the author or two books on civility (*Civility Unleashed: Using Civility to Survive and Thrive in the Workplace* (2016) and *The Civility Workout: Your Personal Guide to Unleashing Civility in the Workplace* (2017)).[64]

Damron defines civility as the consistent implementation of respect.[65] Damron focuses on the word consistent as civility is a daily exercise that needs to be practiced even when doing so steps on other's toes.[66] To promote trust and civility, Damron utilizes the 3 C's: Civility, Communication, and Character.[67] Damron believes that our civility needs to undergird our communication with one another to form connections that promote respect and both protect and nurture others.[68] Further, Damron breaks down Civility into 5 action steps in which one: Chooses intentionally to be civil;

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[59] Civility Experts, Inc. Website, https://www.civilityexperts.com/.
[60] *Id.*
[61] *Id.*
[62] Diana Damron Website, https://dianadamron.com/about/.
[63] *Id.*
[64] *Id.*
[65] The Force of Civility, Ted Talk, https://www.youtube.com/watch?v=paAfcZMpFAc.
[66] *Id.*
[67] Diana Damron Website, *supra* note 60.
[68] The Force of Civility, *supra* note 63.

Identifies their own strengths and weaknesses; understands their Values; Invites change into their lives and others to join; and Let's go of negativity.[69]

Dr. Linnda Durre, Psychotherapist

Linnda Durre is a psychotherapist, consultant, author, speaker, and former columnist and TV/radio host.[70] Durre has written many different works including one book (*Surviving the Toxic Workplace: Protect Yourself Against Coworkers, Bosses, and Work Environments That Poison Your Day* (2010)).[71]

In her book, Durre discusses many of the prevalent types of toxic coworkers, bosses, and situations prevalent in workplaces today. While Durre describes common toxic scenarios, the book then recommends specific solutions that one may take to resolve the toxicity, as well as alternatives (*e.g.*, a lawsuit or going to HR) if direct action proves ineffective.[72] Durre advocates for the sandwich method to address incivility by (i) first giving a positive compliment, (ii) then using "and" (not "but") to give feedback regarding the problem you are facing, and finally (iii) again using "and" to present a positive solution to move forward.[73]

Stephen M. Paskoff, ELI – Civility Treatment Series

Stephen Paskoff is the founder, president, and CEO of ELI, a training company that helps organizations solve bad behavior in the workplace.[74] Paskoff is a former EEOC trial attorney, partner at a labor and employment law firm, and founder and co-chair of the ABA's compliance training and communication subcommittee.[75] Paskoff has numerous media appearances and has written two books on civility (*CIVILITY Rules! A New Business Approach to Boosting Results and Cutting Risks* (2016) and *Teaching Big Shots to Behave (and Other Human Resources Challenges)* (2004)).[76] ELI

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[69] Diana Damron website, *supra* note 60.
[70] Surviving the Toxic Workplace Website, http://www.survivingthetoxicworkplace.com/biography.html.
[71] *Id.*
[72] *Surviving the Toxic Workplace: Protect Yourself Against Coworkers, Bosses, and Work Environments That Poison Your Day*, (2010).
[73] Surviving a toxic workplace, News Interview, https://www.youtube.com/watch?v=c_BoRDIbFCw.
[74] ELI company website, https://www.eliinc.com/about-eli/meet-the-team/stephen-m-paskoff/.
[75] *Id.*
[76] *Id.*

provides an award-winning training program on civil treatment in the workplace for managers and employees. Notable ELI clients include Coca-Cola, Verizon, Mastercard, Cox, Capital One, and the Department of Justice.[77]

As a former attorney, Paskoff's work has a greater legal bent, attempting to reshape companies' perspectives on workplace behavior from one centered on legal compliance to one based on civility and respect.[78] Paskoff believes that this narrow, legal-focused approach pushes other concerns to the side, is harmful to business performance, makes it harder to build respectful cultures, and breeds cynicism and narrowness.[79] Paskoff gives six solutions for companies to consider when transforming their business: 1) legal compliance is mandatory for a business, but does not go far enough in eliminating workplace incivility; 2) civility may be a "soft skill" but it has "hard" results and costs for an organization depending on the continuum of uncivil behavior (*e.g,.* illegal to rude conduct) allowed to fester; 3) unite other behavioral and compliance trainings (*e.g.*, sexual harassment) under the umbrella of civility to avoid regulatory fatigue; 4) keep it simple to make it stick for employees; 5) welcome all concerns and feedback from employees to build trust and diagnose issues; 6) senior leaders should initiate and model the change to civility for the rest of the company.[80]

Amir Erez, University of Florida

Amir Erez is a Professor at the University of Florida's Warrington College of Business Management.[81] Erez's research focuses on how positive moods and positive personality, influence individuals thought processes, motivation, and work behaviors.[82] Erez also investigates how negative work behaviors such as rudeness and disrespect affect individuals performance and cognition.[83] Erez has a large number of journal articles and studies regarding the effects of civility and incivility.

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[77] *Id.*
[78] *6 ways to make Civility Rule!*, ELI, https://www.eliinc.com/wp-content/uploads/6-ways-civility-rule-0317.pdf.
[79] *Id.*
[80] *Id.*
[81] Amir Erez Faculty Page, https://warrington.ufl.edu/directory/person/5084/.
[82] *Id.*
[83] *Id.*

In his research, Erez has found that rude behavior and incivility can have a negative effect on the mental capacities of individuals.[84] Erez and a team found that incivility drains the working memories of individuals—the area of the cognitive system where planning, analyses, and management of goals occur—and adversely affects team performance.[85] Erez notes that people can't think correctly when confronted with rudeness, and that incivility can spread easily from person to person.[86] Erez has also studied the effects of civil behavior in the work place and found that it can have both positive and negative effects.[87] In two studies, team members that had civil team communication tended to perform better, but for surgery teams undergoing progressively complex tasks, civil team communication eventually flipped to a negative.[88] Thus, Erez has found that the type of effect civility will have often depends on the broader environmental demands of the team.[89]

Jody J. Foster, University of Pennsylvania

Jody Foster, MD, MBA, is a Clinical Associate Professor of Psychiatry in the Perelman School of Medicine at the University of Pennsylvania, chairs the Department of Psychiatry at Pennsylvania Hospital, and leads the Professionalism Program at Penn Medicine as the Executive Clinical Director.[90] Foster's clinical practice includes general psychiatry, with a special emphasis on treating acute inpatients, psychopharmacology, and also

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[84] Riskin, A., Bamberger, P., Erez, A. and Zeiger, A. (2020), *Discrete Incivility Events and Team Performance: A Cognitive Perspective on a Pervasive Human Resource (HR) Issue*, Buckley, M.R., Wheeler, A.R., Baur, J.E. and Halbesleben, J.R.B. (Ed.) Research in Personnel and Human Resources Management (Research in Personnel and Human Resources Management, Vol. 38), Emerald Publishing Limited, Bingley, pp. 223-258. https://doi.org/10.1108/S0742-730120200000038008

[85] *Id.*

[86] *The Sunshine Economy: Civility and Commerce*, WLRN, Oct. 27, 2020, https://www.wlrn.org/podcast/the-sunshine-economy/2020-10-27/the-sunshine-economy-civility-and-commerce.

[87] Liu, Y., Vashdi, D. R., Cross, T., Bamberger, P., & Erez, A. (2020), *Exploring the puzzle of civility: Whether and when team civil communication influences team members' role performance*, Human Relations, 73(2), 215-241. https://doi.org/10.1177/0018726719830164

[88] *Id.*

[89] *Id.*

[90] Jody Foster Faculty Page, https://www.med.upenn.edu/professionalism/foster.shtml.

provides consulting support and evaluation services to executives.[91] Foster has authored the book, *The Schmuck in My Office: How to Deal Effectively with Difficult People at Work* (2017).[92]

Foster approaches civility in the workplace from her psychiatric background. Foster finds that early and direct confrontation of uncivil behaviors is the best solution for stopping incivility in the workplace.[93] However, frequently people avoid unpleasant situations, including difficult people and disruptive workplace behavior.[94] Further, many employees don't understand why colleagues act uncivilly. Foster's book seeks to educate individuals to identify and understand numerous disruptive behaviors and archetypes within the workplace (*e.g.*, the narcissist, the robot, the controlling perfectionist, the chaos bringer).[95] Through greater clarity of the individual and their uncivil behavior, Foster argues one is then able to empathize with the individual and try and rectify the situation.[96]

Trevor Foulk, University of Maryland

Trevor Foulk is an Assistant Professor of Management & Organization at the Robert H. Smith School of Business at the University of Maryland.[97] Foulk's research interests center around deviant workplace behaviors, workplace power dynamics, social perception, and interpersonal influence behaviors.[98] Foulk has published numerous articles in both scholarly journals and popular news outlets.[99]

Foulk's research on the effects of incivility in the workplace has been diverse and covered multiple areas. Foulk defines rude work behavior as low-intensity deviant behavior with ambiguous intent to harm.[100] This incivility

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[91] *Id.*
[92] *Id.*
[93] *The Schmuck in My Office: How to Deal Effectively with Difficult People at Work*, (2017)
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Trevor Foulk Faculty Page, https://www.rhsmith.umd.edu/directory/trevor-foulk.
[98] *Id.*
[99] *Id.*
[100] *Why rudeness at work can be harmful and contagious*, Silicon Republic, Feb. 6, 2020, https://www.siliconrepublic.com/careers/rudeness-work-trevor-foulk.

can lead to adverse effects including decreased performance, decreased creativity, and increased turnover intentions.[101] Further rudeness in the workplace is contagious and can spread from person-to-person through (i) the process of social learning of uncivil workplace norms and (ii) through non-conscious agitation.[102] In non-conscious agitation, rudeness stimulates a part of the brain responsible for processing rudeness, making it more likely for a person to notice rude cues and interpret ambiguous interactions as rude.[103]

Foulk's research on rudeness has also extended to leaders in power, finding those who were reminded of their power were more likely to treat others inappropriately.[104] Further, those in power were also more likely to perceive interactions from others as uncivil.[105] This focus on rudeness took its toll on leaders outside of the office as the leaders reported greater negative feelings and reduced well-being later at home.[106]

Craig Freshley, Good Group Decisions

Craig Freshley is a professional meeting facilitator, speaker, trainer, consultant, and president of Good Group Decisions.[107] Freshley focuses his professional work on improving how corporate teams collaborate and get things done. Freshley won the 2019 American Civic Collaboration Award for creating and facilitating make shift coffee houses in an effort to bring civility and understandings to political life.[108] Freshley has written hundreds of tips and insights for improving group skills including one book (*The Wisdom of Group Decisions* (2010)).[109]

Freshley provides facilitation and trainings for companies looking to improve group collaboration while handling conflict, running meetings, and

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Feeling Powerful at Work Makes Us Feel Worse When We Get Home*, Harvard Business Review, June 13, 2017, https://hbr.org/2017/06/feeling-powerful-at-work-makes-us-feel-worse-when-we-get-home?elqTrackId=f1a4c64d43d04a3b9478ee828ab8a6aa&elq=a6aa296715844dfaad976d0b53d9efab&elqaid=14504&elqat=1&elqCampaignId=6105.
[105] *Id.*
[106] *Id.*
[107] Good Group Decisions Website, https://craigfreshley.com/about-craig/.
[108] *Id.*
[109] *Id.*

disagreeing.[110] Much of Freshley's published work is condensed into one-page pieces of advice on over one hundred different topics (*e.g.*, email, agenda setting access, crediting the group, private criticism, etc.).[111] These tips start with a principled understanding of the issue, and how it can go wrong, then offers practical tips to better communicate with others.[112]

David A. Grenardo, St. Mary's School of Law

David Grenardo is a Professor of Law at St. Mary's University School of Law teaching professional responsibility, contracts, sports law, business associations, and civil procedure.[113] Grenardo has presented on professionalism and ethics multiple times locally, statewide and nationally, including at the American Bar Association's Annual Meeting and the ABA's Annual National Conference on Professional Responsibility.[114] Grenardo has written multiple articles on the topic of civility in the legal profession.

Much of Grenardo's civility scholarship has revolved around fixing incivility in the legal profession by advocating for mandatory civility rules. In his work Grenardo examines the various definitions of civility before noting that civility includes treating opposing counsel, the parties, the courts, and everyone an attorney encounters, with respect, courtesy, and dignity.[115] For attorneys especially, civility is also linked to professionalism and ethics.[116] Grenardo highlights the high costs of incivility within the legal profession as increased costs for the client, potentially losing a case, greater stress for the attorneys, negative public perceptions of the legal profession, waste of public and judicial resources, and ostracization within the legal community.[117] In spite of these costs, most jurisdictions have only adopted voluntary civility

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[110] *Id.*
[111] *The Wisdom of Group Decisions*, (2010).
[112] *Id.*
[113] David Grenardo Faculty Page, https://law.stmarytx.edu/academics/faculty/david-grenardo/.
[114] *Id.*
[115] *Making Civility Mandatory*, Cardozo Pub. Law, Policy, & Ethics J., Vol. 11, 239 (2013), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1044&context=facarticles.
[116] *Id.*
[117] *The High Costs of Incivility*, 43 Student Law. 24 (2015), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1561&context=facarticles.

oaths and civility guidelines for attorneys.[118] Grenardo finds these voluntary acts fall short of stopping incivility as there are no repercussions for uncivil violations.[119]

In response, Grenardo argues for making civility mandatory. For Grenardo, if civility is considered mandatory, then any time an attorney fails to act with civility, they would be sanctioned or penalized; though sanctions and penalties need not only be monetary, but could also include treatment or rehabilitation to fix the root of the problem.[120] To help enforce civility, Grenardo offers ten model rules and comments for mandatory attorney civility.[121] Grenardo also takes on objections to the idea of mandatory civility. He rejects the idea that because incivility cases are subjective they are cannot be ruled on given the legal profession already regulates similarly opaque professional conduct.[122] Next, Grenardo asserts that zealous advocacy does not require incivility, finds that civility requirements do not chill free speech, and will lower the costs of enforcement in the long run.[123] Finally, Grenardo advocates that solving incivility will require greater education in law schools and requiring professionalism/civility courses for lawyers.[124]

Janine Hammer Holman, J&J Consulting Group

Janine Holman is the founding principal and CEO of J&J Consulting Group. Holman uses scientifically validated strategies and tools to build high performance teams, enhance organizational development, and develop organizations and leaders with whom everyone wants to work.[125] Holman spent 10 years studying brain science and developed curriculum to help great organizations create thriving workplaces with engaged, emotionally

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[118] *Making Civility Mandatory*, *supra* note 113.
[119] *Id.*
[120] *Id.*
[121] *Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct,* National Conference on Professional Responsibility (2013), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1002&context=faccle.
[122] *Id.*
[123] *Id.*
[124] *Making Civility Mandatory*, *supra* note 113.
[125] J&J Consulting Group Website, https://jandjcg.com/our-team.

intelligent, high-performing teams, led by dynamic, innovative and compassionate leaders.[126]

Holman defines incivility in the workplace broadly as rude and disrespectful behavior that violates organizational norms and has an ambiguous intent to harm.[127] Holman combats this incivility through a unique approach that utilizes "brain science," emotional intelligence, and partnerships.[128] Holman defines "brain science" as the study of how the human brain works, and emphasizes that the trainings and approaches she takes are scientifically-based in how the brain responds to incivility.[129] Further, Holman emphasizes partnership as an active choice among individuals when working together and the importance of managing and understanding the emotions of oneself and others.[130] For organizations, Holman identifies 10 ways to increase civility: 1) focus on organization culture, 2) enroll leaders on the importance of action, 3) create a policy of large and small changes, 4) manage yourself, 5) use emotional intelligence, 6) screen out incivility in hiring, 7) teach and train others on civility best practices, 8) learn how to deal with conflict, 9) be intolerant of bad behavior, and 10) reward good behavior.[131]

Pete Havel, The Cloture Group

Pete Havel is a keynote speaker, trainer, and consultant on workplace culture and organizational leadership.[132] Havel is the president of The Cloture Group which provides speaking, training, and consulting to help transform toxic workplaces.[133] Pete has written tips and advice for dealing with toxic workplaces as well as a book on the matter (*The Arsonist in the Office: Fireproofing Your Life Against Toxic Coworkers, Bosses, Employees, and Cultures* (2019)).[134]

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[126] *Id.*
[127] *The Incivility Epidemic*, Sept. 11, 2020, https://jandjcg.com/blogs-%26-articles/f/the-incivility-epidemic.
[128] J&J Consulting Group Website, *supra* note 123.
[129] *Id.*
[130] *Id.*
[131] The Brutal Costs of Incivility on the Bottom Line, https://speakerhub.com/sites/default/files/Incivility-presentation-Vistage.pdf.
[132] Pete Havel Website, https://petehavel.com/about/.
[133] *Id.*
[134] *Id.*

Havel defines a toxic workplace as one wherein drama, chaos, and dysfunction trump common sense, ethical standards, and reason.[135] While toxic employees may pervade every organization, Havel notes it is management that is responsible for workplace culture and dealing with toxic environments.[136] In working to detoxify workplaces, Havel trains leadership and mangers to have the mindset, the understanding, and the tools to identify the problem areas, re-establish the organization's core values, and then identify and implement solutions.[137]

Michael P. Leiter, Deakin University

Michael P. Leiter is Professor of Organizational Psychology at Deakin University, Melbourne, Australia.[138] He previously held the Canada Research Chair in Occupational Health at Acadia University.[139] Leiter's work focuses on job burnout, work engagement, and workplace civility, with recent initiatives surrounding improving the quality of work life through enhancing the level of civility and respect among colleagues.[140] Leiter is widely published and has authored a number of articles and books (including *Analyzing and Theorizing the Dynamics of the Workplace Incivility Crisis* (2013)).

Leiter approaches incivility at work from a psychological background, incorporating academic theory to build a model of how and why incivility exists. In analyzing civility at work, Leiter uses a risk management model to explain the negative effects of incivility.[141] Under this model, incivility creates greater risks by ostracizing colleagues from the group, whereas civility brings safety.[142] Leiter's model's application to workplace civility builds on five propositions: 1) people want to belong in social groups; 2) people notice their own status in social groups; 3) workplace climates are self-perpetuating; 4) improving civility benefits from feeling psychologically safe;

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[135] *The Arsonist in the Office: Fireproofing Your Life Against Toxic Coworkers, Bosses, Employees, and Cultures* (2019).
[136] *Id.*
[137] Pete Havel Wesite, *supra* note 130.
[138] Michael Leiter Website, https://mpleiter.com/about/.
[139] *Id.*
[140] *Id.*
[141] *Analyzing and Theorizing the Dynamics of the Workplace Incivility Crisis*, (2013).
[142] *Id.*

5) improving civility is a reflective process.[143] The reflective process to improve civility requires clear and shared values, active and meaningful reflection and conversations, action and practicing civility, and full integration into day-to-day work life.[144] Through these processes, Leiter finds that the level of civility and respect in a workplace can improve, and there is a close link of improved collegiality with greater engagement with work (leading to less burnout).[145] However, any improvement requires groups to make a serious commitment to change, to dedicate time to a changes process, and to focus their attention on bringing that change about.

James Lukaszewski

James Lukaszewski identifies as "America's Crisis Guru" and the go-to person for senior executives when there is trouble in the room or on the horizon.[146] Lukaszewski is retained by senior management to directly intervene and manage the resolution of corporate problems and bad news while also providing personal coaching and executive recovery advice for executives in trouble or facing career-defining problems and succession or departure issues.[147] Lukaszewski has authored hundreds of articles and 13 books (including *The Decency Code: The Leader's Path to Building Integrity and Trust* (2020) (co-authored with Steve Harrison)).[148]

Lukaszewski's book emphasizes the importance of little acts of decency as the way to promote civility within the workplace. Lukaszewski defines business decencies as a thoughtful, meaningful gesture offered that in ways small and large can enhance a corporate culture; decencies are how we humanely treat each other.[149] Institutionalized corporate decencies are self-propagating and create a barrier to misconduct by building an ethical, compliant, and productive culture through pathways of accountability, civility, compassion, empathy, honesty, humility, and principle.[150] Lukaszewski believes that

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[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Jim Lukaszewski Website, https://www.e911.com/.
[147] *Id.*
[148] *Id.*
[149] *The Decency Code: The Leader's Path to Building Integrity and Trust*, (2020).
[150] *Id.*

seeing and experiencing little decencies adds impact to principle and creates change that can be felt and observed by everyone.[151]

Anna Maravelas, Thera Rising International

Anna Maravelas is the founder and president of Thera Rising International.[152] Maravelas is a Psychologist Emeritus with additional training in system thinking and process mapping.[153] Her work focuses now on transforming negative cultures into climates of respect, fiscal responsibility and pride.[154] Maravelas is the author of *Creating a Drama-Free Workplace: The Insider's Guide to Managing Conflict, Incivility and Mistrust* (2020). Notable clients include Wells Fargo, Target, Honeywell, General Mills, 3M, Lockheed Martin, and Best Buy.[155]

Thera Rising provides both seminars and trainings, workplace consulting, and facilitator and trainer certifications.[156] When working with companies, Thera Rising employs a three-step team building process: 1) a seminar training on drama-free work; 2) applying new principles to behaviors within the team and creating a code of conduct; 3) working to resolve private conflicts between pairs.[157] Maravelas' seminars and trainings emphasize three broad areas to increase civility: 1) positive energy is necessary to protect health, create connection, and lower stress levels; 2) insights into the causes and cures of workplace hostility by building alliances, being hard on the problem (soft on the person), and identifying the root of conflicts and when people are most vulnerable; 3) specific strategies to transform confrontations to shared searches for solutions, use reciprocity favorable, avoid adversarial factions, change blame-based conversations, and open up dialogue with a 96% chance of a positive outcome.[158]

Catherine Mattice, Civility Partners

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[151] *Id.*
[152] Thera Rising International Website, http://thera-rising.com/about/.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Creating a Drama-Free Workplace: The Insider's Guide to Managing Conflict, Incivility & Mistrust*, (2020).

