(2000) 83 Cal.App.4th 1309, 1324 (emphasis added)). Since both rule and order permit a party to request oral direct testimony, it cannot be said that either inevitably prohibits direct live testimony.

The thrust of Jeffrey's argument is that the provisions for direct by declaration denied him the opportunity to be heard. On the contrary, the provisions gave Jeffrey the opportunity to be heard in both an opening and a responsive declaration and in trial briefs, as well as through cross-examination of Marilyn and of the joint expert Eggers and through his own oral rebuttal and redirect testimony at trial. And Jeffrey also had the opportunity to lay the foundation for his exhibits in either an opening or responsive declaration or in trial briefs and, as further discussed *post* in arguments III(D)(2) and IV, a second opportunity to lay that foundation at trial.

Moreover, in some respects this procedure expands the opportunity to be heard. It provides for opening and reply declarations of any length in lieu of live direct testimony. The amount of time allocated to a trial, on the other hand, is frequently and permissibly limited. Here, for example, Jeffrey participated in setting trial for only one day. The direct-by-declaration process is intended to, and does, "provide for orderly presentation of evidence, and . . .make efficient use of the time available for hearing of this matter." (AA Tab 2, TSO first sentence.)

In addition to permitting litigants to request exemption from the direct-by-declaration provision, both rule and order make all direct-testimony declarations subject to cross-examination and legal objections. Thus both rule and order comport with due process of law. In *In re Adair* (9th Cir.1992) 965 F.2d 777, the court upheld a similar procedure against a similar due process challenge. As Jeffrey's challenge is based on the Federal Constitution (Petition at 25), federal case law is apposite.

In *Adair,* a federal bankruptcy court employed a standard procedure requiring that direct testimony be presented by written declaration subject to oral cross-examination and redirect. (*In re Adair, supra,* 965 F.2d at 779.) The U.S. District Court for the Central District of California affirmed the bankruptcy court's ruling after trial, rejecting appellants' statutory and due process challenges to the direct-by-declaration procedure (*Id.* at 778), and the Ninth Circuit affirmed. The court noted that it had previously held that the use of written testimony is an acceptable technique for shortening bench trials and that oral cross-examination and redirect preserved the opportunity for the judge to evaluate demeanor and credibility. (*Ibid.)* Specifically addressing the due process challenge, the court found that the procedure did not raise significant due process concerns, because the procedure ensured that the accuracy of witness statements could be tested by cross-examination, that credibility could be initially established by factual consistency in the declarations, and that the judge had the

opportunity to observe witness demeanor and gauge the credibility of a witness during oral cross-examination and redirect. (*Id.* at 780.) These holdings are equally applicable here.

Jeffrey makes much of the distinction between hearings on issues raised by motion and trials on what Jeffrey calls "the parties' substantive property rights." (Petition at 21, emphasis in original deleted.) Many cases have held that in motion proceedings, rulings may be made on declarations without any live testimony, direct or cross. (See *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483-484 and cases cited therein.) Jeffrey concedes that motion hearings may properly be heard by declaration but contends that direct examination by declaration in trials on property rights cannot. (Petition at 23.) But this distinction is hard to justify in family law cases. As *Reifler v. Superior Court* itself illustrates, family law motion hearings can be three times the length of the trial on property issues herein and often involve disputed factual issues that are just as important. In *Reifler,* for example, several post-judgment motions were set for a single hearing that wife estimated would consume three days and that involved such significant issues as termination of spousal support, reduction or increase of child support, liquidation of a partnership held in trust, appointment of a receiver, and associated attorney's fees and costs. (*Reifler v. Superior Court, supra* 39 Cal.App.3d at 482.) Further, custody and support rulings that are initially made in a judgment can be, and often are,

completely changed in rulings made following hearing on post-judgment modification motions.

In ordinary civil matters, law and motion proceedings rarely involve disputed factual matters, while in family law the opposite is true. The court in *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1427, fn. 5, recognized this difference, noting that "Unlike civil law and motion maters, family law motions (and trial) usually involve factual issues, not issues of law. In the family law area, most courts have adopted local rules to provide for the expeditious handling of these cases." While concluding in *County of Alameda v. Moore* that it was error to expedite the trial by resolving issues based solely on unsworn statements of counsel or parties, Justice Donald B. King, writing for the court, strongly endorsed the use of testimony by declaration in family law hearings *and* trials:

> Family law calendars, especially district attorney child support calendars, are so large that the system would collapse if every motion **or trial** on the issue of child support required a full-scale evidentiary hearing. To expedite matters and to minimize conflict, we have previously approved a certain informality in the proceedings. . . This process now utilized by most California judges hearing these cases, enables the judge to make decisions based upon moving and responding papers with supporting declarations executed under penalty of perjury, supplemented as necessary by offers of proof, and only occasionally by oral testimony. After all, the judge who has reviewed the declarations in advance of the hearing is the only one who knows what additional information he or she needs from counsel or the parties to resolve factual disputes and issue a decision.

(*County of Alameda v. Moore, supra* at 33 Cal.App.4th 1427 (internal citation and footnote omitted, emphasis added).)