Catherine Mattice is the founder and CEO of Civility Partners and provides consultant, speaker, and trainer services on transforming workplace culture and preventing workplace bullying.[159] Mattice is active in the International Association for Workplace Bullying & Harassment (IAWBH) and one of the four founding members of the National Workplace Bullying Coalition, a nonprofit organization focused on ending workplace bullying.[160] Mattice has written multiple articles and three books on stopping workplace bullying (*BACK OFF! Your Kick-Ass Guide to Ending Bullying at Work* (2012), *Seeking Civility: How leaders, managers and HR can create a workplace free of bullying and abusive conduct* (2016), and *Stand Up, Speak Out Against Workplace Bullying: Your Guide to Survival and Victory Through 23 Real Life Testimonies* (2018)).[161]

Mattice's work focuses on incivility in the workplace through the lens of bullying. Mattice defines workplace bullying as unwanted and recurring negative and abusive acts aimed at one or more individual.[162] Bullying often involves perceived power imbalances and inability to engage in self-defense, resulting in psychological harm to the victim and monetary losses to the organization.[163] As most instances of bullying are not covered by law or most corporate policies, it is often a reflection of the organizational culture and how employees communicate and interact with one another.[164] Mattice offers seven steps to create a bully-free workplace: 1) strategically use internal communication to create a culture of support, fairness, and listening; 2) obtaining and maintaining organizational commitment at every level; 3) periodically auditing internal communication processes for inappropriate behavior; 4) implement an anti-bullying policy; 5) conduct repeated management and employee trainings; 6) take grievances seriously and investigate them immediately; and 7) use a 360-degree review process where every person reviews everyone they have worked with.[165] Eliminating

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[159] Civility Partners Website, https://civilitypartners.com/catherine-mattice-zundel/.
[160] *Id.*
[161] *Id.*
[162] *7 Steps to a Bully-Free Workplace: Deliver a culture of civility to your organization & sustain the positive change*, HR Times, Vol. 3 Issue 4, https://assets.nu.edu/assets/resources/degreeResources/7_Steps_HRTimes_Cover.pdf.
[163] *Id.*
[164] *Id.*
[165] *Id.*

bullying from the workplace motivates staff, increases the quality and quantity of work, reduces stress, and improves the health of employees and the organization.[166]

Peggy Parks, The Parks Image Group

Peggy Parks is a speaker, trainer, and consultant focusing on business etiquette and corporate civility.[167] Parks is certified as an image and etiquette trainer, a branding strategist, and reach assessment analyst.[168] Parks has written numerous articles and some book chapters on business etiquette and civility.[169] Notable clients include AT&T, eTrade, Intel, and UPS.[170]

Parks provides customized workplace civility trainings and workshops for companies to address individual needs. To aid in solving the complex aspects of uncivil behaviors, Parks has created a civility solution model.[171] The 4C's Model for Civil Communication emphasizes communication must be clear, correct, calm, and conscious.[172] Parks supplements training on this communication model with self-assessments relating to communication habits and lessons on why civility matters and how it can improve business through increased respect, retention, morale, and profits.[173]

Christine Pearson, Arizona State University

Christine Pearson is a Professor of Global Leadership at Arizona State University's Thunderbird School of Global.[174] Pearson is an expert on curtailing and containing dysfunctional behavior at work, from dramatic organizational crises, to the corrosive impact of problems stemming from low-intensity incivility and aggression.[175] Pearson also serves as a consultant and executive-development adviser, with notable clients including PepsiCo,

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[166] *Id.*
[167] The Parks Image Group Website, https://www.theparksimagegroup.com/about/.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] Christine Pearson Faculty Page, https://thunderbird.asu.edu/christine-pearson.
[175] *Id.*

Dow Chemical, NASA, Clorox, Transamerica, Cisco Systems, Kraft Foods, AT&T, Mobil, and Chevron.[176] Pearson has authored numerous articles and six books relating to crisis leadership and bad behavior at work (including *The Cost of Bad Behavior: How Incivility Is Damaging Your Business and What to Do About It* (2009) (co-authored with Christine Porath).[177]

Pearson defines civility in the context of the workplace as behavior that helps to preserve the norms for mutual respect at work; it comprises behaviors that are fundamental to positively connecting with another, building relationships and empathizing.[178] In contrast, incivility in the workplace entails the violation of those norms such that cooperation and motivation are broadly hindered.[179] Further, Pearson diagnoses the various ways incivility can creep into an organization. Incivility may be confined into non-escalating exchange between two individuals.[180] However, incivility may also escalate and with each action promoting a more uncivil response creating a spiral.[181] Additionally, incivility can cascade outside of just the participants through direct and indirect displacement (when incivility with one person is taken out on another), word-of-mouth, and direct observation.[182] Much of Pearson's studies have been analyzing and accounting for the costs this incivility can have in the workplace (see Christine Porath below).

To combat incivility, Pearson recommends a series of corrective and protective actions. First, Pearson notes a company must set clear and expectations regarding their standards for interpersonal communication and not simply rely on the assumption everyone knows what civility means; once set, leaders must exemplify such values.[183] Next, companies can reduce incivility by screening for it during hiring, and then by training employees on civil behavior throughout their tenure.[184] Finally, companies should both

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[176] *Id.*
[177] *Id.*
[178] *Assessing and Attacking Workplace Incivility*, Organizational Dynamics, (2000), https://www.researchgate.net/profile/Christine-Porath/publication/228079608_Assessing_an_attacking_workplace_incivility/links/5663616108ae192bbf8ef07a/Assessing-an-attacking-workplace-incivility.pdf.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*

welcome and encourage feedback on uncivil behavior in the workplace and take corrective action on the issues raised.[185]

Christine Porath, Georgetown University

Christine Porath is an Associate Professor at Georgetown University's McDonough School of Business and also serves as a speaker and consultant. Porath's scholarship focuses on civility and is featured in numerous articles and the subject of two books: *Mastering Civility: A Manifesto for the Workplace* (2016) and *The Cost of Bad Behavior – How Incivility Damages Your Business and What You Can Do About It* (2009, co-authored with C.M. Pearson).[186] Notable among Porath's speaking and consulting clients are Google, United Nations, Pixar, Ford, AT&T, Expedia, the World Bank, Marriott, the Department of Justice, and Verizon.[187]

From over 20 years of research and polling workers, Porath has found that incivility is rampant in the workplace (98% of workers had experienced uncivil behavior).[188] Moreover, incivility was on the rise; in 2011, half of respondents stated they were treated badly at least once a week (up from a quarter in 1998).[189] Given the inescapable reality that every workplace deals with incivility in some manner, Porath's work seeks to do two things: (i) quantify and show the costs of incivility, and (ii) devise strategies and recommendations for how to fix it.

Porath defines incivility as disrespect or rudeness; this definition includes a multitude of behaviors that may vary in meaning for different people (what is rude to one person may not be to another).[190] In the workplace, incivility leads to tangible costs. Workers on the receiving end of incivility intentionally decrease effort (48%), quality (38%), and time spent (47%) at work; lose time worrying (80%) or avoiding the offender (63%); experience a decline in performance (66%) or commitment to the organization (78%); take

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[185] *Id.*
[186] Christine Porath Faculty Page, https://gufaculty360.georgetown.edu/s/contact/00336000014ReyuAAC/christine-porath.
[187] Christine Porath Website, http://www.christineporath.com/.
[188] *An Antidote to Incivility*, Harvard Business Review, April 2016, https://hbr.org/2016/04/an-antidote-to-incivility.
[189] *Id.*
[190] *Why being respectful to your coworkers is good for business*, Ted Talk, Oct. 24, 2018, https://www.youtube.com/watch?v=YY1ERM-NIBY.

frustration out on customers (25%); and quit (12%).[191] Further, individuals who experience incivility are less creative, perform worse, and are less likely to help out teammates or collaborate.[192] The effects of incivility also extend to those simply observing incivility, with customers found to be less likely to purchase from a company after witnessing uncivil conduct.[193] Overall, incivility is expensive and costly for a company.

Porath finds the usual responses to incivility—retaliation, direct discussion, avoidance—often fall short.[194] While these approaches can help in certain situations, confrontation usually makes the dynamic worse and avoidance is not sustainable.[195] Instead, companies should take a holistic approach where the best remedy for incivility is to improve the well-being of the office (rather than one offender) as a whole.[196] On a personal level, individuals who are thriving are less affected by the negative consequences of incivility. Thriving takes a two-pronged approach: (i) thriving cognitively, focused around growth, momentum, mentorship, and continued learning both at and outside of work, and (ii) thriving affectively, which is centered around feeling healthy, well rested, and experiencing passion and excitement at work and outside of it.[197] On an organizational level, company leadership should model good behavior, ask for feedback (including post-departure interviews), pay attention to progress, include civility as a factor in hiring, teach and train employees on what it means to be civil, create group norms and expectations, reward good behavior, and punish bad behavior.[198] Greater civility in a company benefits not only the people, but also the bottom line.[199]

Thomas G. Reio, Jr., Florida International University

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[191] *The Price of Incivility*, Harvard Business Review, January-February 2013, https://hbr.org/2013/01/the-price-of-incivility.
[192] *Id.*
[193] *Id.*
[194] *An Antidote to Incivility*, *supra* note 186.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*; *The hidden toll of workplace incivility*, McKinsey Quarterly, Dec. 14, 2016, https://www.mckinsey.com/business-functions/organization/our-insights/the-hidden-toll-of-workplace-incivility#.
[199] *Why being respectful to your coworkers is good for business*, *supra* note 5; Christine Porath Website, *supra* note 185.

Thomas G. Reio, Jr. is a Professor of Adult Education and Human Resource Development at Florida International University.[200] Reio's research concerns taking a sociocultural view of curiosity and risk-taking motivation and their links to learning and development across the lifespan, socialization practices (*e.g.*, mentoring), and workplace incivility.[201] Reio has published numerous academic articles and was awarded multiple awards for work on workplace incivility and conflict management.[202]

Much of Reio's work builds off of what management strategies companies can take after acknowledging that incivility in the workplace is prevalent and harmful. In a study on the effects of supervisor and coworker incivility, Reio confirmed that incivility had a strong, direct negative effect on job satisfaction and employees' emotions.[203] However, Reio found that emotion management—the process to modify one's emotions to fit the appropriate responses for environmental and organizational demands (*e.g.*, suppressing negative emotions or faking positive emotions)—lessened the negative effects of incivility on job satisfaction.[204] Thus, organizations should not only be aware of the ill effects of incivility, but also develop positive emotional management strategies and educate employees.

Reio has also studied the effects of different styles of conflict management in dealing with workplace incivility. Reio found that dominant conflict management style—low levels of concern for others and high focus on yourself—was negatively associated with organizational commitment and retention.[205] However, Reio found that integrative conflict management style—high levels of concern for yourself and others that creatively uses information to achieve mutually-satisfactory results—had positive relations

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[200] Thomas Reio Jr. Faculty Page, https://case.fiu.edu/about/directory/profiles/reio-thomas.html.
[201] *Id.*
[202] *Id.*
[203] Opengart, Rose,et al., *Workplace Incivility and Job Satisfaction: Mediating Role of Emotion Management*, IJAVET vol.10, no.2 2019. http://doi.org/10.4018/IJAVET.2019040101.
[204] *Id.*
[205] Reio, Jr., Thomas G. and Jeannie Trudel, *Workplace Incivility and Conflict Management Styles: Predicting Job Performance, Organizational Commitment, and Turnover Intent*, Adult Education and Vocational Training in the Digital Age, edited by Viktor Wang, IGI Global, 2017, pp. 217-240. http://doi:10.4018/978-1-5225-0929-5.ch013.

to job performance, organizational commitment, and turnover.[206] Thus, Reio encourages companies to seek to use more integrative conflict management styles when dealing with workplace incivility.

Jayne Reardon, Illinois Supreme Court Commission on Professionalism

Jayne Reardon is the Executive Director of the Illinois Supreme Court Commission on Professionalism.[207] Reardon oversees programs and initiatives to increase the civility and professionalism of attorneys and judges, create inclusiveness in the profession, and promote increased service to the public.[208] Reardon has written articles and given various presentations on civility and professionalism within the legal enterprise.[209]

Reardon has defined civility within the legal profession to be a code of decency in conduct and behavior that is a condition of lawyer licensing.[210] Reardon finds that despite attorney's professional obligations to civility, it is rampant in the legal community with the vast majority of Illinois lawyers having experienced unprofessional behavior by other lawyers, whether blatant rudeness in comments or interactions, to more strategic incivility in opposing counsel employing uncivil behaviors in an attempt to gain an upper hand in litigation.[211] However, the research clearly shows the benefits to civility: (1) civil lawyers are more effective and achieve better outcomes; (2) civil lawyers build better reputations; (3) civil lawyers have greater job satisfaction; and (4) civil lawyers have less chances of discipline.[212]

To promote civility among lawyers, Reardon proposes bringing lawyers together for training and mentoring. To that end, the Commission on Professionalism has created a lawyer-to-lawyer mentoring program for new lawyers using a guided curriculum on how attorneys can build careers based

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[206] *Id.*
[207] Illinois Supreme Court Commission on Professionalism Website, https://www.2civility.org/about/our-team/jayne-reardon/.
[208] *Id.*
[209] *Id.*
[210] Civility as the Core of Professionalism, American Bar Association, Sept. 18 2014, https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/.
[211] *Id.*
[212] *Id.*

on integrity and professionalism.[213] Further, the Commission has created CLE programs on civility, expert interviews and tips, and a host of other resources to train and educate attorneys and the entire legal profession on civil behavior.[214]

Bob Sutton, Stanford University

Bob Sutton is a Professor of Management Science and Engineering and Professor of Organizational Behavior at Stanford University.[215] Sutton co-founded the Stanford Technology Ventures Program and the Hasso Plattner Institute of Design.[216] Sutton studies organizational change, leadership, innovation, and workplace dynamics and has received numerous honors and recognitions as a leader in management.[217] Sutton is widely published in academic journals and has authored seven books (including *The No Asshole Rule* (2010) and *The Asshole Survival Guide* (2017)).[218]

Sutton has been influential in popularizing both the costs and negative effects of incivility in the workplace, but also in working to create different solutions for transforming organizational culture. Sutton defines the workplace jerk as someone that makes others feel oppressed, humiliated, de-energized, belittled, or worse about themselves after interacting with them.[219] Sutton then quantifies the total costs of jerks for a company by looking at the damage to victims and witnesses (*e.g.*, distraction, loss of motivation, stress), damage to the jerks (*e.g.*, retaliation from victims, humiliation, unable to work with others), consequences for management (*e.g.*, time lost dealing with jerks and their fallout), legal and HR costs, and negative organizational effects (*e.g.*, reduced creativity, impaired cooperation, less effort).[220] In response, Sutton advocates for the no-jerks rule and five practices for companies to utilize when following it: 1) make the rule public by what you say and do for accountability; 2) employ the rule in hiring and firing

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[213] Illinois Supreme Court Commission on Professionalism Website, *supra* note 205.
[214] *Id.*
[215] Bob Sutton Website, https://www.bobsutton.net/about-bob/.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Building the civilized workplace*, McKinsey Quarterly, May 1, 2007, https://www.mckinsey.com/business-functions/organization/our-insights/building-the-civilized-workplace.
[220] *Id.*

decisions; 3) teach people how to constructively disagree and argue; 4) apply the rule to customers and clients; and 5) manage the little moments as ways to repeatedly practice the rule.[221]

After writing extensively on how organization's may utilize the no-jerks rule to transform company culture, Sutton has also researched its application specifically to senior management. People in positions of power are more likely to act uncivil in their behavior whether it is because they are overworked, insecure, distanced, or drunk on power.[222] Because of this, leaders have to be especially self-reflective and cognizant of whether they are the source of incivility in the organization.[223] Sutton proposes a five-point plan to help top executives strive to treat others with respect: 1) make sure you are not surrounded by jerks because rudeness is contagious and can spread; 2) be aware of how you wield your influence and power and practice humility and giving credit to others; 3) understand the risks of overload and addiction to technology, which often has the indirect effect of causing unintentionally uncivil conduct; 4) when you behave like a jerk, make sure to apologize correctly and personally (don't delegate); and 5) envision your actions from the future and reflect upon how you would like to behave looking back on your life.[224]

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[221] *Id.*

[222] *Memo to the CEO: Are you the source of workplace dysfunction?*, McKinsey Quarterly, Sept. 14, 2017, https://www.mckinsey.com/featured-insights/leadership/memo-to-the-ceo-are-you-the-source-of-workplace-dysfunction.

[223] *Id.*

[224] *Id.*

Appendix 5: Referral and Dispute Resolution Programs

Report On Civility Mediation Programs

TO: **Civility Task Force**

FROM: **Jeanne A. Fugate and Alan M. Mansfield**

DATE: **July 29, 2021**

RE: **Referrals and Dispute Resolution Subgroup Final Report**

The Civility Task Force is exploring potential programs, procedures, and rule changes to increase civility in the legal profession in the State of California. Our subgroup was tasked with investigating examples of attorney referral programs utilized by other State Bars as well as to explore examples outside the context of the legal profession, such as conflict resolution programs adopted by public and private entities. We looked specifically for programs addressing *incivility* in the legal profession and/or the workforce, as opposed to programs that deal with ethical violations or address claims of illegal conduct in the workforce (discrimination, harassment, etc.).

Below we briefly summarize the programs that we have located. Each of the programs discussed below share common characteristics: They are confidential and voluntary, and are not part of any formal disciplinary body. The sessions are mediated by a neutral third party—usually a volunteer but in one example below a professional and paid mediator. There tend to be civility rules (or workplace conduct rules) against which to gauge behavior. And there tends to be a limitation in geographic scope.

Based upon our research and discussions with the Task Force, we also attached hereto as Exhibit "1" our recommendations, should there be interest in implementing a similar program in California.

I. ATTORNEY REFERRAL PROGRAMS

At least four states have adopted some form of lawyer professionalism and/or civility referral programs: (1) New Jersey, (2) Utah, (3) Colorado, and (4) Florida. Both Illinois and Michigan have engaged in a sustained effort to promote civility, but do not appear to have adopted formal referral programs.

We also saw references to similar programs in Arizona, Georgia, and North Carolina, but so far have been unable to locate detailed information about them.

A. New Jersey

In 1997, New Jersey implemented a "Professionalism Counseling Program." https://tcms.njsba.com/PersonifyEbusiness/Default.aspx?TabID=2009. According to their website, the Commission on Professionalism in the Law asked county bar associations across New Jersey to take the lead through the establishment of Professionalism Committees that would have the ability to identify and counsel lawyers whose conduct falls short of accepted levels of professional behavior or competence.

The Professionalism Counseling Program addresses conduct by lawyers that does not rise to the level of a violation of the ethics rules (the Rules of Professional Conduct). Thus, it does not handle any matter that is within the jurisdiction of a District Ethics Committee. For instance, the program deals with such things as harassing conduct, abusive litigation tactics, incivility, inappropriate courtroom conduct, and repeated lack of respect for colleagues, judges, and court staff. The program is educational in nature. No discipline or sanctions are imposed, and all matters are confidential. The only records kept are those relating to the type of complaint addressed.

The program is operated through local Professionalism Committees appointed by county bar associations. The precise composition, structure and operation of a committee is left to the bar association to establish, and different approaches have been taken. Some committees operate under formal operational rules; others deal with complaints on a more ad hoc basis. Another committee has established a mediation program to deal with disputes between lawyers. The commission encourages such experimentation and leaves it to bar associations to determine what type of program best fits the needs of the bench and bar of that county.

The Commission has, however, set some basic guidelines for the local Professionalism Committees to follow:

- Each committee, and a committee chair, should be appointed by the county bar president.
- Lawyer members of committees should be highly regarded and experienced members of the bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

The program should offer assistance in the following circumstances:

- A lawyer requests assistance in dealing with another lawyer, or in addressing specific conduct of another lawyer
- A lawyer requests assistance in dealing with a professionalism issue
- A judge requests assistance in dealing with a lawyer, or in addressing specific conduct of a lawyer
- The Appellate Division encounters unprofessional behavior and refers an opinion to the Commission, for referral to the appropriate county bar committee.
- The program shall not handle complaints from clients, or members of the public.

Generally, complaints are directed to the chair of the Professionalism Committee. The evaluation of complaints is done pursuant to committee rules and guidelines. Most committees will ask a member to look into a complaint by talking with the lawyers involved. If further action is deemed necessary, committee members will be assigned to counsel the lawyer in question, or the lawyer will be asked to appear before the committee. If a lawyer is reluctant to cooperate, the assignment judge (pursuant to Court Directive #1-97) may be asked to intercede and assist in ensuring the lawyer's cooperation.

Currently, almost all of New Jersey's twenty-one county bar associations have adopted some form of professionalism counseling. Committees may also refer lawyers to other programs, if the circumstances so warrant. For instance, such referrals have been made in cases where substance abuse problems have been uncovered.

B. Utah

Utah has adopted a "Program of Professionalism," pursuant to the Utah Supreme Court Standing Order No. 7 (amended June 12, 2012). The program is administered pursuant to Rule 14.303 of the Utah Supreme Court Rules of Professional Practice, a copy of which is included in our Appendix.

The program consists of seven members in staggered 3-year terms, appointed by the Supreme Court, to server on a "Professionalism and Civility Counseling Board." The purpose of the Board is to "(1) counsel members of the Bar, in response to complaints by other lawyers, referral from judges or referrals from counsel in the Office of Professional Conduct, (2) provide counseling to members of the Bar who request advice on their own obligations under the Standards, (3) provide CLE on the Standards and (4) publish advice and information relating to the work of the Board." One member of the Board has small firm or solo practitioner experience, and one has transactional experience. The Board does not consider complaints from clients or the public.

The Board addresses most matters in panels of three, based on written complaints or referrals (which are not to be anonymous in terms of the person making the referral). If they find the matter warrants a response, is submitted in good faith and not for purposes of harassment or to attain a strategic advantage, they are to let the complainant know that a complaint or referral has been received, and gives them a description of how the Board intends to address the issue. The contents of any complaint or response is to remain confidential, and Board members are free to investigate such claims. They may, but are not required to, inform the lawyer of the relevant factual assertions and provide them a copy of the complaint prior to issuing an advisory or taking any other action.

Resolution may be a written advisory to the attorney, or a face-to-face meeting with the lawyers or through counsel. The Board may also advise relevant supervisors, employers, agencies or judges of the disposition if it is a written advisory, and may also publish the advisory for the benefit of the Bar and the public, while keeping the names of the persons involved confidential.

The Board reports annually to the Utah Supreme Court concerning its operations, the standards it has interpreted, the advice it has given, any trends it believes are important for the Court to know and suggestions as needed to modify the standards. These results are also to be published in the Utah Bar Journal and on a website, in a database of advisories for reference for the benefit of practicing lawyers.

C. Colorado

Colorado has implemented a "Peer Professionalism Assistance Group." https://www.cobar.org/For-Members/Professionalism-Resources/Peer-Professionalism-Assistance-Group

According to the PPA's website, the PPA provides free confidential coaching to individual attorneys, informal mediation assistance to attorneys and education to groups of attorneys. The PPA is confidential and any communications are not shared with any regulatory agency, court, or professional association.

The PPA, which apparently is staffed by volunteer attorneys, (1) provides one-on-one confidential advice to individual attorneys on how to handle an unprofessional situation; (2) communicates with opposing counsel upon request of the calling attorney to discuss and help resolve professionalism issues; (3) meets jointly with and provides informal mediation services to both/all attorneys experiencing professionalism issues (either upon request of the attorney(s) or when ordered by the court); and (4) receives referrals from judges and magistrates to eliminate unprofessional behavior in courtrooms; and (5) provides Continuing Legal Education seminars.

D. Florida

Florida has taken a variety of approaches to address civility issues, mostly on a local Bar level, although it also has enforced formal civility complaints through the State Bar and published decisions. As one example, the Palm Beach County Bar Association has created a "Professionalism Panel," to meet with attorneys who have conducted themselves in a manner inconsistent with The Florida Bar Professionalism Expectations or the Palm Beach County Bar Association Standards of Professional Courtesy and Civility. The purpose of the Panel is to discuss their conduct and counsel them to avoid such conduct in the future. The Panel has no authority to discipline attorneys or to compel an attorney to appear before it. The Bar

provides an online form that can be submitted to the Panel, a copy of which is included in our Appendix.

E. Illinois

The Illinois Supreme Court has created a formal Commission on civility and professionalism, which has created a website devoted to lawyer civility issues and is an excellent clearinghouse of information our committee should review for ideas and resources: https://www.2civility.org/civility/. We confirmed via email with Executive Director Jayne R. Reardon that it does not utilize any form of referral program. According to Ms. Reardon, "The Commission on Professionalism is charged with promoting professionalism above the floor required by the Rules of Professional Conduct. . . . We do not have any involvement in referral for dispute resolution."

F. Michigan

Michigan has similarly created a clearinghouse of information on civility, based on an October 2018 summit on civility by bench and bar leaders throughout Michigan that resulted in the creation of a clearinghouse for civility information and a presentation to the State Supreme Court of Michigan in October 2019 of "Professionalism Principles for Lawyers and Judges." https://www.michbar.org/file/professional/pdfs/Professionalism-Letter.pdf

Michigan considers the Principles to be "aspirational," and address no possible enforcement or disciplinary process. There is not a formal referral program within these principles. We found interesting, however, the below, which the Michigan State Bar identified as "The Top Ten Most Shared Recommendations" to encourage civility:

- Encourage bar associations, lawyer organizations, and judicial groups to conduct similar summits.
- Consider the adoption of Michigan specific civility guidelines for lawyers and judges and use them more deliberately.
- Review The Lawyer's Oath more frequently and include it in a State Bar curated clearinghouse and professionalism tool kit.
- Focus on personal relationship building, inclusion, and more thoughtful communication, especially when using technology.

- Focus on lawyer wellness.
- Recognize lawyers and judges practicing civility and professionalism through awards, social media, and other methods designed to celebrate those who exemplify good practice.
- Create more court ombudsman programs to invite communications regarding judges and lawyers who may be struggling with civility in the courtroom.
- Send the message through mentorship and similar efforts that uncivil conduct unfavorably affects time management, economics of law practice, and personal credibility.
- Encourage the public and the business community to look for attorneys with civility and professionalism qualities.
- Involve the public in this conversation and invite community organizations to have public speakers on the subject.

Above we summarize the programs in place in New Jersey, Utah, Colorado, and Florida, as well as describe programs to promote civility in Illinois and Michigan. Please let us know if further research would be helpful as to these or other attorney referral programs.

II. PRIVATE/PUBLIC ORGANIZATION EXAMPLES

We also investigated dispute resolution mechanisms in the public and private sector. As an initial note, we have not been able to identify any private sector program, despite wide inquiries in that regard. It is the authors' suspicion that private sector programs are often more focused on discipline and risk mitigation (and most HR functions would operate confidentially) and thus we have not yet identified any private sector programs that could be interest to the Task Force.

However, we were able to identify several public sector organizations that have implemented, or are in the process of implementing, dispute resolution programs. We have spoken with representatives of the County of Los Angeles, the City of San Francisco, and the City of Los Angeles, who have shared their programs and/or aspirations. Of them, the County of Los Angeles program has been in place the longest and may provide the most guidance.

A. County of Los Angeles

We interviewed two representatives from LA County's Department of Human Resources: William Gomez, Senior Manager for Civil Service Advocacy Division; and Diane Woo, Deputy Compliance Officer, Dispute Resolution Mediation. Ms. Woo is considered to be a subject matter expert as she has been involved in the County's program for the past 15 years.

The program was created to deal with miscommunications between supervisors and line staff, escalation of workplace tensions, etc. The program is voluntary for its participants, and is entirely confidential. According to a Resource Guide, the process is initiated by a supervisor contacting the DRM section for consultation. The supervisor then meets with a professional facilitator (who is paid by the County, at $100 per hour). The professional facilitator then drafts a plan of action and holds a confidential meeting with the employees who are the subject of the referral.

Ms. Woo reported that she believed the most important attributes of their program (and of any similar program) are: (1) that it be voluntary, with willing participants, (2) that is be entirely confidential, (3) that it not be tied to discipline, and (4) to obtain participants' views on what worked and what didn't to continually improve the program.

Materials in Appendix include the DCO Resource Guide, and Program Flyer.

B. City of San Francisco

We spoke with Jacqueline Joseph-Veal, who goes by "jjv," the Diversity, Equity, and Inclusion Director of the City of San Francisco to learn about their program. The San Francisco program has just launched as a pilot project for four departments. Like the Los Angeles County program, the program is entirely voluntary and confidential. Also similar to LA County, the program starts with a referral, followed by a pre-meeting with the participants, and a formal mediation session, subject to a confidentiality agreement.

Unlike Los Angeles County with pays professional mediators to lead session, the "facilitators" in San Francisco are volunteers from the City. The City received 243 applications from employees, narrowed to the top 70 based on highest scores and manager approval, and eventually chose 50 employees with the top scores to be the mediators.

jjv reports that employees are very excited about the program – they have adopted a slogan, "be part of the solution," that has gained a lot of traction. It is still early in the program, and jjv offered to speak again after the program ahs been in place for longer to give more feedback. She agreed, however, the important attributes are: (1) voluntariness, (2) confidentiality, and (3) that the "facilitator" be outside the supervisory chain of the participants. It is also not a disciplinary program.

Materials in the Appendix include a Powerpoint summary of the Program and an exemplar Confidentiality Agreement

C. City of Los Angeles

We spoke with Malaika C. Billups, Chief Diversity, Equity & Inclusion Officer of the City of Los Angeles. The City is in the process of creating its own dispute resolution program. It is looking at both the LA County and San Francisco programs described above. Ms. Billups had several observations: (1) there needs to be an agreed upon set of rules/conduct to measure the participants' conduct against, (2) the program needs to be voluntary, confidential and separate from discipline.

III. CONCLUSION

Upon the request of the Task Force, attached hereto as Exhibit 1 are our recommendations, should there be interest in pursuing dispute resolution program in California.

Exhibit 1
Key Attributes of Peer Review Counseling Program

1. Program would be overseen and coordinated by local bar associations in contrast to state-wide organization such as California State Bar.

2. Program would be staffed by volunteers with experience in mediation, similar to voluntary mediation programs operated by local Bar associations. If there could be a source of funding, it would be ideal to pay mediators a nominal hourly or daily fee, but question as to who would provide the source of that funding.

3. Referrals to program would be by other attorneys and local state and federal court judges, not clients, and participation in any referral to the Program would be voluntary

4. Format of Program would be more in form of mediation than a formal proceeding, with results not being formally transcribed or reported. Results of the mediation would be confidential.

(a) Question how to provide participants the results from participation in the program (i.e., would there be a written letter or report generated from the mediation, or entirely oral summary), and if the matter has been referred to the Program by a judge, would the results of that mediation be provided to the judge either orally or in writing.

(b) Results would not be reported to State Bar of California or other relevant jurisdiction

5. Program would be promoted in monthly bar and bench journals, bar organizations, and possibly through a centralized website containing updated information on civility programs, such as maintained in Illinois and/or Michigan

6. Program would develop a template for local bar associations to use for referrals and general rules to follow in process, which would be modified by local bar as appropriate to match/fit local needs. A template is attached as Ex. 1-A

EXHIBIT 1-A

REQUEST FOR REFERRAL TO PEER REVIEW COUNSELING PROGRAM

Important: Please read the instructions on the next page.

A. Your Information:

Name: _____

Address: _____

E-mail address: _____

Telephone no.: _____

B. Lawyer or Staff Person Complained About:

Name of lawyer: _____

Name of staff person: _____

Firm name: _____

Address: _____

C. Nature of Conduct Complained of (*check all that apply*):

_ Dishonesty, lack of candor

_ Unfair or dilatory tactics

_ Disruptive in court or other oceeding

_ Disorganized/unprepared

___ Rude, discourteous, disrespectful, uncivil

___ Bullying, badgering, abusive, insulting

___ Profanity, obscene gestures, facial expressions

___ Lack of decorum

___ Other

Did the conduct occur in connection with litigation? ___Yes ____No.

If yes:

Case caption: _____

Court:_____

Case No. _____

D. Specific Conduct. The specific conduct complained of is described on the attached sheet(s).

E. **Declaration, Request, and Signature.** By signing below, I declare that I believe in good faith that the information that I am providing is true and complete, and I request that this matter be referred to the Peer Review Counseling Program.

_____

Date: _____ Name: _____

INSTRUCTIONS FOR REFERRAL FORM

Purpose: The Peer Review Counseling Program was established pursuant to a Civility outreach program established by the State Bar of California. Its purpose is to meet with attorneys who have conducted themselves in a manner inconsistent with Standards of Professional Courtesy and Civility to discuss their conduct and counsel them to avoid such conduct in the future.

The Panel has no authority to discipline attorneys or to compel an attorney to appear before it. Likewise, neither the mediator overseeing the referral or the County Bar Association can intervene on your behalf in a civil or criminal case or give you legal advice.

Completion of Form: Please submit no more than **ten pages,** including the referral form and attachments**.** Do not include this instruction page. You may indicate that additional evidence or exhibits are available upon request. Please type or print legibly, using only black typeface or ink.

Conduct in Question: Describe in detail the conduct about which you are complaining, supplying dates where possible. Please be aware that simply alleging conclusions unsupported by facts may result in the rejection of your request or a delay in its disposition.

Signature: You must sign the form where indicated. Unsigned forms will be returned for signature.

Submission of Form: Please e-mail your completed form and accompanying pages to _____, Executive Director of the County Bar Association Peer Review Counseling Program, at _____

Thank you for your interest in promoting the professionalism of attorneys in this County.

Appendix 6: Bias-Driven Incivility

BIAS AND INCIVILITY

By Esther K. Ro, Bradley S. Pauley, Mike H. Madokoro, Marisa Hernandez-Stern[i]

I. Bias-driven incivility in the legal profession

Notwithstanding efforts to minimize the effects of implicit bias in the legal profession, diverse attorneys continue to face "bias-driven incivility," a distinct form of incivility resulting from expressions of explicit and implicit biases.[225] In this section, we define and provide examples of bias-driven incivility; explain the negative effects of bias-driven incivility on attorneys who are directly impacted and on the legal profession; and make recommendations for intervention through MCLE programming.

II. What is bias-driven incivility?

Bias-driven incivility is uncivil conduct resulting from expressions of implicit and explicit biases,[226] including the unconscious expression of an

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[225] Although this section primarily focuses on the experiences of attorneys, we recognize that other legal professionals face bias-driven incivility. An attorney's duty of civility extends beyond their treatment of other attorneys and encompasses an attorney's treatment of all members of the legal profession, including but not limited to legal staff, judicial officers, and court staff. Additionally, attorneys should be mindful of their civility obligation to clients and the public. (California Attorney Guidelines of Civility and Professionalism, p. 3, https://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf.) When clients or the public witness or are subjected to incivility, it "perpetuate negative perceptions and stereotypes about lawyers and the legal system—namely that lawyers are arrogant, rude, obstreperous, and obnoxious jerks, and the client with the most abhorrent lawyer in the case will prevail." (Gernardo, *A Lesson in Civility* (2019) 32 Georgetown J. L. Ethics 135, 146; see Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 237 [incivility undermines public confidence in the legal profession].)

[226] "Bias" is generally defined as a prejudice in favor of or against one person or group compared with another, usually in a way considered to be unfair. California State Bar Rule 2.72(B)(2) states a non-exhaustive list of

internal bias or a covert manifestation of a discriminatory preference.[227] When biases are openly expressed through words or conduct, the persons against whom the biases operate may experience the behavior as uncivil conduct. Bias-driven incivility may occur between opposing counsel or colleagues at a firm, at work, or at social functions. A correlation exists between bias-driven incivility and power dynamics, with people in positions of authority more likely to engage in bias-driven incivility, though some forms of bias-driven incivility are more common between peers.[228] Attorneys

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biases experienced because of one's "sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation . . . ." More generally, biases are rooted in prejudices and stereotypes caused by racism, sexism, homophobia, ableism, and ageism, among other causes.

Implicit biases are unconsciously held attitudes and stereotypes about someone. Explicit biases are consciously held attitudes and stereotypes about someone.

The American Bar Association has issued reports comprehensively detailing and documenting the biases and obstacles experienced by women attorneys, attorneys of color, LGBTQ+ attorneys, and attorneys with disabilities, including You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession (2018), prepared jointly with the Minority Corporate Counsel Association; Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color (2020); and Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers who Identify as LGBTQ+ (2020).

[227] Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579, 1580-1581. Workplace incivility is generally defined by the academic literature as "low-intensity deviant behavior with ambiguous intent to harm the target, in violations of norms of workplace mutual respect. Uncivil behaviors are characteristically rude and discourteous, displaying a lack of regard for others." (Andersson & Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace* (1999) 24 Acad. Mgmt. Rev. 452, 457.)

[228] Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 255–256; Kim et al., *Microaggression Theory: Influences and Implications, The 360-Degree Experience of Workplace Microaggressions: Who Commits Them? How Do Individuals Respond? What*

may unintentionally engage in uncivil behavior because their conduct arises from an implicit bias or from a lack of awareness that their conduct is offensive. Regardless of the intentions of the attorney behaving this way, the persons against whom biases or ignorance operate continue to experience bias-driven incivility.

Common acts of incivility, such as interrupting one's opposing counsel during an oral argument or a negotiation, may constitute bias-driven incivility in certain circumstances. For example, if the attorney being interrupted is a young, Latinx woman, the attorney interrupting may be motivated by a combination of biases held against women, people of color, and young attorneys.[229] Importantly, recognizing these incidents as bias-driven incivility validates, rather than minimizes,[230] the experiences of diverse attorneys and helps to explain why they face greater exposure to incivility in legal practice.

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are the Consequences? in Microaggression Theory: Influences and Implications (Torino et al. edits., 2019) pp. 164-166.

[229] Applying an intersectionality framework to our understanding of bias-driven incivility recognizes that each person is comprised of overlapping identities. Legal scholar Kimberle Crenshaw coined the term "intersectionality" to explain that people may be subjected to unique forms of discrimination based on others' biases towards their overlapping identities, as opposed to a single-axis framework that silos one's various identities and assumes, for example, that all Black people experience racism in the same way or that all women experience sexism in the same way. (See *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989) 1989 Univ. Chi. Legal Forum 139.)

[230] For example, telling a woman attorney that she is imagining being interrupted more frequently or that "everybody gets interrupted sometimes" are examples of minimizing her experience. Notably, one study documents that female Justices of the Supreme Court are interrupted three times as often as their male colleagues. (Gender Equality is Part of the Civility Issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; see generally The Universal Phenomenon of Men Interrupting Women https://www.nytimes.com/2017/06/14/business/women-sexism-work-huffington-kamala-harris.html.)

Bias-driven incivility can occur through microaggressions. Microaggressions are "the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership."[231] Microaggressions "communicate bias and can be delivered implicitly or explicitly."[232] Being mistaken for a nonlawyer is a common example of a microaggression in the legal profession and is often based on biases about what an attorney should look like.[233] One study, conducted by the American Bar Association, found that women of color are mistaken for law firm, court, or janitorial staff at a rate 50 percentage points higher than White men; White women reported rates 44 percentage points higher, and Black men reported rates 23 percentage points higher.[234] The higher rates at which attorneys of color experience this kind of incivility demonstrates the effect of implicit and explicit biases on the experiences of attorneys with intersectional identities. Further, an attorney's choice to wear religious garb (e.g., a Sikh turban or a hijab) or to present in gender nonconforming ways may also

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231 https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/july-august/unconscious-bias-implicit-bias-microaggressions-what-can-we-do-about-them/.

232 Torino et al., *Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask* in Microaggression Theory: Influences and Implications (2019) p. 3.

233 This kind of bias-driven incivility can be expressed, for example, by asking a woman lawyer to perform administrative tasks, mistaking a Black woman lawyer at the deposition as the court reporter, or assuming a Latinx male lawyer is the defendant in the case. (See https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer; https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf; Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 31.)

234 https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf.

increase the chances of being misidentified as a nonlawyer.[235] This kind of bias-driven incivility can be harmful to an attorney's ability to make interpersonal connections, which can affect their professional progression, as well as their sense of belonging in the legal profession.[236]

Attorneys subjected to bias-driven incivility often experience incivility in the form of professional discrediting, including having their competence challenged, being addressed unprofessionally (for example, using pet names), and being critiqued on their physical appearance and attire.[237] Bias-motivated conduct may be overtly uncivil.[238] Attorneys also report experiencing incidents based on their identities, which may not be overtly uncivil, but have the effect of excluding, "othering," or otherwise relying on stereotypes associated with that attorney's identity.[239] Professional exclusion from advancement or social events also can be bias-driven incivility.[240]

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235 Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 9–14.

236 https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer.

237 Gender Equality is part of the civility issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer.

238 Using phrases like "that's so gay," making fun of an attorney's disability, and commenting on the physical appearance of a woman attorney are examples of overtly uncivil conduct. See https://www.360advocacy.com/wpcontent/uploads/2015/10/ChangChopraArticle-1.pdf.

239 For example, continually confusing two attorneys with similar backgrounds, commenting to a Muslim colleague that "he is no fun" because he abstains from drinking for religious reasons, or serving pork as the main dish at a firm event without consideration of the dietary restrictions of Jewish, Muslim, or Buddhist attorneys are incidents that may exclude or "other." Joking to an Asian American colleague that she should work on a case involving accounting fraud because "all Asians are good at math" is an example of implicating a stereotype associated with Asian Americans.. (See Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 31;

III. Effects of bias-driven incivility on impacted attorneys and the legal profession

Bias-driven incivility has profound effects on individual attorneys as well as on the legal profession. Bias-driven incivility negatively impacts the well-being and career trajectories of diverse attorneys. Additionally, individual experiences of bias-driven incivility, when considered collectively, have negative repercussions on the overall environment of legal workplaces.

Bias-driven incivility is uniquely harmful for attorneys who experience it. Because the legal profession remains one of the least diverse professions in the nation,[241] diverse attorneys typically experience bias-driven incivility in

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Gender Equality is part of the civility issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2015/micro-aggressions-boardroom-courtroom-presidential-campaign-trail/; E. Chung, S. Dong, J. Hu, C. Kown, G. Liu, A Portrait of Asian Americans in the Law, pp. 29, 31, https://www.apaportraitproject.org/ [" 'Asians work hard and do not say no to their superiors. With that, somehow I was the only one staying back to cover the team assignments...' "].)

[240] For example, excluding women attorneys from attending a basketball game because of a perception that they would not be interested, or failing to promote a Black woman associate to partnership because she is being held to a higher standard of performance and being over penalized for past mistakes are examples of exclusion motivated by biases. (Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 246–247; Gender Equality is part of the civility issue, pp. 1–2, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html.)

[241] https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ (providing statistics); https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf (explaining California state's attorney population does not reflect its diversity). For example, in 2013, 20.2% of partners nationally were women; 2.3 % were women of color nationally and in many cities, women of color made up only 1% of partners. (IILP Review 2014: The State of Diversity and Inclusion in the Legal Profession, p. 14,

predominantly White, male, cisgender, non-disabled spaces. Against this backdrop, attorneys who are subjected to bias-driven incivility often expend emotional and mental labor to determine what role their identity played in their mistreatment, to process their mistreatment, and to protect themselves accordingly.[242] Protecting oneself from bias-driven incivility may result in additional identity performances by the affected diverse attorney that can further impact his or her psychological well-being.[243] Moreover, when acts of bias-driven incivility occur, the onus typically falls on the diverse attorney to speak up or to explain why the conduct was problematic.[244] This burden adds to the already higher emotional and mental labor shouldered by diverse attorneys.

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https://theiilp.wildapricot.org/Resources/Documents/IILP_2014_Final.pdf.) Additionally, Latinas, who constitute 7% of the total U.S. population, make up 2% of associates, 0.4% percent of equity partners, and only 0.6% of general counsels at Fortune 500 companies. (Los Puentes y Las Barreras: Latinas in the Legal Profession, The Federal Lawyer (2017) p. 37, https://www.fedbar.org/wp-content/uploads/2017/01/Latinas-pdf-1.pdf.) LGBTQI+ attorneys represented only 2% of all equity partners and less than 1% were persons with disabilities. (2019 NAWL Survey Report, p. 5.)

[242] Torino et al., *Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask* in Microaggression Theory: Influences and Implications (2019) p. 5 (explaining that microaggressions are more stressful than everyday incivilities because "[w]hen individuals of historically marginalized groups . . . are aware of historical or systemic discrimination or have experienced microaggressions in the past, they may be more conscious of how their identity impact interpersonal dynamics").

[243] See generally Carbado & Gulati, Acting White? Rethinking Race in "Post-Racial" America (2015) (discussing the costs and burdens of identity performances including the work performed to negate stereotypes); Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256–257.

[244] Evans & Moore, *Impossible Burdens: White Institutions, Emotional Labor, and Micro-Resistance* (2015) 62 Soc. Probs. 439, 441 (explaining "how participation in white institutional spaces requires particular forms of emotional labor and management of emotions from people of color, resulting from the stark contradiction between their racialized experiences in these institutions, on the one hand, and the dominant discourse that minimizes and delegitimizes their experiences on the other hand").

Studies have shown that incivility can result in adverse psychological effects such as stress, anxiety, depression, burnout, or a loss in self-esteem.[245] Additionally, experiencing incivility can negatively impact job performance, satisfaction, and commitment, and it can lead to leaving the job.[246] Women attorneys and attorneys of color often report having to work harder in order to overcome biases and stereotypes and receive the same recognition or respect as their colleagues.[247] They also report being penalized more harshly for mistakes.[248] As a result, bias-motivated incivility discourages diverse attorneys from actively participating or joining the community and reduces the inclusiveness of the legal profession.[249]

From an organizational perspective, workplace incivility "can negatively affect organizational performance because employees may reduce work efforts, be less likely to work collaboratively, avoid extra-role behaviors or simply exit the organization. When it affects women and employees of color specifically, workplace incivility can place them on the margins of everyday

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245 Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579; Estes & Wang, *Workplace incivility: Impacts on individual and organizational performance* (2008) 7 Hum. Res. Dev. R. 218.

246 Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256-257; Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579; Estes & Wang, *Workplace incivility: Impacts on individual and organizational performance* (2008) 7 Hum. Res. Dev. R. 218; Pearson et al., *Assessing and attacking workplace incivility* (2000) 29 Organizational Dynamics 123; Hershcovis & Barling, 2010.

247 https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf.

248 https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer; https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html.

249 https://hbr.org/2013/01/the-price-of-incivility?registration=success.

work life, further disadvantaging historically marginalized groups."[250] On the other hand, studies have shown that increased diversity and inclusion boost law firm and corporate profitability.[251] Thus, for law firms and corporations, to the extent bias-driven incivility causes diverse attorneys to seek other employment or reduce their productivity, failing to address bias-driven incivility can adversely affect their bottom line. Studies also demonstrate that workplaces that encourage open discussion about problems, foster social connections, and practice empathy are more productive.[252] Accordingly, an organization's productivity objectives are aligned with efforts to minimize bias-driven incivility and to foster a more inclusive environment, including open and honest conversations about bias-driven incivility.

For the profession generally, bias-driven incivility impedes the goal of increasing diversity and inclusivity. It negatively impacts the entry, retention, and promotion of those impacted by biases and stereotypes in the workplace, which in turn affects the number of diverse attorneys remaining in the law or rising to supervisory and leadership levels within law firms, government agencies, in-house legal departments, and other C-Suite positions.[253] Thus, addressing bias-driven incivility helps legal employers who aim to promote diversity and inclusion as a core value of their organizations.

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[250] Smith et al., *Gender, Race, and Experiences of Workplace Incivility in Public Organizations* (2020) R. Pub. Pers. Admin. (citations omitted) <https://journals.sagepub.com/doi/10.1177/0734371X20927760>.

[251] https://www.abajournal.com/columns/article/demographics-as-destiny-making-the-case-for-law-firm-diversity-and-inclusion; https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2014/diversity-inclusion-profit-drivers/.

[252] https://hbr.org/2015/12/proof-that-positive-work-cultures-are-more-productive.

[253] For example, one study found that 52% of lawyers of color leave their law firms by the third year and 85% leave by the fifth year. (IILP Review 2014: The State of Diversity and Inclusion in the Legal Profession, p. 66, https://theiilp.wildapricot.org/Resources/Documents/IILP_2014_Final.pdf; see https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf, p. 13 [70% of female lawyers of color report leaving or considering leaving the legal profession].) Many diverse attorneys attribute retention issues to the

IV. Interventions through MCLE programming

Education about bias-driven incivility through MCLE programming can be an effective way to reduce incidents of bias-driven incivility and to address it when it does happen. Although existing MCLE requirements include Recognition and Elimination of Bias,[254] programming typically focuses on increasing awareness of one's own implicit biases and how to minimize the impact of implicit biases on decision making, for example, hiring and promoting attorneys. While related, bias-driven incivility is a distinct problem that requires a distinct form of education.

Programming should seek to educate attorneys about what bias-driven incivility is and its adverse impacts on diverse attorneys and on the legal profession. One way to do this is to elevate the narratives of diverse attorneys who have experienced bias-driven incivility, including the repercussions such conduct has had on their careers and on their sense of belonging in the legal profession. Further, all attorneys should be encouraged to become more

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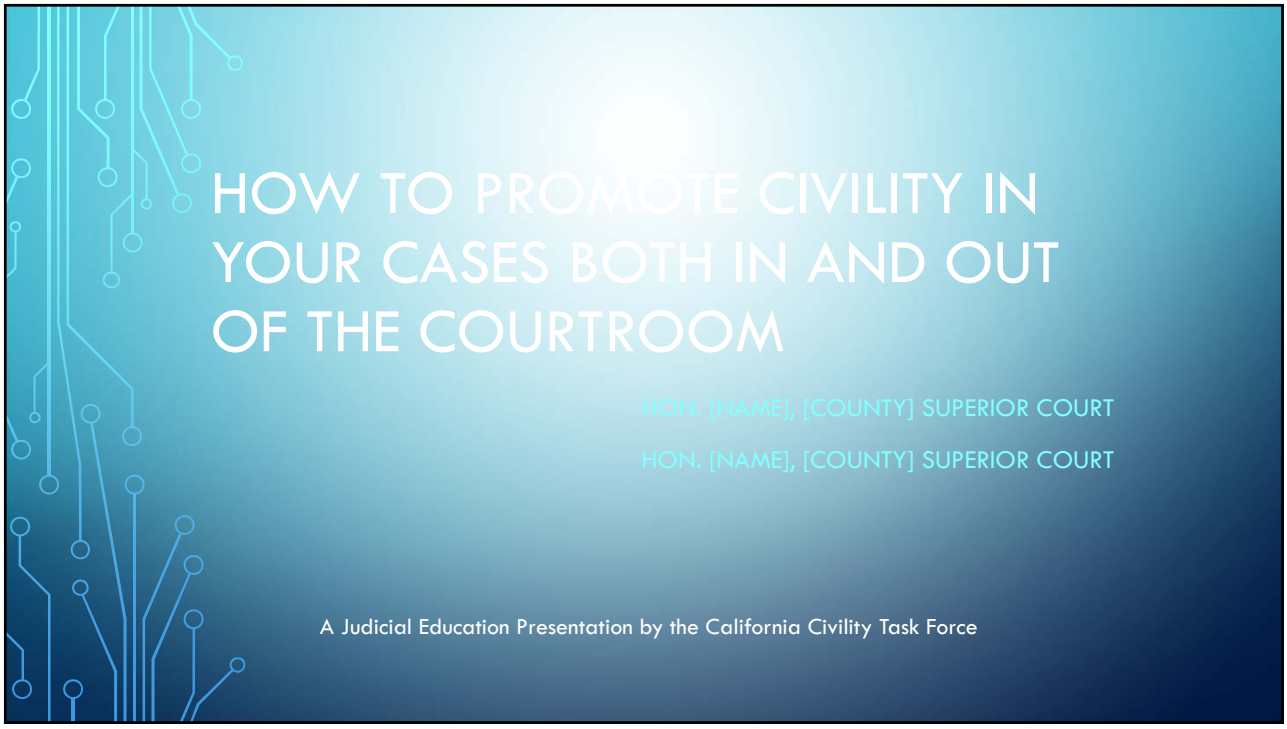
effects of bias-driven incivility, including biased performance reviews, unequal distribution of work assignments, lack of mentorship opportunities, and work/life balance issues. (See IILP Review 2014, at p. 67; https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2507&context=law-faculty-publications, pp. 193–194.) Indeed, an ABA study found that women reported microaggression and negative stereotypes contributed to their desire to leave the legal profession. (https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf, pp. 4–9, 12–13; see also Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256–257 [study finds increased experience of incivility leads to attorneys leaving the legal profession].)

[254] The State Bar currently requires at least one hour of MCLE devoted to Recognition and Elimination of Bias in the Legal Profession and Society ("elimination of bias"). As of January 1, 2022, all licensed attorneys must complete "at least two hours dealing with the recognition and elimination of bias in the legal profession and society . . . ." (State Bar rule 2.72(B)(2)(a)(ii).) "Of those two hours, at least one hour must focus on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system . . . ." (*Ibid.*).

knowledgeable about the problem through self-education. Self-education is an important tool because it helps to relieve the burden shouldered by diverse attorneys of having to explain why bias-driven incivility is harmful, which may place them in a sensitive or difficult position.

Once a foundational understanding has been achieved, programming should focus on training so that each attorney feels equipped to address bias-driven incivility when it happens. Programming can be tailored to focus on the various perspectives involved in any incident: the attorney directly impacted by bias-driven incivility, the attorney who engaged in bias-driven incivility, and bystanders. These conversations can be difficult for a multitude of reasons, including a power imbalance between the attorneys involved and a concern about professional repercussions. Providing attorneys with the tools and language to productively communicate about bias-driven incivility will encourage all members of the legal profession to engage in meaningful and impactful conversations to further promote civility in the practice of law.

Appendix 7: Sample Judicial Education Program on Promoting Civility


HOW TO PROMOTE CIVILITY IN YOUR CASES BOTH IN AND OUT OF THE COURTROOM
HON. [NAME], [COUNTY] SUPERIOR COURT
HON. [NAME], [COUNTY] SUPERIOR COURT
A Judicial Education Presentation by the California Civility Task Force

"It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law."

People v. Chong (1999) 76 Cal.App.4th 232, 243

In Re S.C. (2006) 138 Cal.App.4th 396, 412

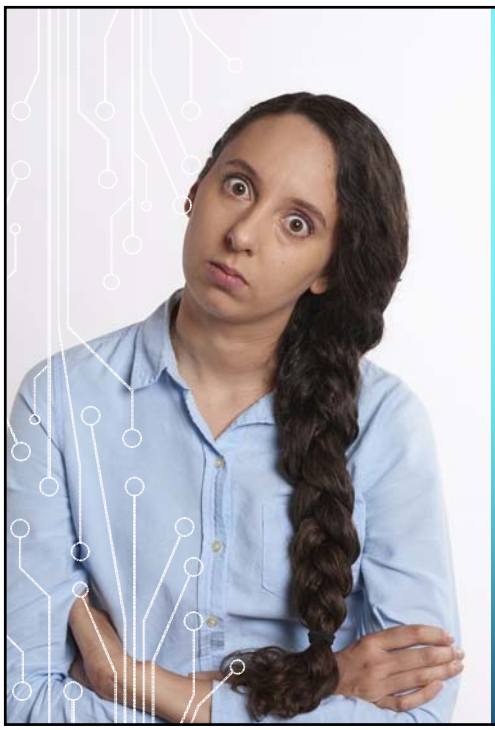
"In situations involving the misconduct of lawyers in court or settlement conferences, the judge's obligation to take action may be difficult and embarrassing to the offending lawyer. The consequences of not acting, however, could result in the appearance of tacit approval of the conduct, creating an invitation for further like conduct."

Rothman, Fybel, MacLaren and Jacobson, California Judicial Conduct Handbook (California Judges Association, 2017) at §2.11, pg. 75

"'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' [citations]. 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.'"

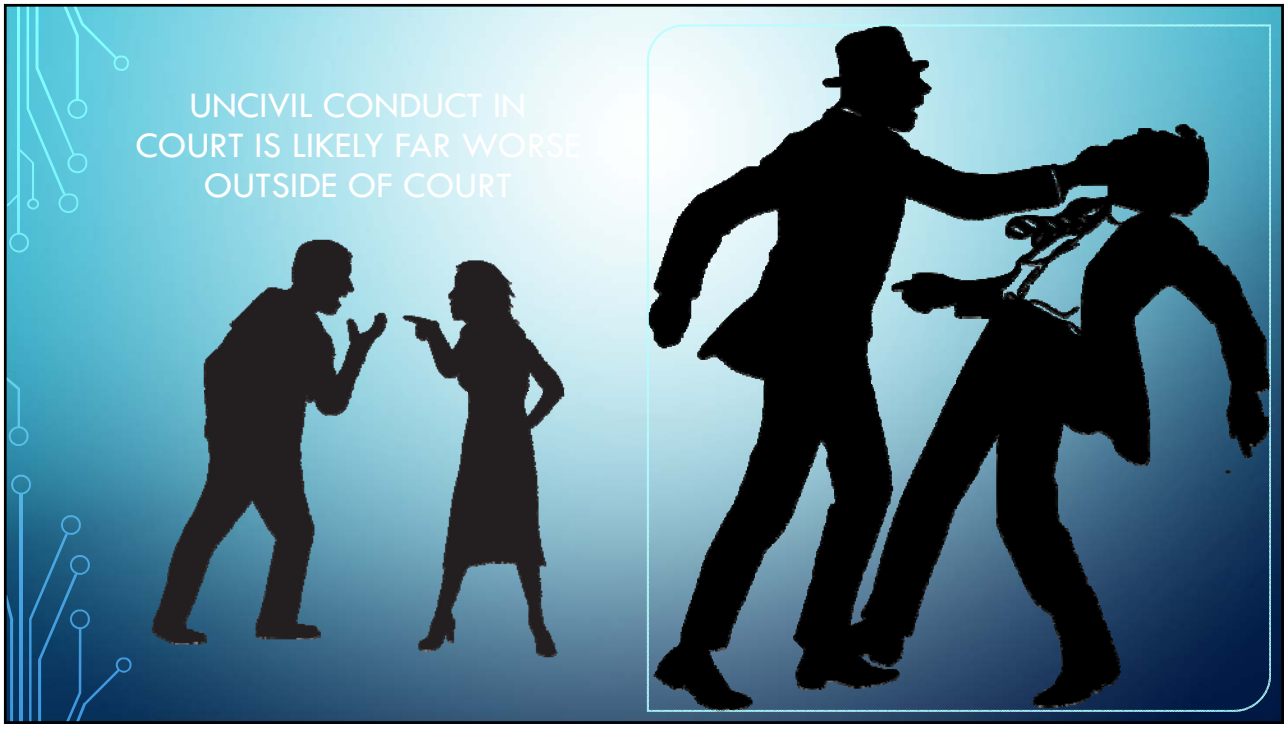
In re Paul M. Mahoney (2021) 65 Cal. App. 5th 376 at *5

(citing *In Re Ciraolo (1969) 70 Cal.2d 389, 394-95.*)

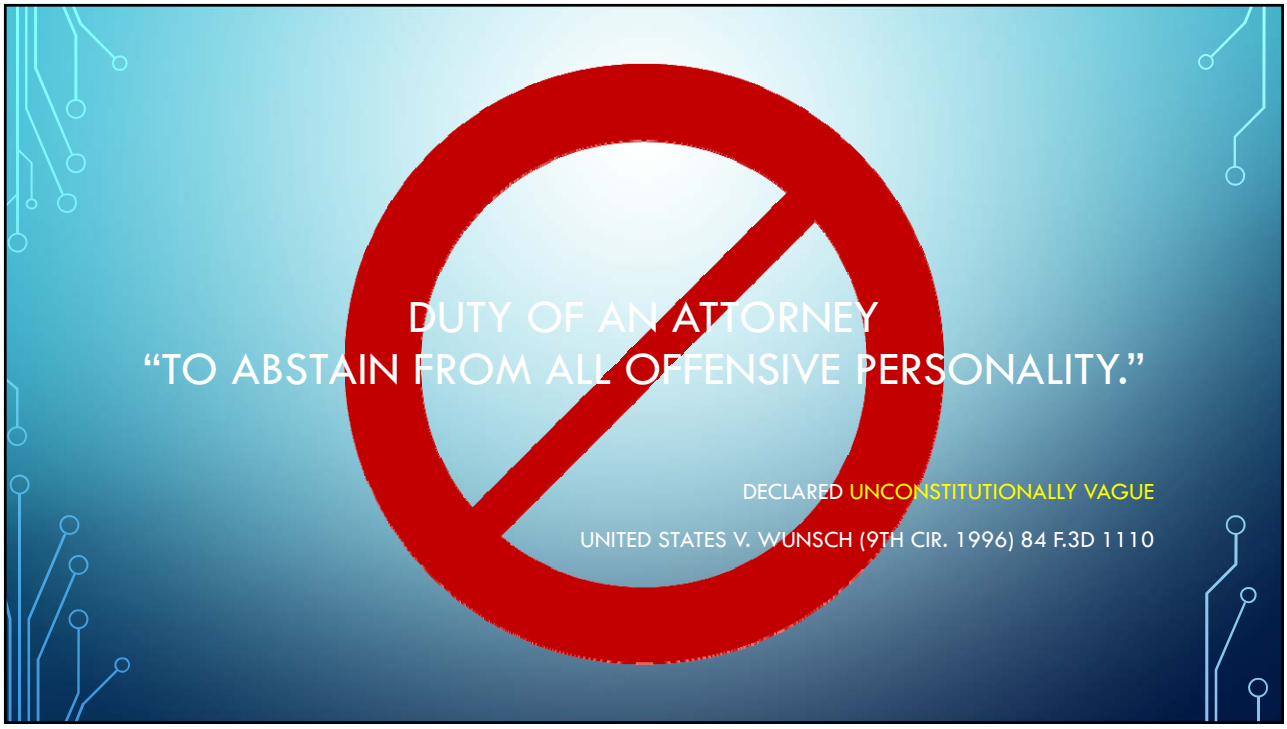


PROBLEM AREAS FOR INCIVILITY

- Discovery disputes
- Abusive and uncivil communication outside court
- Lack of professional courtesies resulting in acrimonious and unnecessary motion practice
- Conducting meaningful meet and confers as required by law
- Counsel working together to prepare trial documents
- Improper use of sanctions requests to intimidate and bully


UNCIVIL CONDUCT IN
COURT IS LIKELY FAR WORSE
OUTSIDE OF COURT


LEGAL BASIS FOR REQUIRING CIVILITY


DUTY OF AN ATTORNEY
"TO ABSTAIN FROM ALL OFFENSIVE PERSONALITY."
DECLARED UNCONSTITUTIONALLY VAGUE
UNITED STATES V. WUNSCH (9TH CIR. 1996) 84 F.3D 1110

BIAS IN THE COURTROOM

CA CODE OF JUDICIAL ETHICS
CANON 3

- A judge shall perform judicial duties without bias or prejudice. Canon 3B(5)
- A judge shall require lawyers in proceedings before the judge to refrain from (a) manifesting by words or conduct, bias, prejudice or harassment. Canon 3B(6)

CA RULES OF PROF. CONDUCT
RULE 8.4.1(A)

In representing a client…a lawyer shall not (1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.

"DON'T RAISE YOUR VOICE AT ME. IT'S NOT BECOMING OF A WOMAN..."

"A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common. The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession. A recent ABA report found that 'inappropriate or stereotypical comments' towards women attorneys are among the more overt signifiers of the discrimination, both stated and implicit, that contributes to their underrepresentation in the legal field. When an attorney makes these kinds of comments, 'it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.' …. [T]he court finds that Bertling's conduct was in bad faith…the remark was emblematic of an unacceptably disrespectful attitude towards Plaintiffs' counsel."

Hon. Paul Grewal (ret.), ordering donation to Women Lawyers Assoc. of Los Angeles Foundation

Claypole v. County of Monterey (Jan. 12, 2016), 2016 WL 145557

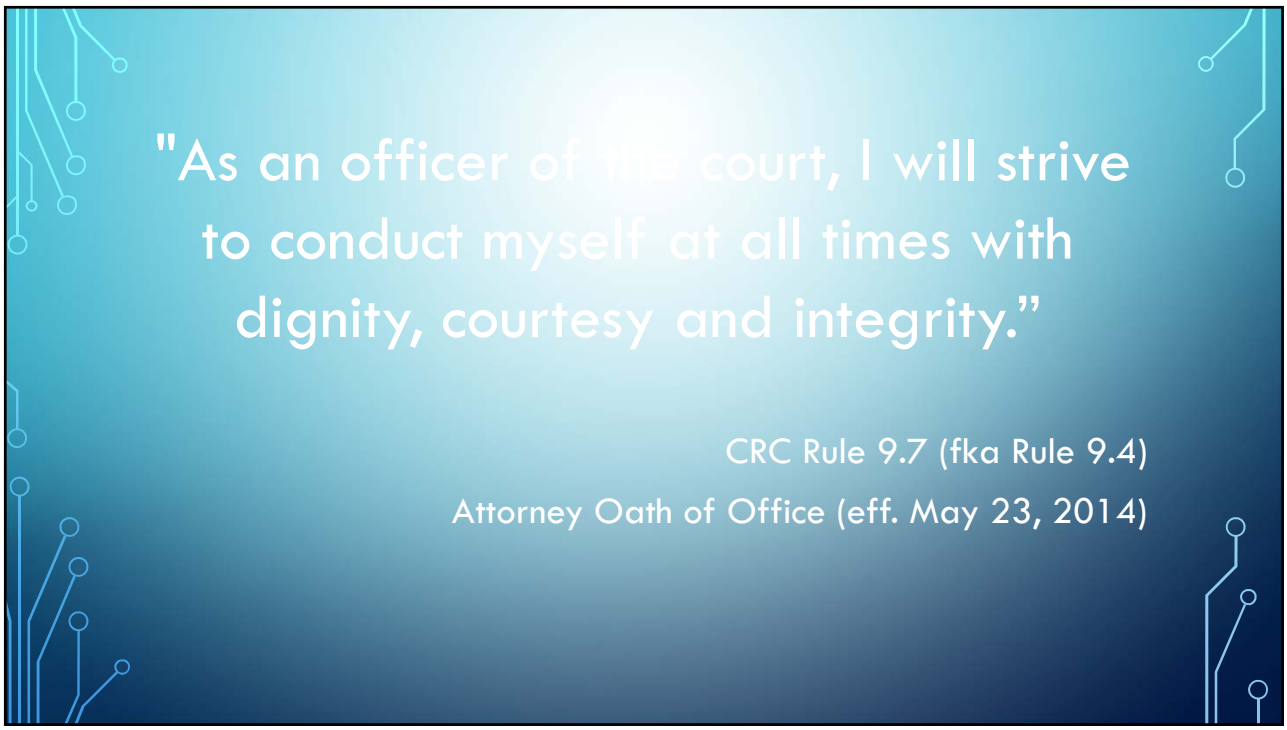
TWITTER POSTS IN ANOTHER LAW FIRM'S NAME ETHICS VIOLATION?

- "Dennis Block & Associates is helping to #MAGA by evicting one latino at a time!"
- My associate Nasti Hasti really needs to start wearing longer skirts to court. Or underwear. Or [omitted]"
- "A client called to complain that our Manisha Bajaj was 'dressing like a prostitute'. I told him wait until he sees 'Nasti Hasti' Rahsepar!'").

JUDGE'S ETHICAL RESPONSIBILITIES

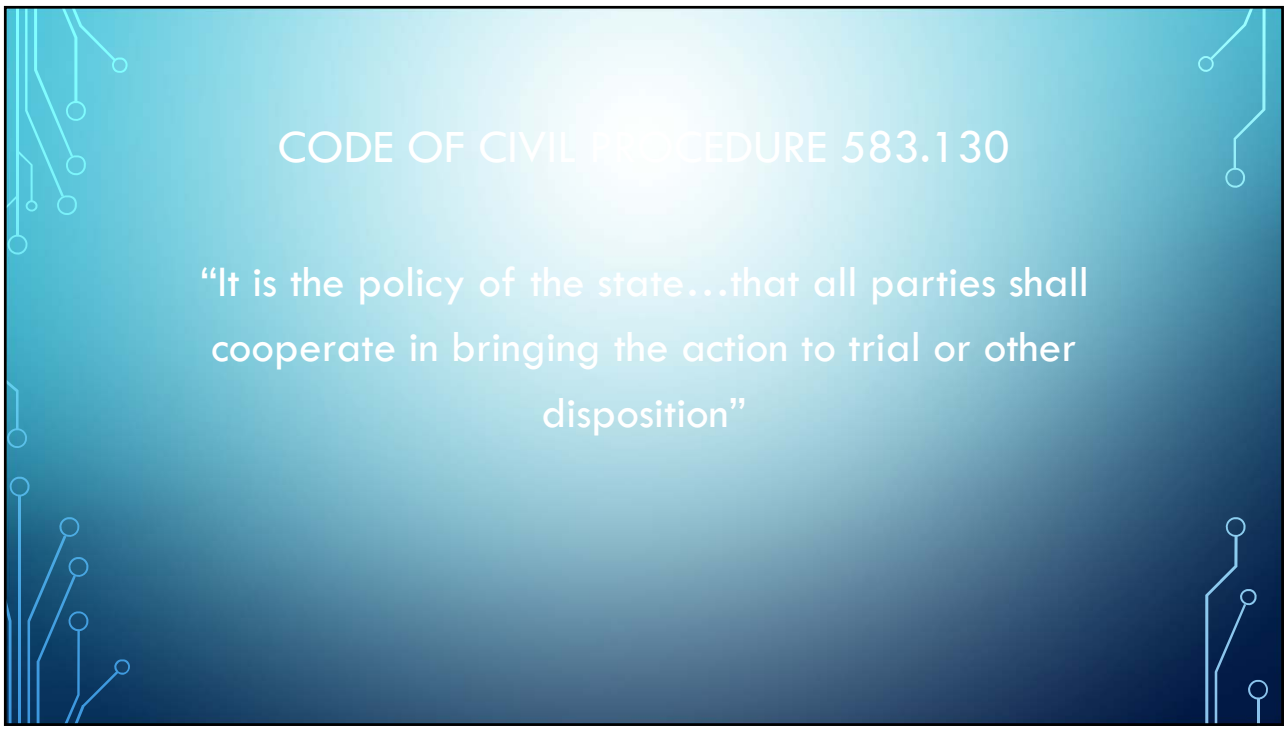
"Judicial ethics require a judge to 'be patient, dignified, and courteous to litigants ... [and] ... lawyers ... and ... require similar conduct of lawyers ... under the judge's direction and control." (Cal. Code Jud. Ethics, canon 3(B)(4).)"

Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal. App. 4th 994


"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."
CRC Rule 9.7 (fka Rule 9.4)
Attorney Oath of Office (eff. May 23, 2014)

Loyola Law School Swearing In Ceremony, 12/2/2019
https://www.lls.edu/thellsdifference/facesoflls/swearinginfall2019/swearinginfall2019.html

Applies only to those taking the attorney oath after its adoption in 2014


CODE OF CIVIL PROCEDURE 583.130
"It is the policy of the state…that all parties shall cooperate in bringing the action to trial or other disposition"

FAMILY CODE 271(A)

"…the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

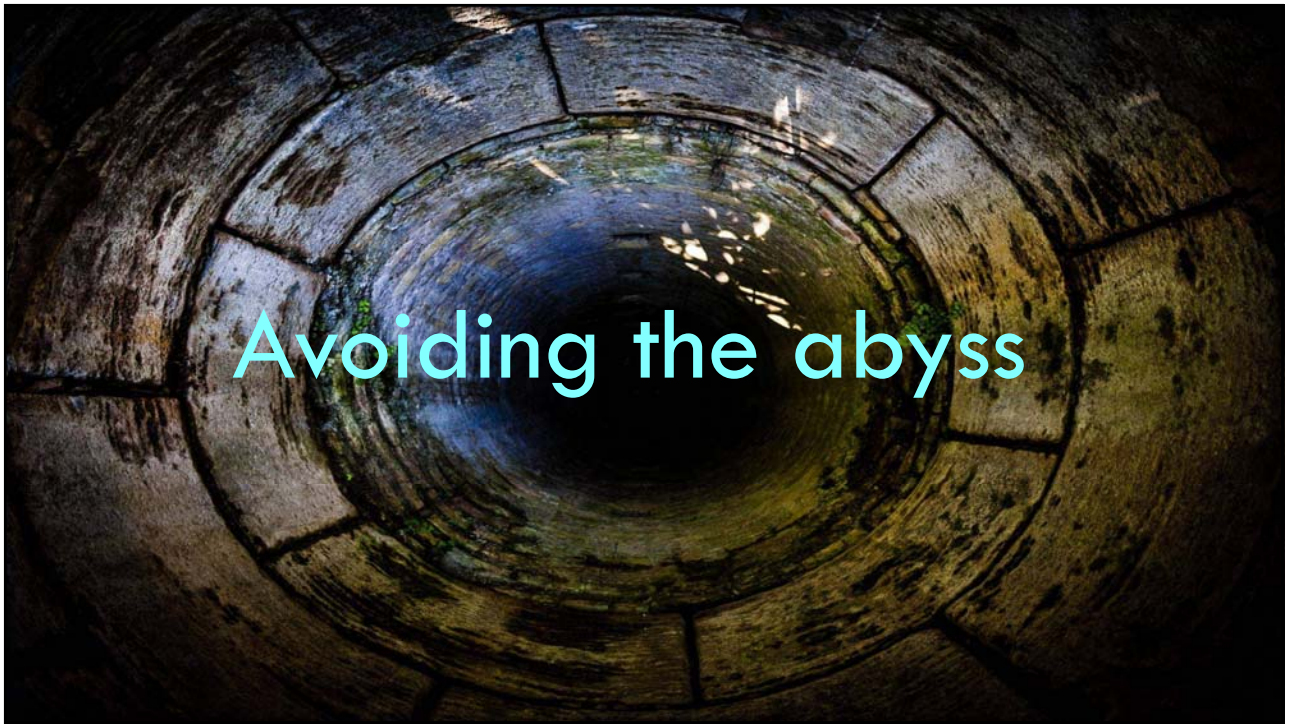
BUSINESS & PROFESSIONS CODE 6068

It is the duty of an attorney to do all of the following:…

(b) To maintain the respect due to the courts of justice and judicial officers…

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged…

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.


Avoiding the abyss

LOCAL GUIDELINES

- LASC Civility Guidelines, Appendix 3.A of Local Rules
  - "…Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility. Section (I)(2)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

CHAPTER THREE
CIVIL DIVISION

APPENDIX 3.A

GUIDELINES FOR CIVILITY IN LITIGATION

(a) CONTINUANCES AND EXTENSIONS OF TIME.

(1) First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if the counsel requesting it has previously refused to grant an extension.

(2) After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

(3) A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough".

(4) A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

(5) A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

(b) SERVICE OF PAPERS.

(1) The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

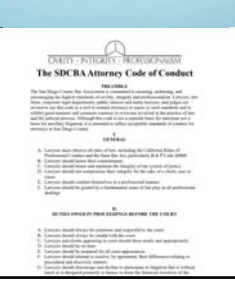
(2) Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

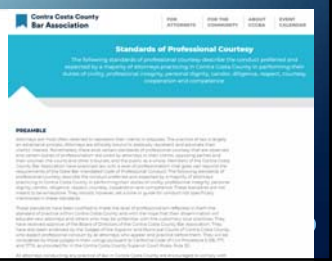
(3) Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

(4) Service should be made personally or by facsimile transmission when it is likely that

PROFESSIONAL ASSOCIATION GUIDELINES

http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism





HYPOTHETICAL

- Fee dispute between attorney acting as SRL and contractor – total payment to date $92,651
- Contractor is unlicensed
- Attorney SRL files suit, and prevails
- Attorney files attorney fee motion seeking $271,530 in fees
- Court permits briefing with 10 pages of text filing. Attorney SRL files:
  - 11 pages of text, plus 400 pages of supplemental papers
  - Increases fee request
  - Accuses defense counsel of witness tampering, making frivolous comments, and improper tactics "typical" of those employed by defense counsels

How would you rule on fee motion?

REDUCTION OF FEE AWARDS TO UNCIVIL COUNSEL

"Attorney skill is a traditional touchstone for deciding whether to adjust the lodestar… Civility is an aspect of skill. Excellent lawyers deserve higher fees and excellent lawyers are civil…. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook."

- Counsel lacked objectivity and appropriate scale of litigation
- $300k request reduced to $90K
- *Karton v. Ari Design & Const., Inc.* (2021) 61 Cal. App. 5th 734, 747

HYPOTHETICAL

- Attorney serves defendant and 36 days later (on a Friday), warns defendant that she had until following day to respond or he would file default
- Defaulted the following Monday
- Defendant motion to set aside default denied
- Default judgment entered 1 year later, for $1 million. Defendant appeals.

Was the trial court correct in denying motion to set aside?

REVERSAL OF THE ORDER OBTAINED THROUGH UNCIVIL CONDUCT

The mantra "this is a business" has been repeated so much in the legal field that counsel have "lost sight that the practice of law is *not* a business. It is a profession and those who practice it carry a concomitantly greater responsibility than businesspeople."

"'[L]awyers who know how to think but have not learned how to behave are a menace and a liability ... to the administration of justice.... [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.'"

- Stealth default vacated, unreasonable deadline, set up defendant for failure

LaSalle v. Vogel (2019) 36 Cal.App.5th 127, 134, 141

(*quoting* [CJ] Burger, *Address to the American Law Institute, 1971*)

HYPOTHETICAL

- Male plaintiff's counsel believes female defense counsel uses intimidation tactics during depositions
- Brings his own video camera to deposition to tape opposing counsel, without giving notice
- When on second day defense counsel refused to permit taping, a verbal altercation ensued
- Defense counsel terminates the deposition
- Cross motions for sanctions are filed

How do you rule?

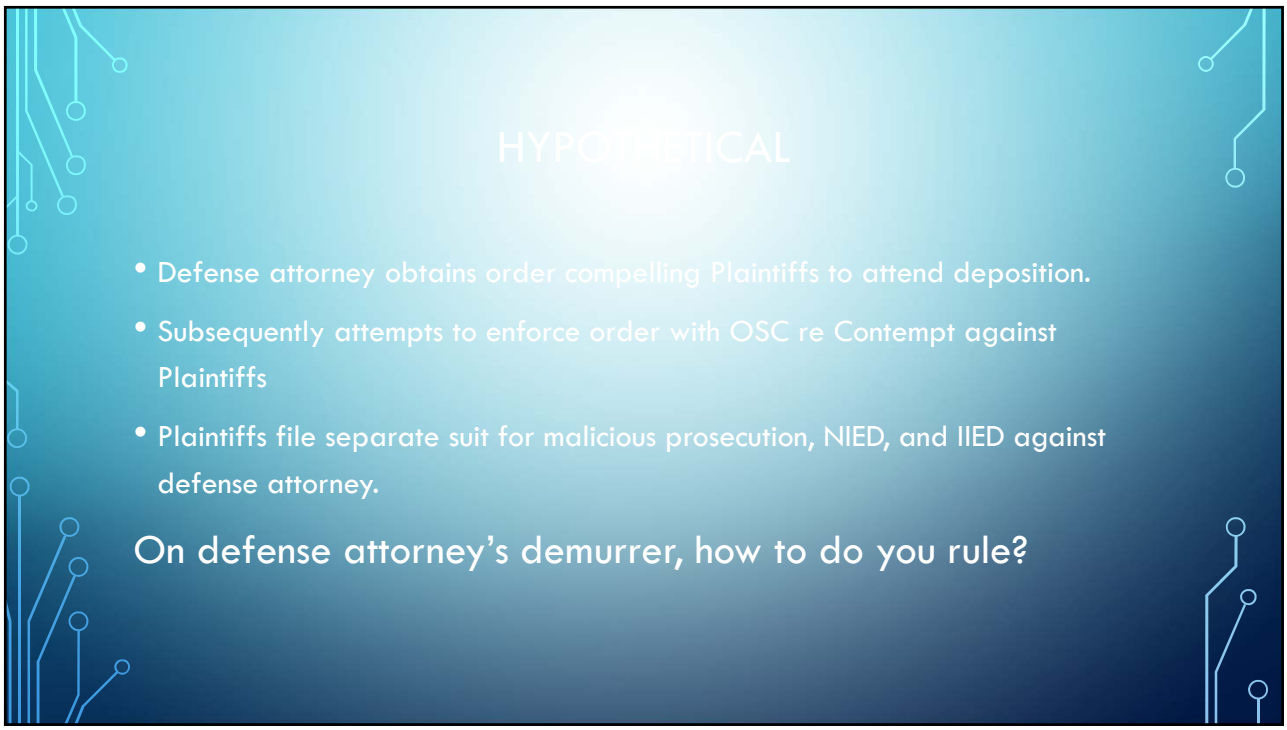
DISCOVERY SANCTIONS

"If this case is an example, the term 'civil procedure' is an oxymoron."

"Both the legal profession and the courts would be better served if litigation arose from legitimate disputes between the litigants instead of wasteful bickering between their attorneys."

- Plaintiff counsel sanctioned $950

Green v. GTE California, Inc. (1994) 29 Cal.App.4th 407, 408, 410


HYPOTHETICAL
• Defense attorney obtains order compelling Plaintiffs to attend deposition.
• Subsequently attempts to enforce order with OSC re Contempt against Plaintiffs
• Plaintiffs file separate suit for malicious prosecution, NIED, and IIED against defense attorney.
On defense attorney's demurrer, how to do you rule?

DISCOVERY SANCTIONS IN PRIMARY LITIGATION IS PROPER REMEDY, NOT MALICIOUS PROSECUTION

"It seems clear that this litigation arose from a fit of pique between counsel in the underlying action. Frivolous litigation, or that brought for purposes of harassment, has no place in our overburdened court system. The taxpayers who bear the cost of providing our judicial system should not have to shoulder the burden of providing a forum for frivolous or absurd litigation."

- Affirms order sustaining demurrer to IIED and NIED without leave
- Finds demurrer to malicious prosecution should also have been sustained

Lossing v. Superior Court (1989) 207 Cal.App.3d 635

NON-DISCOVERY MONETARY SANCTIONS

- Code of Civil Procedure 177.5
  - A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification.
- Code of Civil Procedure 128.5/128.7
  - 128.5: reasonable expenses, including attorney's fees due to actions or tactics in bad faith, frivolous or solely intended to cause unnecessary delay
  - 128.7: pleading certification
  - Beware tactical weaponization of these motions
    - These are reportable sanctions if over $1000

HYPOTHETICAL

- New attorney with little family law experience files unnecessary motions and excessive evidence that does not prove claims, without meeting and conferring, and engages in hostile and rude communications with opposing counsel.
- New attorney tells judge he was taught to litigate "with unbridled aggression."
- Sanctions motion pursuant to Family Law Code 271 filed.

How do you rule?

FAMILY CODE 271 SANCTIONS AGAINST NEW ATTORNEY "TAUGHT" TO LITIGATE WITH "UNBRIDLED AGGRESSION"

"all counsel, regardless of practice, regardless of age—that zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility."

- $100,000 sanctions imposed
- $304,387 awarded for opposing attorney fees

Marriage of Davenport (2011) 194 Cal.App.4th 1507, 1537

HYPOTHETICAL

- Defendants appeal default judgment, arguing evidence did not support the judgment granted
- On appeal, Plaintiff's counsel requested extension stating he needed more time to research under penalty of perjury
- Plaintiff's counsel subsequently files verbatim duplicate brief of one previously filed with court, referencing facts not in the current case (i.e. he copied it from another case)

WOULD YOU TAKE ACTION, AND IF SO, WHAT?

SANCTIONS FOR DISHONESTY OF COUNSEL

"it is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term "officer of the court," with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only "little" lies, we feel the distinction between little lies and big ones is difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible."

- Default overturned, not enough evidence, court is gatekeeper for appropriate claims
- $10,000 sanction imposed

Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267


REFERRAL TO STATE BAR
"I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit."
• Fee dispute between prior counsel and successor counsel
• $6000 monetary sanctions for a frivolous appeal
• Referral to State Bar of CA
DeRose v. Huerlin (2002) 100 Cal. App. 5th 158

HYPOTHETICAL

- Counsel files documents with the following statements:
  - Insinuation that party may have prevailed because it had contracts with a third party "who … wields a lot of legal and political clout in [County]"
  - "… [B]ecause of a judicial slight [sic] of hand with no factual basis, this court has altered the landscape and created a windfall for [Party A]."
  - "court did not 'follow the law,'" "ignores the facts," "indiscriminately screw[ed]" [Party B]
- Legitimate advocacy? Or improper conduct?

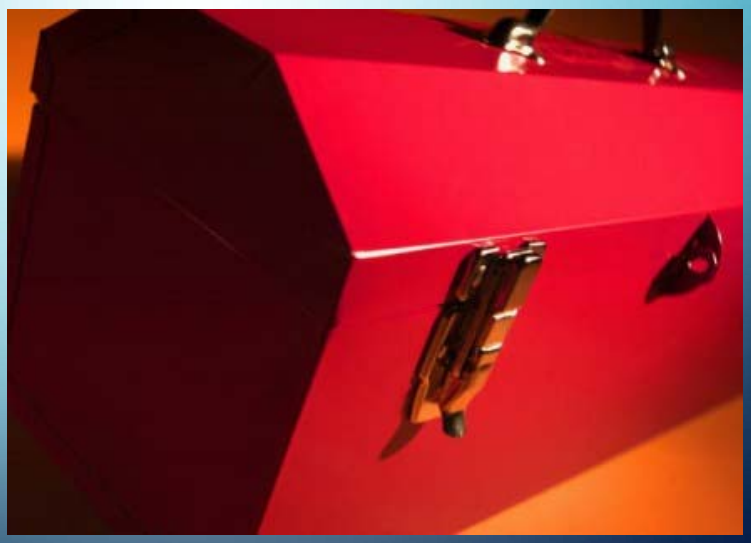
IN RE PAUL M. MAHONEY
(2021) 65 CAL. APP. 5TH 376

"Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non."

- Found to be in direct contempt on two counts
- fined $2,000 Code of Civil Procedure §1209 and §1218
- forwarding copy of the judgment of contempt to the State Bar

- Code of Civil Procedure 178 - Punishment
- Code of Civil Procedure 128 – Powers
- Code of Civil Procedure Sections 1209 -1222 – Of Contempts
- *In re Paul M. Mahoney* (2021) 65 Cal. App. 5th 376

"SOFT" TOOLS FOR YOUR TOOLKIT



COURTROOM STANDING ORDERS/GUIDELINES

"I. **EXPECTATIONS OF CIVILITY**

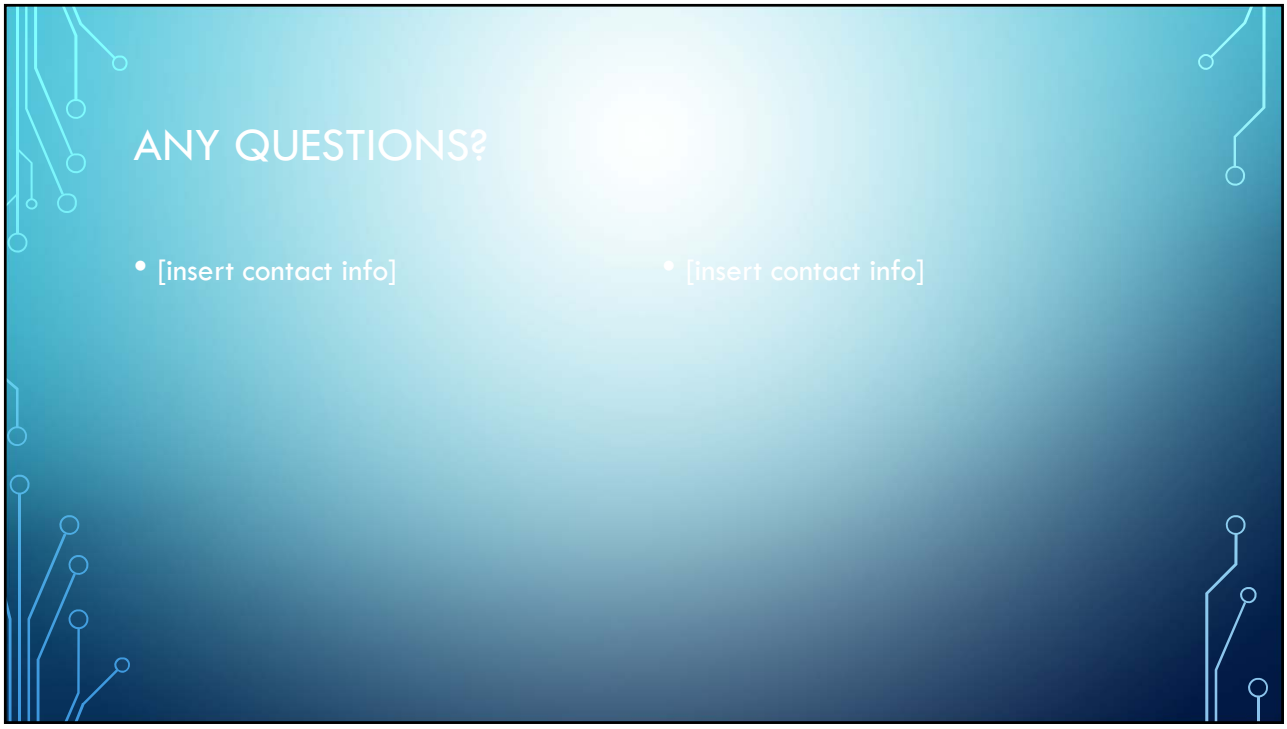
The Court will consistently provide all parties with a reasonable opportunity to be heard prior to any rulings being made. Interruptions when someone else has been recognized to speak will not be tolerated. Personal attacks and raised voices shall also be prohibited. Counsel are reminded of California Rules of Court, Rule 9.7, which includes the following language: "[T]he oath to be taken by every person on admission to practice law is to conclude with the following: 'As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.'" Litigants should review and be familiar with the Los Angeles Superior Court's Guidelines for Civility in Litigation, Appendix 3.A to the LASC Local Rules, which establish the minimum standard of courtesy and civility expected of attorneys who appear in this court." Hon. Stuart M. Rice, Los Angeles Sup. Crt.

OTHER TOOLS

- The bench officer sets the tone for civility - model civil behavior
- Informal discovery conferences
- Order meet and confers and enforce the requirement
- Appoint a Discovery Referee
- Sanctioning both sides
- Notice and inform
- Admonish
- Require appearance of firm managing lawyers when subordinates repeatedly fail to comply with ethics and civility standards

AVOID EMBROILMENT WITH THE HIGH CONFLICT PERSONALITY (HCP)

- Educate yourself on HCP
- Set boundaries: time, issues
- Avoid blame, criticism
- Seek kernel of truth
- Maintain professional distance
- Listen
- Control expectations
- Don't argue
- Be respectful
- Know yourself and your triggers
- Remain cautious and stay calm
- Create a flexible plan for managing
- Maintain procedural formalities
- Avoid deviating from rules
- Look for small agreements
- Take a break


ANY QUESTIONS?
• [insert contact info]
• [insert contact info]

Appendix 8: Proposed Civility Revisions to the California Rules of Professional Conduct

PROPOSED CHANGES TO RULES OF PROFESSIONAL CONDUCT

Rule 1.0.1 Terminology

Add the following definition:

(*) "Incivility" means discourteous, abusive, harassing, or other significantly unprofessional conduct.

Rule 1.2 Scope of Representation and Allocation of Authority

(a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. **A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.**[255]

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255 Numerous other states have similar language in their equivalent version of California's Rule 1.2. See, e.g., *Massachusetts* ("A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."); *Michigan* ("A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the

(b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*

Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This rule addresses only a lawyer's responsibility for his or her own professional diligence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

[3] A lawyer's duty to act with reasonable diligence does not eliminate a lawyer's other professional obligations and lawyers

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rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics."); *New York* ("A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process."); *Ohio* ("A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.").

should strive to treat all persons involved in the legal process with courtesy and respect.[256]

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256 Numerous other states have similar language in their equivalent version of California's Rule 1.3. See, e.g., *Alaska* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Arizona* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Colorado* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Delaware* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *District of Columbia* ("The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer's duty to pursue a client's lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client's rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration."); *Florida* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Hawaii* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Illinois* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Massachusetts* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Minnesota* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *New Mexico* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has

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respect."); *New York* ("Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect."); *South Carolina* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Utah* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Washington* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Wyoming* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *ABA Model Rules* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").

engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.

(e) In appearing as a lawyer before a tribunal,* a lawyer shall not:

(1) engage in a pattern of incivility;

(2) intentionally or habitually violate any established rule of procedure or of evidence; or

(3) engage in conduct intended to disrupt the tribunal.* [257]

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other

257 At least one other state has similar language in its equivalent version of California's Rule 3.3. See, e.g., *New York* ("In appearing as a lawyer before a tribunal, a lawyer shall not: (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply; (2) engage in undignified or discourteous conduct; (3) intentionally or habitually violate any established rule of procedure or of evidence; or (4) engage in conduct intended to disrupt the tribunal.").

material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably* incurred by a witness in attending or testifying;

(2) reasonable* compensation to a witness for loss of time in attending or testifying; or

(3) a reasonable* fee for the professional services of an expert witness;

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

(f) A lawyer shall not ask any question intended to degrade a witness or other person except where the lawyer reasonably* believes that the question will lead to relevant and admissible evidence;[258]

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258 Numerous other states have similar language in their equivalent version of California's Rule 3.4. See, e.g., *Texas* ("A lawyer shall not … ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or (5) engage in conduct intended to disrupt the proceedings."); *Virginia* ("A lawyer shall not … assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). See, also, *Delaware*, in its Notes to Decision for Rule 3.4, citing to a particular case where a lawyer's behavior

(g) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

(h) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Rule 3.5 Contact with Judges, Officials, Employees, and Jurors

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel and any unrepresented parties in the matter;

(3) in the presence of all other counsel and any unrepresented parties in the matter;

(4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

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was uncivil ("New trial was granted where defense counsel's comments to jury included an unjustified attack on the integrity of opposing counsel.").

(c) A lawyer shall not engage in a pattern of incivility that is degrading to a tribunal.* [259]

(d) As used in this rule, "judge" and "judicial officer" shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(e) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(f) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(g) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

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259 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal."); *Delaware* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."); *Hawaii* ("A lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity."); *Kansas* ("A lawyer shall not ... engage in undignified or discourteous conduct degrading to a tribunal."); *Michigan* ("A lawyer shall not ... engage in undignified or discourteous conduct toward the tribunal."); *Ohio* ("a lawyer shall not ... engage in undignified or discourteous conduct that is degrading to a tribunal."); *South Carolina* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal;"); *ABA Model Rules* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal.").

(h) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(i) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(j) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(k) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(l) This rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(m) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to

adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or discourteous, the lawyer may continue to advocate on behalf of the client and stand firm in the position of the client, but this shall not provide justification for the lawyer engaging in any violations of this rule.[260]

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260 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Colorado* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is

no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Delaware* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *District of Columbia* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Florida* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Hawaii* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Illinois* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Massachusetts* ("The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Michigan* ("The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Minnesota* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can prevent the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *New Mexico* ("Refraining from abusive or obstreperous conduct is a corollary of the advocates right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *New York* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's misbehavior is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *South Carolina* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); Utah ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); Virginia ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer must stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Washington* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for

[5] The duty to refrain from incivility applies to any proceeding of a tribunal,* including a deposition.[261]

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;

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subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Wyoming* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *ABA Model Rules* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

261 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Colorado* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Delaware* ("The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition."); *New Mexico* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *South Carolina* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Utah* ("The duty to refrain from disruptive conduct applies to any proceedings of a tribunal, including a deposition."); *Washington* (""The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Wyoming* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *ABA Model Rules* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.").

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or

(e) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See In re Kelley (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the

lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] **A lawyer violates paragraph (d) by repeated incivility while engaged in the practice of law or related professional activities.**[262]

[7] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

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[i] The authors would like to acknowledge the significant contributions received from Megan S. Wilson, a Fellow at Horvitz & Levy LLP.

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262 Numerous other states have similar language in their equivalent version of California's Rule 8.4. See, e.g., *District of Columbia* ("A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."); *Florida* ("Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct."); *Utah* ("The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).").

[Name of Organization]
Resolution in Support of Proposals of the
California Civility Task Force

Whereas, the California Civility Task Force is a joint project of the California Judges Association (CJA) and the California Lawyers Association (CLA); and

Whereas, the governing board of [Name of Organization] has been provided with the task force's initial report entitled Beyond the Oath: Recommendations for Improving Civility; and

Whereas, [Name of Organization] agrees with and embraces the task force's recommendations to improve civility in the legal profession;

NOW THEREFORE, [Name of Organization] hereby respectfully:

1. Asks the State Bar Board of Trustees to mandate one hour of civility MCLE training for attorneys (without increasing total MCLE hours). Some portion of the civility training should be devoted to making the profession more welcoming to underrepresented groups by addressing the link between incivility and bias.

2. Asks the Chief Justice, as head of the Judicial Council, and the Center for Judicial Education and Research Advisory Committee (CJER) to provide voluntary training to judges on promoting civility inside and outside courtrooms.

3. Asks the State Bar Board of Trustees to recommend to the Supreme Court revisions to the Rules of Professional Conduct to clarify that repeated incivility constitutes professional misconduct and that civility is not inconsistent with zealous advocacy; and

4. Asks the Supreme Court to amend Rule of Court 9.7 to require all attorneys, when annually renewing their licenses to practice law, to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity;" and,

5. Urges the Chief Justice, Judicial Council, and State Bar to take further appropriate action to improve civility in the practice of law.

Dated: [Insert date], 2021

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT
NORTHERN CALIFORNIA

Volume 27 No. 2
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Success for Women In and Out of the Courtroom

Hon. Elizabeth D. Laporte (Ret.)

Five years ago, I attended the United States District Court for the Northern District of California's annual conference along with other judges from the federal court, lawyer representatives to the court and other attorneys. There, professors Joan Williams of the University of California, Hastings College of the Law and Deborah Rhode of Stanford Law School—leading scholars regarding how women fare in the legal profession—spoke of the obstacles that, despite much progress, many still faced, including implicit bias. I was already familiar with studies in which

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Also in This Issue

Pointers on Discovery Motions in Federal Court

Hon. Sallie Kim

Hon. Thomas Hixson

In the Northern District of California, district judges and magistrate judges often require parties to submit their discovery disputes in the form of letter briefs with specific limitations on the number of pages. Letter briefs have become popular with the Court because they are seen as a more efficient way to resolve discovery disputes than the default five-week briefing and hearing schedule with 25-page briefs that normally applies to motions. However, letter briefs place a premium on making the right arguments in limited space. In the midst of discovery in a busy case, and given all the demands of modern legal practice, it can sometimes be hard for attorneys to find the time needed to write a well-crafted letter brief. Still, it's obviously essential to do it because what you do or don't get in discovery, or what you are forced to produce, can have a significant impact on the strength of your claims and defenses, as well as on the expense of litigation. The authors of this article

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VINCE PARRETT

On SHANE READ'S WINNING AT CROSS-EXAMINATION

Vince Parrett

All business trial lawyers can benefit from Shane Read's new book, *Winning at Cross-Examination*. By focusing on the importance of creating compelling bottom-line messages, Read shows how cross examination is done right by some of the best trial lawyers alive using examples like David Boies in the Proposition 8 trial challenging California's ban on same-sex marriages.

The golden thread that runs throughout Read's book is that to effectively cross-examine a witness you must first develop a bottom-line message that will show why you should win. Developing a bottom-line message before crafting your cross-examinations will focus you on what is most important and thereby help you ask the right questions. And it will stop you from going down rabbit holes that waste the valuable time of counsel, witnesses, and the court—and even worse, bore the jury.

Likewise, the topics that you choose for your cross-examinations should advance your bottom-line message to win your case. To help you select the right topics for a successful cross, Read shows you how to use the acronym ***CROSS***:

- **C**redibility: challenge by showing a witness's (1) favoritism for one side, (2) past criminal convictions or evidence of untruthfulness, (3) murky perceptions of what happened, or (4) memory of past events that is too good;

- **R**estrict damaging testimony: show the jury a witness's lack of knowledge about important matters;

- **O**utrageous: exploit witness statements that exceed the limits of what jurors will believe as true, *e.g.*, "It depends on what the meaning of 'is' is" or "I smoked, but I never inhaled";

- **S**tatements that are inconsistent: impeach with statements made by the witness prior to trial that are inconsistent with trial testimony; and

- **S**upport your case: Read considers this one of the most neglected tools in an attorney's arsenal on cross. For even if a witness has hurt you on direct, you can still ask many questions that will support and highlight your bottom-line message to the jury.

Interestingly, Read's advice to focus your cross on crystal-clear themes conflicts with some of Irving Younger's famous Ten Commandments of Cross-Examination, which many of us learned in law school or in CLE courses on trial advocacy. Irving Younger, a distinguished professor of trial techniques at Cornell Law School, attorney at a major New York law firm, and Judge on the Supreme Court of New York City, was a strong believer in his commandments. He wrote, "I cannot tell you how powerfully I want to preach these Ten Commandments. You should never violate them; if you do, you will want the ground to open up beneath your feet, so that you will sink in and be devoured forever. Every time you violate these commandments, your case will blow up in your face. . . . They come from on high; they must be obeyed."

But Read begs to differ, arguing that some should never have been included in the list and are "flat-out wrong." Among the Ten Commandments, Read highlights in **bold** those that are wrong:

1. *Be brief.*
2. *Use plain words.*
3. **Use only leading questions.**
4. *Be prepared.*
5. *Listen.*
6. **Do not quarrel.**
7. *Avoid repetition.*
8. **Disallow witness explanation.**
9. **Limit questioning.**
10. **Save for summation.**

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MARIE BAFUS

On SECURITIES LITIGATION

Federal courts may adjudicate more claims under the Securities Act of 1933 ("Securities Act") following a recent Delaware Supreme Court decision. Earlier this year, the Delaware Supreme Court ruled that corporations may require stockholders to litigate claims under the Securities Act in federal court, holding that such forum provisions in corporate charter documents and bylaws are facially valid. The Court's decision in *Salzberg v. Sciabacucchi*, --- A.3d ---, 2020 WL 1280785 (Del. Mar. 18, 2020), reversed an earlier ruling of the Delaware Court of Chancery and opened the door for Delaware corporations to require plaintiffs to bring Securities Act claims in federal court. From the perspective of the defense bar, the decision allows Delaware corporations to mitigate the costs, inefficiencies, and burdens imposed when such claims are filed and litigated in state court.

Marie Bafus

Background

Over the past several years, the plaintiffs' bar has increasingly filed Securities Act claims in state rather than federal court. Plaintiffs' lawyers view state court as a more favorable forum for such cases because many of the key provisions of the Private Securities Litigation Reform Act ("PSLRA") – including more stringent pleading standards, an automatic stay of discovery pending motions to dismiss, and a statutory process for appointing lead plaintiffs – often have been held inapplicable in state court proceedings. To address that trend and minimize the prospect of multiple Securities Act cases proceeding simultaneously in different courts, many corporations included provisions in their charter documents or bylaws requiring Securities Act claims to be brought exclusively in federal court. The enforceability of those clauses assumed greater importance after the U.S. Supreme Court's March 2018 decision in *Cyan, Inc. v. Beaver County Employees' Retirement Fund*, which confirmed that plaintiffs may file Securities Act claims in either state or federal court.

Delaware law expressly permits corporations to use their charter documents and bylaws to require internal corporate claims – *e.g.*, derivative suits and claims involving alleged breaches of fiduciary duty, the rights of stockholders, or application of the Delaware General Corporation Law – to be brought exclusively in the Court of Chancery. But in December 2018, Vice Chancellor J. Travis Laster of the Court of Chancery found that federal forum provisions (FFPs) – those requiring Securities Act claims to be brought in federal court – are unenforceable under Delaware law. In *Sciabacucchi v. Salzberg*, V.C. Laster held that while charter documents and bylaws may properly specify that claims involving the "internal affairs" of Delaware corporations be litigated in Delaware, they may not regulate matters involving federal law or other "external issues."

The Delaware Supreme Court Decision

Reversing V.C. Laster's decision, the Delaware Supreme Court held that FFPs: (1) are, on their face, within the permissible scope of bylaws and charter provisions because (in the words of the relevant statute) they address "the management of the business" and "conduct of the affairs of the corporation"; (2) provide corporations with "efficiencies in managing the procedural aspects of securities litigation" post-Cyan; and (3) do not violate Delaware law or policy. The Delaware Supreme Court rejected the lower court's finding that, as a matter of Delaware law, mandatory forum provisions are applicable only to matters involving a corporation's "internal

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ROGER N. HELLER

On CLASS ACTIONS

Picking up where the last decade left off, the 2020s are off to a fast developing and interesting start for class action practitioners in the Ninth Circuit, with the court already handing down several notable opinions addressing such important issues as personal jurisdiction, privacy law, class damages, punitive damages, and Article III standing.

Roger N. Heller

At the intersection of several of these issues, is perhaps one of the most closely-watched cases of the year, *Ramirez* v. *TransUnion LLC*, --- F.3d ---, 2020 WL 946973 (9th Cir. Feb. 27, 2020), where the Ninth Circuit recently provided clarification regarding the application of Article III standing principles in the class action context.

The *Ramirez* case involved allegations that the defendant credit reporting bureau knowingly violated the Fair Credit Reporting Act ("FCRA") by placing inaccurate "terrorist alerts" on consumers' credit reports, failing to take reasonable steps to ensure the accuracy of the information, and incorrectly indicating to the consumers that the alerts had been removed from their credit reports when that was not the case. The plaintiff, on behalf of himself and a proposed class of others who had these false alerts on their reports, sought statutory and punitive damages under the FCRA. After the district court certified a litigation class pursuant to Federal Rule of Civil Procedure 23(b)(3), the case proceeded to a jury trial. After the trial, the jury found in favor of plaintiff and the class and awarded statutory damages and punitive damages. On appeal, the Ninth Circuit affirmed the jury's award of statutory damages as "clearly proportionate to the offense and consistent with the evidence." The court determined, however, that the jury's punitive damages award—approximately 6.45 times the amount of the statutory damages—were excessive under the facts of the case and the standards articulated by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and ordered that the punitive damages be reduced by approximately 38% (*i.e.*, to a ratio of 4:1). *Ramirez*, 2020 WL 946973, at *18-19.

Prior to addressing the damages issues, the majority tackled two important issues regarding Article III standing in the class context. *First*, the majority held that, at the motion to dismiss stage, class certification stage, and, for purposes of injunctive relief, at the judgment stage, only the representative plaintiffs must have Article III standing. *Ramirez*, 2020 WL 946973, at * 7. *Second*, the majority held that, at the final judgment stage of a class action, only those class members who can satisfy Article III standing requirements may recover monetary damages. *Ramirez*, 2020 WL 946973, at * 8.

It is probably fair to say that neither of these holdings significantly defied general expectations among class practitioners. As the *Ramirez* majority noted, the first holding followed prior Ninth Circuit authority on the issue. *Id.* at * 7 (citing *In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018); *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015), *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *Casey v. Lewis*, 4 F.3d 1516, 1519–20 (9th Cir. 1993)). As for the second holding, the issue was essentially presented but not resolved by the Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016). The requirement that class members must satisfy Article III to recover damages at the final judgment stage does not stray significantly from the practice, employed in certain types of class cases that go to trial, of utilizing a second phase or process (*i.e.*, bifurcation) regarding the calculation and/or allocation of class members' damages.

After addressing these doctrinal issues, the *Ramirez* majority conducted a detailed analysis of whether the recovering class members in the case at hand had Article III standing under the Supreme Court's and Ninth Circuit's respective decisions in *Spokeo*, concluding that each class member did, in fact, allege a concrete injury and had Article III standing. The majority emphasized the severe nature of the inaccurate information at issue and the corresponding risk of harm. *Ramirez*, 2020 WL 946973, at *8-14. The third member of the panel, who concurred in part and dissented in part, would have held that only those class members

Continued on page 16

AMY BRIGGS

On INSURANCE LITIGATION

On March 16, 2020, six Bay Area counties issued "shelter in place" orders, which effectively brought many businesses to a grinding halt. Lawsuits against insurers who sold business interruption coverage are now rolling in, thus far led largely by restaurants. In California, for example, Thomas Keller's Michelin-starred restaurant—The French Laundry—recently filed suit in Napa County seeking coverage for the shutdown of his restaurant. Similar suits have been filed in New Orleans and Chicago. As one CEO recently put it, "Shut the doors = shut down the revenue. If that's not a property-based interruption, I'll go light the [expletive] thing on fire myself."

Amy Briggs

Many policyholders, however, are not ready for litigation, and instead are asking what they need to do simply to preserve their rights under their business interruption policies. Of course, it is critical for clients to read their insurance policies and know their terms and conditions. Generally speaking, however, there are three different steps to keep in mind.

First, many policies require a notice of loss within a limited time frame following awareness of either the event causing the loss or the loss itself. A notice of loss is a straightforward document that simply alerts the insurer to the fact of a loss. Even if the insured does not timely submit notice, failure to do so is not necessarily fatal. California generally follows a notice-prejudice rule, requiring the insurer to demonstrate that it was actually and substantially prejudiced by the late notice. *Northwestern Title Security Co. v. Flack*, 6 Cal.App.3d 134, 140 (1970). This can be a difficult burden for insurers to meet except in rare circumstances. Strict adherence may be required, however, in other jurisdictions.

Second, commercial property and business interruption coverage requires that the insured then submit a proof of loss. A proof of loss is a more detailed document that provides the insurer with information substantiating the claim that is being made. Generally speaking, it entails a sworn and notarized itemized statement that includes information such as (1) the date and cause of the loss; (2) documents that support the value of the property and the amount of loss claimed (*i.e.*, estimates, inventories, receipts, etc.); (3) the identity of parties claiming the loss under the policy; (4) parties having an interest in the property, like the bank holding the mortgage; and (5) the policy under which coverage is sought.

Often—but not always—the time to submit a proof of loss runs from the date the insurer requests it. Be advised that it may be due within 60 days of the request, which, given the current situation, could be a challenging deadline for insureds to meet.

Submission of a proper and timely notice and proof of loss may be subject to a "substantial compliance" standard. *McCormick v. Sentinel Life Ins. Co.*, 153 Cal.App.3d 1030, 1046 (1984). Accordingly, a defect in a notice or proof of loss, by itself, is rarely a sufficient ground to deny a claim. Moreover, the insurer is under a duty to specify any defects in the notice or proof of loss so that the insured can address them. If the insurer fails to identify the deficiency, the notice is waived. Cal. Ins. Code §§ 553, 554. However, the total failure to comply with the notice and proof of loss conditions could excuse insurer liability altogether. *1231 Euclid Homeowners Assn. v. State Farm Fire & Cas. Co.*, 135 Cal.App.4th 1008, 1018 (2006); *Hall v. Travelers Ins. Cos.*, 15 Cal.App.3d 304, 308 (1971).

If your client is unable to meet the proof of loss deadline for logistical reasons, make sure it is in touch with its insurer to obtain an extension *in writing*.

Third, if the client receives a denial from its insurers, it may want to initiate litigation or arbitration. Many clients may have California's four-year statute of limitations in mind and feel little pressure to move forward at this time. But that would be a mistake. Most property and business interruption insurance contains a different—and much shorter—contractual limitations period. For instance, the California Standard Form Fire

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Frank Cialone

On TRUSTS & ESTATE LITIGATION

No-contest clauses and the anti-SLAPP law, again . . . . A few years ago, I wrote a column in this publication in which I discussed the tension between then-recent changes to the Probate Code governing the application of no-contest clauses in testamentary instruments and the anti-SLAPP law. Since then, several cases have reached the Court of Appeal and confirmed the need for the Legislature to resolve that tension.

Frank Cialone

A no-contest clause provides, in essence, that a beneficiary of a will or trust instrument will be disinherited if he or she contests that instrument. Such clauses have long been held valid in California. They promote the policies of honoring donative intent and discouraging litigation. On the other hand, they limit access to the courts and create potential forfeitures, deterring what might well be meritorious claims of undue influence or similar problems in the procurement of testamentary instruments. In practice, moreover, they often resulted in drawn-out "safe harbor" proceedings in which parties sought preliminary findings that would avoid a no-contest provision.

The Legislature balanced these interests by enacting Probate Code Section 21311, in 2010. That statute provides that no-contest clauses will be enforced only against "[a] direct contest brought without probable cause" (and against certain other types of claims if the no-contest clause itself expressly so provides). To invoke a no-contest clause, a trustee, named executor, or other interested party will bring a petition to disinherit in order to obtain a court determination that Section 21311 applies. But, because the predicate for such a petition is the filing of litigation (*i.e.*, the contest), it can trigger a motion to strike, and a request for attorney's fees, under the anti-SLAPP statute, C.C.P. Section 425.16. To defeat such a motion, the petitioner must offer admissible evidence to show that the contestant lacked probable cause for his or her claim. An anti-SLAPP motion stays discovery, and an order granting or denying such a motion is subject to an immediate direct appeal.

Reported cases confirm that the anti-SLAPP statute applies to a petition to enforce a no-contest clause. *See, e.g., Kay v. Tyler*, 34 Cal. App. 4th 505, 510 (2019). In one case, the Court of Appeal stated that "the policies underlying the no contest provisions have been carefully balanced by the Legislature" through its enactment of Probate Code section 21311, and that "the anti-SLAPP procedures may impede some of those goals, including increasing litigation costs and potential delay." *Urick v. Urick*, 15 Cal. App. 5th 1182, 1195 (2017). But the *Urick* court also found that the anti-SLAPP statute—which the Legislature expressly directed the courts to construe broadly—applies by its terms to a petition to disinherit. (In both cases, the Court of Appeal reversed an order granting the anti-SLAPP motion, finding that the petitioner had adequately demonstrated a likelihood of success on the merits.)

To put this in practical terms: The trustee of a trust (or the named executor of a will, or a beneficiary of such instruments) that contains a no-contest provision will likely want to invoke that provision in the event of a contest. But a lawyer representing that person will have to advise that doing so risks an anti-SLAPP motion and an award of fees to the contestant—and also risks months or years of delay, not only to the litigation but to the overall administration and distribution of the trust or estate, while such a motion is litigated and appealed. In both *Kay* and *Urick*, the Court of Appeal acknowledged that good reasons exist to limit the application of the anti-SLAPP statute to actions to enforce no contest clauses. But in both cases, the Court also acknowledged that those reasons are for the Legislature to consider.

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Success for Women In and Out of the Courtroom

reviewers of two otherwise identical resumes, except for one having a female-sounding first name and the other a male-sounding one, rated the male resume superior (as well as similar studies involving a name usually associated with African-Americans and a typically Caucasian one). Yet I was particularly struck by what Professor Williams termed "the tightrope" that women must navigate due to stubborn gender stereotypes between being seen as likeable versus being respected. *See* Joan C. Williams and Rachel Demsey, *What Works for Women at Work: Four Patterns Working Women Need to Know* (2014). When women attorneys are perceived as likeable, they are also often mistakenly perceived as less competent; but when they are perceived as competent, they too often get demerits for being unlikeable or worse. By contrast, men enjoy more latitude to be perceived as both, without being penalized for an authoritative stance. This bias runs deep in the unconscious of both men and women. Think, for example, of the two meanings of "stature" as "natural height" (women being shorter on average) and "importance or reputation gained by ability or achievement," illustrating the traditional association of greater physical height, where men on average loom over women, with higher status and skill. *Oxford English Dictionary* (2020) (www.oed.com).

Wanting to do something to help, I gathered a handful of the excellent women attorneys at the conference to meet and brainstorm, thus launching the Women Attorneys Advocacy Project. Many attorneys (too numerous to list all) have generously volunteered their time to the Project, including Randy Sue Pollack who has worked tirelessly from the start and current members Jamie Dupree, Miriam Kim, Michelle Roberts, Charlene (Chuck) Shimada and Juliana Yee. With the full support of the court, including Chief Judge Phyllis Hamilton, we have put on a series of programs open to all at the federal courthouse, as well as at UC Hastings and Stanford Law School. Our programs have included panels of judges or judge moderators, including Judge Yvonne Gonzalez Rogers and Justice Teri Jackson, and outstanding attorneys giving tips on how to overcome obstacles and—at least as important—create and get the most out of opportunities. Other programs have featured outstanding coaches in effective styles of speech and presentation in the courtroom and other litigation settings. They focused on how to project confidence and competence without being perceived (too often unfairly) as tentative and uncertain on the one hand, or cold and overly aggressive on the other (*i.e.*, walking the tightrope). Then, in March of 2020, we co-sponsored an Association of Business Trial Lawyers dinner program, which I moderated, featuring outstanding and diverse panelists: the Honorable Teri Jackson of the First District Court of Appeal; Ruth Bond of the Renne Public Law Group; Kate Dyer of Clarence Dyer & Cohen; Jan Little of Keker, Van Nest & Peters; and Quyen Ta of Boies Schiller Flexner. We had an excellent turnout, including both men and women.

Based on these programs, talking to many judges and lawyers (female and male; of diverse ages, ethnicities and backgrounds; straight and from the LGBTQ community), reading the research, and my own experience (first as an attorney and then over two decades as a judge), certain common themes and lessons emerged. One fundamental takeaway is that diverse teams that embrace inclusivity deliver better results, as numerous recent studies have shown, so attorneys and judges benefit when law firms enable women and ethnically diverse attorneys to contribute fully. Further, some clients are demanding such teams, with women and minority attorneys playing important roles, not just window dressing, and juries and judges are paying attention. *See, e.g.*, David Rock and Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016). Seizing these opportunities requires leadership, by both men and women. As more women and minorities graduate from law school, they need mentorship, feedback and opportunities to learn and shine. Fortunately, many judges are actively encouraging oral argument and examination of witnesses by newer lawyers, which means more opportunities for women attorneys, as well as minorities, as the pipeline improves with a higher percentage graduating from law school.

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Success for Women In and Out of the Courtroom

Women can take steps to help themselves and each other, building their confidence and in some cases overcoming cultural pressures that have traditionally led some of them to voice opinions in a tentative tone or not to take up space. For example, if at a meeting a woman first makes a good point that is ignored, others can echo it; and if a man gets credit for later raising the same point, others can thank him for agreeing with the original comment. Many attorneys can benefit from training in effective vocal skills, posture, body language and eye contact to better project confidence and competence while successfully navigating the tightrope. *See, e.g.*, Cara Hale Alter, *The Credibility Code: How to Project Confidence and Competence When it Matters Most* (2012).

Women also have to be prepared for the obstacles they may encounter. Courtroom behavior is generally more respectful under the eyes and ears of the judge, but on occasion we still observe an attorney (more often male) talking over and interrupting opposing counsel (more often female or younger). Attorneys must be prepared not to get knocked off their stride and to calmly but persistently have their say, enlisting the help of the judge if necessary.

More often, uncivil behavior occurs outside the courtroom (*e.g.*, in the hallway, in meet and confer sessions and in depositions). And sometimes even lead counsel is still mistaken for a secretary or associate when female, young, minority or some combination thereof. (As Quyen Ta noted at the ABTL dinner program, she recently came to take a deposition and wondered why it was slow to begin, only to learn that opposing counsel was waiting for lead counsel—assuming that role could not be hers. And Justice Jackson in her courtroom, albeit without a robe, has been mistaken for a clerk.) Attorneys must be ready to calmly but firmly correct such mistakes and call out bad behavior, make a record, enlist help as needed and not back down. Many judges, including those in the Northern District, take calls during depositions and can rule when opposing counsel misbehaves, *e.g.*, on obstreperous speaking objections, as well as in subsequent motions. In the alternative dispute resolution setting, the mediator can help ensure a level playing field, set a respectful tone and, if necessary, separate the parties and their counsel.

Traditionally, women have shouldered more responsibility for raising children and doing housework ("the second shift," as sociologist Arlie Hochschild termed it in her book of the same name), although younger generations are sharing responsibilities more equally. Accommodating the need for flexibility (*e.g.*, for school and doctor appointments)—and not just permitting but encouraging the use of parental leave by men and women alike, rather than stigmatizing it—helps retain valuable attorneys in whom law firms have invested. Openness to hiring attorneys who have left the workforce for a period of time to raise children and to non-traditional arrangements like job sharing also keeps talented attorneys in the work force.

Importantly, each of us needs to develop our own effective style that is authentically ours. As Oscar Wilde said, "Be yourself. Everyone else is already taken." From my experience on the bench, calm, persistent (but not repetitive) advocacy based on solid preparation on the law and the evidence is far more persuasive than overheated rhetoric or interrupting opposing counsel or—worst of all—the judge. Therefore, do not give up your voice, do not bluster and be prepared to address the substantive issues and answer any questions from the judge.

Finally, working together to overcome bias, implicit or otherwise, is beneficial for all because law firms, clients and judges cannot afford to go without the full contributions that the skills and expertise of women attorneys bring to the table.

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Pointers on Discovery Motions in Federal Court

are magistrate judges on the Court, and we offer some pointers for briefing discovery disputes.

1. Tell us what you want

It seems incredible, but sometimes lawyers don't say what they want from the court. They are so mired in their dispute and complaints about the opposing party and counsel that they forget to ask for specific relief. Some briefs are rants instead of well-reasoned explanations why the other side should produce specified documents or information. A better strategy is to remember that there is a decisionmaker on the receiving end of the letter brief who must decide what to do. Instead of just handing the Court a problem – the other side's misconduct – propose a solution. Ideally, the first line of the letter brief would state the relief requested and the reason for that request. Think about it this way: if you can't figure out what you want, how are we supposed to know? In particular, with discovery disputes, the lawyers normally have much more information about the case than we ever will – what documents have and have not been produced, who the custodians are, who's been deposed, and so on. We're looking to you to identify what you want because we usually don't know what you have. Given the space limitations on letter briefs, if you cannot summarize your request in one or two sentences, your request is probably doomed.

2. Include the essential information

Give us what we need to know to rule on your dispute. You should include, as an attachment or as a quote in the brief, the specific request or requests and the response by the opposing party, and cite the specific number of the request(s) at issue. When we review disputes over discovery, we always read the request(s) and response(s). Sometimes the information or discovery that the moving party seeks is not even contained in any specific request, and in other situations, the opposing party has failed to object in the written objections on the basis asserted in the brief. Sometimes the opposing party explains in the written response that the requested documents or information do not exist, and the requesting party completely ignores that written response. The written requests and responses matter.

Also, make sure that the letter brief provides an adequate discussion of the specific requests you want us to address. When your opponent stiffs you on 100 requests for production all at once, it may be tempting to file an angry letter brief denouncing their obstructionist tactics and demanding immediate compliance, but there is no way that the space limitations will allow you to explain why we should compel production of documents responsive to 100 requests. It's much more effective to break down a major dispute into more digestible pieces.

3. Provide a summary of the case

Federal courts have busy dockets, and each of us touches a large number of cases in any given week. As a result, when you file a discovery letter brief, you should not assume we remember the case or can learn about it quickly. Often we feel as if we are entering a movie halfway through and struggle to catch the plot. If a discovery referral to us takes place a year or two into the case, we may in fact be entering it halfway through. So, tell us what your case is about, or at least the part that's relevant to your discovery dispute. If there is another order or pleading on the docket that explains the case well, refer to it by docket number. For example, an order on a motion to dismiss or a case management statement usually provides a good summary of facts. We know that lawyers have problems squeezing information into a short letter brief, so referring to other sources is helpful for us.

4. Tell us why you need the evidence

Tell us why the information you want is relevant, and then tell us why it matters. Too many letter briefs skip past this part. If you do that, you force us to guess at a theory of relevance, which may not be what you were thinking. Also, be concrete and lay out what you plan to do with the information

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Pointers on Discovery Motions in Federal Court

you're seeking. For example, if you're seeking the defendant's revenue information, don't just say it relates to multiple issues in the case, including damages, because that tells us nothing new. Identify the claim that allows you to recover the defendant's profits related to certain conduct, and then detail how you would use this revenue information to get there. A motion to compel is much more compelling if we have a practical sense of why you need this evidence and what you're going to do with it. It's true that lawyers are sometimes reluctant to be that specific for fear of educating their opponent or divulging their trial strategy. Realistically, however, your opponent is far more likely to have already figured this out, and the issue is educating us, the decisionmakers.

5. Don't wait until the last minute

Judges have common sense, and we think you do too. If there is something you really need to prove your case, we assume you will ask for it right away, and if the other side doesn't agree to give it to you, you will promptly meet and confer with them and then raise this issue with the court. Even if you technically have the ability to ask the court to order the opposing party to produce information or documents at the last minute, don't do that. For example, under our district's local rules, parties may file motions regarding discovery (normally in the form of a discovery letter brief) up to seven days after the discovery cutoff, but filing a request that late might hurt your chances of getting a favorable ruling. First, raising a discovery dispute on the very last day to do so sends a message that this is the stuff you didn't care about enough to seek earlier. If you actually wanted to use these documents in depositions, you obviously wouldn't have waited until the last possible day to seek help from the court. Second, a late-breaking motion to compel that raises more than minimal issues can present scheduling concerns. If we grant the request and order production or additional responses, that could affect the schedule for dispositive motions or trial. If we as magistrate judges are handling discovery for a district judge, we must learn whether compelling further discovery will create a problem for the district judge. If you worry that you are filing too soon, let us know that you are filing earlier rather than later to give us notice that there are disputes about discovery that might affect the timing of other motions or trial. We can always send you back to meet and confer further, but we will be aware at least of the issue and can plan accordingly.

6. Tell us when you need the evidence

If you need the documents or information by a certain time frame, explain why and show that you were diligent in raising this dispute. Setting production deadlines often isn't necessary and can sometimes be undesirable, so you need to tell us when you need a deadline. For example, if it's early in the case and you have a dispute about whether a certain subject is relevant, but the parties are still in the process of negotiating who the document custodians will be, setting a production deadline at the same time the Court rules on the relevance objection would likely not make sense. But if you have a schedule for upcoming depositions, then you might need a production deadline. You will know these background facts much better than we will. Conversely, if we rule against you and order you to provide additional responses, documents, or a witness for deposition, you should be prepared at the hearing to say how long you need to comply.

7. Discuss proportionality

If you are asking for something, try your best to explain why it's not that hard for the other side to produce it. We know you're at a disadvantage because you have limited information about how your opponent stores documents and information, but through the Rule 26(f) conference, meet-and-confers, and early depositions, you may learn enough that you can say something credible on this score.

Conversely, if you're opposing the request, explain what is easy and what is hard for you to do and give specific information. How many people-hours will it take to produce the requested

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On TRUSTS & ESTATE LITIGATION

The purposes of the anti-SLAPP statute do not appear to include making it easier to bring a contest without probable cause, or imposing obstacles to enforcing no-contest clauses when against such a contest is brought. In this context, moreover, even a successful anti-SLAPP motion will not end the litigation: the parties will still litigate the merits of the contest, even if the claim that it was brought without probable cause is stricken. It seems appropriate, then, to provide that a petition to enforce a no contest provision pursuant to Probate Code Section 21311 should not be subject to the anti-SLAPP statute. In the meantime, practitioners in this area must be mindful of the interplay between the two statutes.

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Pointers on Discovery Motions in Federal Court

information or documents? Have you talked to your IT experts or conducted a sampling to bolster your claim of burden? Is some of the requested information in a database and you could run a query and find it easily, but the rest requires time-intensive manual review? Often we will ask during a hearing if parties can produce some information even if they cannot produce all of the requested information, and often the parties agree to the limited scope of production.

8. Follow the rules

Read the standing order of the judge assigned to this dispute. For example, in our district, all magistrate judges require discovery disputes to be raised in letter briefs, and none of us allows motions. Some of our standing orders require lawyers to meet and confer in person or by telephone; communicating in writing is not sufficient to satisfy the requirement of meeting and conferring. If you hand us a poorly formed discovery dispute that doesn't satisfy our rules, we may hand it right back to you and tell you to sharpen your pencil.

Each judge has an order outlining the number of pages for the letter brief and how to handle attachments. All of the orders are different, but most give fewer than 10 pages for a joint letter brief.

Some judges also allow informal discovery conferences without letter briefs, and the order will also address that issue.

9. Ask for hearing

If the matter is complicated, don't be afraid to ask for or volunteer for a telephone hearing or actual hearing. We often call them when we want to ask questions. And if you participate in a hearing by telephone, make sure we can hear you loudly and clearly. Even though you are not physically present, you should be mentally present. We have held hearings where lawyers have called in while driving or getting in an elevator or multi-tasking, and it is clear that there are distractions that make the argument ineffective.

10. Don't whine about things that don't matter

Often the letter briefs we receive catalogue a long list of supposedly evil acts opposing counsel committed, and those actions have nothing to do with the dispute at issue. (And sometimes the acts weren't evil.) If you think that you can sway us with your recitation of wrongdoing, you are sadly mistaken.

In conclusion, we hope that these pointers help you to file successful, succinct letter briefs.

Hon. Sallie Kim and Hon. Thomas Hixson are U.S. Magistrate Judges for the Northern District of California, both with chambers in San Francisco.

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On Shane Read's Winning at Cross-Examination

While five of them are good, Read explains how the other five "are so incorrect that they undercut his whole list." For instance, in his Tenth Commandment, Younger proclaimed that "you should save the ultimate point for summation" and argued that during your cross you should ask "the one question" that the jury will not understand why you asked—but you ask it anyway, because you know you can explain it in closing argument. Younger preached that your question will be so intriguing that the jury will think about it for the rest of the trial and wonder why you asked it; then you can give them the prize in your closing argument.

But Read shows that the reality of how jurors make decisions—they make snap judgments about you and your cross—makes Younger's Tenth Commandment bad advice. You need to grab your jurors' attention with your bottom-line message and never let go. Jurors are not going to spend any time thinking about your "clever" question after you asked it. They are not going to be "intrigued" by it and as a result wait breathlessly throughout the trial for a prize you will give them during your close.

Instead, by focusing your questions on your bottom-line message, Read argues that you should never wait until closing argument to tie up the reasons for asking your questions on cross-examination. So Read would replace Younger's Tenth Commandment with, "Never save it for summation. Make your points on cross now." The jury is contemporaneously deciding who won the battle of cross-examination, and it's up to you to show them clearly that you won.

Regarding Younger's Ninth Commandment to "limit questioning," Younger uses the following cross-examination from a criminal trial for assault to make his point that you must avoid asking "the one question too many":

Q. Where were the defendant and the victim when the fight broke out?
A. In the middle of the field.

Q. Where were you?
A. On the edge of the field.

Q. What were you doing?
A. Bird watching.

Q. Where were the trees?
A. On the edge of the field.

Q. Were you looking at the birds?
A. Yes.

Q. So your back was to the people fighting?
A. Yes.

Younger declares that after getting that helpful answer, "You stop and sit down. And what will you argue in summation? That he could not have seen it. His back was to them. You have challenged perception. Instead, you ask the one question too many:

Q. Well, if your back was to them , how can you say that the defendant bit off the victim's nose?
A. Well, I saw him spit it out."

Younger says that "this is the kind of answer you will get every time you ask the one question too many."

But Read says this is a bad commandment and terrible example. Why? Because if you don't ask the last question, the prosecutor surely will ask it on redirect examination. Your momentary "victory" on cross-examination would be immediately snatched away when the prosecution asks the "one question too many" that you cleverly avoided asking. When the prosecutor does this, you not only look foolish, you also look like you were trying to hide the truth.

Younger's example is also a bad one because it assumes that the prosecutor somehow did not discover before trial the key fact that this witness saw the defendant spit the victim's nose out of his mouth. But how realistic is that? If the prosecutor even briefly interviewed the witness before trial, wouldn't the witness tell the prosecutor about that unforgettable sight? That's why Read would change this commandant to: "Be the truth-teller in the courtroom."

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On Shane Read's Winning at Cross-Examination

Likewise, Read shows that the example that Younger used to support his Eighth Commandment—"disallow witness explanation"—actually undermines it completely. Younger used a cross examination by Abraham Lincoln, representing a defendant charged with murder, of the star witness who claimed to have seen the defendant hit the victim on the head:

Q. Did you actually see the fight?
A. Yes.

Q. And you stood near them?
A. No, it was about 150 feet or more.

Q. In the open field?
A. No, in the timber.

Q. What kind of timber?
A. Beech.

Q. Leaves on it rather thick in August?
A. Yes.

Q. What time did all this occur?
A. Eleven o'clock at night.

Q. Did you have a candle?
A. No, what would I want a candle for?

At this point, Younger insists that anyone but a "genius like Lincoln" must "stop and sit down. The witness has been impeached. He could not have perceived the murder."

But Read argues that it would be a mistake to stop and sit down for three reasons: First, by abruptly stopping and sitting down when the witness just asked a legitimate question that the jury may be interested in, you're giving the jury the bad impression that you're hiding the truth, that you're not a truth-teller in the courtroom. The second problem with sitting down is that on redirect examination the prosecutor will be sure to protect the witness by phrasing the question this way:

Q. Let me start where Lincoln so abruptly stopped. Do you remember asking him why you would need a candle before he abruptly sat down?
A. Yes.

Q. Let me ask you the question that he deliberately ignored. Is there a reason that you did not need a candle?
A. Yes. I could see because there was a full moon.

The third problem is that Younger's example does not make his point because the last two questions about the time of night and whether the witness had a candle to see by *do* work if there had been no moonlight that night. So to win this cross you don't need to be a "genius," you only need to ask a few more questions to show that there was no moonlight—just like Lincoln did:

Q. How could you see from a distance of 150 feet or more without a candle at eleven o'clock at night?
A. The moon was shining real bright.

Q. A full moon?
A. Yes, a full moon.

Lincoln then pulled out an almanac and asked the witness:

Q. Does the almanac not say that on August 29 [the night of the murder], the moon had disappeared; the moon was barely past the first quarter instead of being full?
A. [Witness does not answer.]

Q. Does not the almanac also say that the moon had disappeared by eleven o'clock?
A. [Witness does not answer.]

Q. Is it not a fact that it was too dark to see anything from 50 feet, let alone 150 feet?
A. [Again, witness does not answer.]

Regarding Younger's Sixth Commandment, "Do not quarrel," Read explains that this would

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On Shane Read's Winning at Cross-Examination

be correct if Younger meant "do not argue with the witness"—but Younger meant something different. Younger wrote that if during your cross-examination you get an answer that is "contradictory, absurd, patently false, irrational, crazy, or lunatic," you should stop and sit down.

Reads argues that "instead of sitting down, highlight the irrational answer for the jury." This ties back to Read's central theme that "you should use cross-examination to argue your case to the jury"—even where you know that the witness will give negative answers. Read encourages you to drive home the themes of your case through cross-examination, especially in the face of hostile answers, for two reasons: First, you want to remind the jury in your questions of facts that support your case. Second, you want the jury to contrast the truth of your questions with the lies of the defendant's answers. For, once you "have credibility with the jury, each of the witness's denials will be a further nail in his coffin."

Finally, Younger's Third Commandment proclaims, "use only leading questions." But Read shows how that makes for a boring cross-examination and can even undermine it if pushed too far. Read argues that it would be much better if this commandment read, "Only ask leading questions *unless* the answer to a non-leading question cannot hurt you." For it is perfectly fine to ask the witness to explain something if you know that whatever the explanation will be, that answer will not hurt your bottom-line message to the jury.

David Boies in the Proposition 8 trial is one of many powerful real-life examples that Read shows of brilliant trial lawyers on cross getting right to their bottom-line message. The key opposing expert, David Blankenhorn, opined during his direct examination that California's ban on same-sex marriages should be upheld because children raised with one biological parent are worse off than children that grow up with two married biological parents. On cross, Boies wasted no time in challenging that assertion. After an exchange with the witness about different types of studies, Boies goes straight for the kill:

Q. Let me jump right to the bottom line, OK, sir?
A. Good.

Q. Are you aware of any studies showing that children raised from birth by a gay or lesbian couple have worse outcomes than children raised from birth by two biological parents?
A. No, sir. Would it be OK for me to say additional—

Q. It would not be OK for you to volunteer anything. I heard your—the speech that ended, and I'm really trying to move along; OK, sir? You will have a chance to make speeches when your counsel is asking you questions.
A. OK.

Boies did *not* follow Younger's Tenth Commandment to ask subtle questions and tie everything up in closing. Instead, what did Boies do? He tells the witness and shows the trier of fact exactly what he wants to prove on cross, by confidently proclaiming: "Let me jump right to the bottom line, OK?" By making his bottom-line message through cross and never losing control of the examination, Boies won the cross, and won the trial.

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On SECURITIES LITIGATION

affairs"; instead, the scope of the relevant statute is broad enough to extend to certain other matters, including Securities Act claims. The decision stressed that provisions designed to regulate where stockholders may bring claims based on their purchase of shares in a company (such as Securities Act claims) fall within an area of "intra-corporate" matters, and thus are not purely "external" matters (such as tort or commercial contract claims). Finally, the decision concluded that FFPs do not violate federal policy or principles of "horizontal sovereignty" vis-à-vis other states.

What this Means for Federal Courts and the Plaintiffs' Bar

As more Delaware corporations adopt FFPs, federal courts can expect to adjudicate more Securities Act claims than they have in the recent past. And, as more Securities Act claims end up in federal court, plaintiffs will face the additional hurdles imposed on such litigation by the PSLRA.

To the extent plaintiffs determine to bring a Securities Act claim in state court despite an FFP, the Delaware Supreme Court left open the possibility that – although such provisions are facially valid – they may be invalid "as applied" – in other words, plaintiffs can argue that a particular FFP is not enforceable in a particular set of circumstances.

What Companies Can Do

- Delaware corporations without FFPs should consider adopting such a provision promptly. The easiest way to do so is by means of a bylaw amendment, which may be accomplished via board action and does not require a stockholder vote. And, although the Delaware Supreme Court's decision is based on – and limited to – Delaware law, it may provide persuasive authority for companies incorporated in other states that may want to adopt FFPs.

- Delaware corporations that adopted FFPs before the Court of Chancery's decision in Sciabacucchi but determined not to enforce them pending appellate review in that case, should view the Delaware Supreme Court's decision as a "green light" to seek enforcement of FFPs going forward. To the extent such companies included risk factors or other disclosures (including on Form 8-K) regarding the non-enforcement of FFPs, such risk factors and disclosures may need to be updated.

- For companies currently defending Securities Act claims in state court, if they had pre-existing FFPs but deferred enforcing them in the wake of Sciabacucchi, they may want to consider whether to seek enforcement now. The success of that strategy will depend on various factors, including the law of the state where the action is pending, the stage of litigation, and whether there are parallel actions in federal court. The ability of a corporation to enact a provision now that would apply retroactively to a pending suit is not yet clear.

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On INSURANCE LITIGATION

Insurance Policy (codified in California Insurance Code § 2071) provides:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

There are three important aspects to understand about this provision.

The first is that the limitations period is significantly shorter than the four years allowed by statute. Cal. Civ. Code § 337.

The second is that this shorter, contractual limitations period is routinely upheld by California courts. *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1093 (9th Cir. 2003) ("Under this provision, any claim that is 'on the policy' must be brought within 12 months of the 'inception of the loss' or it is time-barred.").

And third, the 12 months begins to run from "inception of the loss," not the insurer's denial of the claim. The California Supreme Court has clarified that "inception of the loss" is that point in time when appreciable damage occurs and is or should be known to the insured. *Prudential-LMI Comm'l Ins. v. Superior Ct.*, 51 Cal.3d 674, 686-87 (1990). And, given the national emergency arising out of COVID-19 and the impact on businesses, many policyholders are well aware of the loss their businesses have sustained. This means that the 12-month contractual limitations period is likely well underway for many policyholders already.

The limitations period is tolled while the insurer investigates the claim. *Prudential-LMI,* 51 Cal.3d at 692-93 (equitable tolling applies from time insured gives notice to time insurer denies claim in writing). But clients are reporting that the denials they have received have been almost immediate. *See, e.g.*, Complaint, *Big Onion Tavern Group, LLC et al. v. Society Insurance, Inc.*, No. 20-02005 (D. Ill. Mar. 27, 2020), ECF No. 1 (alleging insurer prospectively circulated memorandum concluding no coverage due to COVID-19 shutdown). This means that your client's claim may not have been tolled for very long.

Clients also may not be sure whether their policies afford coverage and need time to consult with their brokers or attorneys. In California, however, courts have generally rejected these reasons as a basis to extend the contractual limitations period. *Abari v. State Farm Fire & Casualty Co.*, 205 Cal.App.3d 530, 535 (1988) ("It is the occurrence of some ... cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations.").

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On CLASS ACTIONS

who had the false information disseminated to a third party had Article III standing. *Id.* at *23.

Looking ahead, while the generally fact-specific and claim-specific nature of the Article III standing and punitive damages inquiries may very well limit the direct applicability of *Ramirez* to other cases, class practitioners in the Ninth Circuit should expect to see *Ramirez* cited and quoted in their cases for the foreseeable future, particularly regarding the doctrinal issues. On the plaintiffs' side, the confirmation in *Ramirez* regarding Article III standing standards at the pleading and class certification stages, and the majority's analysis and application of *Spokeo* to claims involving risk of harm, may prove helpful. On the defense side, it is probably reasonable to expect an uptick in the filing of decertification motions at or around the time of trial, which was already becoming an increasingly standard procedural event for those class cases that go to or threaten to go to trial. Class practitioners on both sides should pay careful attention to the development of the law in this area.

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