Jeffrey's contention (Petition p. 26) that it is unreasonable to expect a judge in a complex case to read long declarations and review attached exhibits is without merit for several reasons. First, Rule 12.5 applies only in the average case; a complex case would presumably fall within the "unusual circumstance" exception of Rule 12.5(b)(3) (and the TSO requires only advance request for oral direct). Second, it is nonsensical to assume that a judge will not read a long declaration but will listen carefully to lengthy testimony. Third, a judge rarely has the advantage of daily transcripts to review after a lengthy trial to check what the direct testimony was, a limitation avoided by declarations in lieu of oral direct. Finally, the purpose of pretrial delivery of exhibits by attaching them to declarations is not so much to enable the judge to review the exhibits in advance as to give the parties the time to review them and to prepare cogent objections. Such a rule avoids the kind of trial by ambush that family law has long abhorred.

C. The Procedure Does Not Prejudice Unrepresented Parties

Direct testimony by declaration gives parties not represented by counsel some distinct benefits, as it gives them two opportunities (in the opening and response declaration) to set out and swear to all the facts the unrepresented party considers important without interruption or objection. Moreover, for unrepresented parties—whether, like Jeffrey, they choose to

represent themselves although they could afford counsel, or whether they cannot afford to hire an attorney—live "direct" is awkward, since there is no second person to pose direct questions. As a result, in such circumstances live direct, like direct by declaration, frequently is simply a narrative. It is difficult to see the difference between an unrepresented party reading his direct testimony from the stand and that party providing the same testimony in written form.

Further, the procedure also assists pro per litigants less sophisticated than Jeffrey in their preparation for cross-examination, since they have the direct testimony of the other spouse days before trial and are not at the disadvantage live direct produces, where self-represented litigants are not as adept as experienced trial counsel in meeting live testimony through cross-examination occurring immediately following live direct. The provision in the TSO that the declaration should include the basic evidentiary foundation for documents to be offered as evidence at trial alerts the unrepresented party to the need to be able to establish such foundations in time for the party to become familiar with the rules of evidence, or to seek assistance if needed, before the day of trial.

Finally, the procedure as embodied here in Local Rule 12.5 and the TSO builds in the ability to request live direct testimony and also to offer live redirect and live rebuttal testimony.

III. Jeffrey's Challenges To The Trial Scheduling Order Are Without Merit

A. Jeffrey Has Waived His Claims, and Lacks Standing To Assert Them

Jeffrey never below raised a claim that the TSO was invalid because not published as part of the local court rules, and never claimed that it would be unconstitutional as applied to him. Therefore, he has waived his current challenges to the TSO and this court should not consider them. (*Dimmick v. Dimmic, supra* 58 Cal.2d at 422.) Further, the record establishes that the trial court did not, in the end, hold Jeffrey to the TSO's requirement that Jeffrey set forth the evidentiary foundations for his exhibits in his declaration (RT 6-10), with the result that Jeffrey was not aggrieved by the TSO or its provisions and lacks standing to challenge it. (Code of Civil Procedure §902.) On these grounds, this Court need not, and should not, reach Jeffrey's claims regarding the TSO.

B. Standards of Review

Should the Court nonetheless consider Jeffrey's contentions, other principles and standards of review apply. For example, because this Court will not speculate that the lower court may have committed error, in reviewing Jeffrey's claims, any ambiguity in the record will be resolved in favor of the appealed judgment. (Eisenberg, Horvitz, and Wiener, Cal. Prac. Guide: Civil Appeals and Writs (Rutter, 2005) ¶8:16, p. 8-5.) It is

Jeffrey's burden to overcome the presumption of correctness and to establish that the challenged judgment arose from an error of the trial judge:

> A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.

(*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (emphasis in original).)

It is also Jeffrey's burden to show that any claimed error in the TSO was prejudicial in the sense of affecting his substantial rights and further that a different result would have been probable absent the claimed error. (Eisenberg, Horvitz, and Wiener, supra Cal. Prac. Guide *supra* at ¶s 8:285-8:291, pp. 8-157- 8-159.) "There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code of Civil Procedure §475.)

Whether a claimed error is harmless or prejudicial can only be determined on the circumstances of a given case and in light of the entire record. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802.) Further, an error is not prejudicial if it is cured in the trial proceedings below. (Eisenberg, Horvitz, and Wiener, *supra* at Cal. Prac. Guide at ¶8:296, p. 8-161; *Goble v. Appellate Department of Superior Court of Los Angeles County* (1933) 130 Cal.App. 737, 738-739.)

C. The Publication Rule of Code of Civil Procedure §575.1(c) Does Not Apply To the Trial Scheduling Order Filed and Served on the Parties Herein

In his writ petition (at 19), Jeffrey notes that Code of Civil Procedure §575.1(c) permits judges to adopt rules for their courtrooms if the rules are published as part of the general publication of rules required by the California Rules of Court and that the "rules contained in the Trial Scheduling Order are <u>not published</u>." Jeffrey cites no case authority and does not explain what effect should be given to the lack of publication. In his December 28, 2005 letter brief (at 12), Jeffrey repeats these statements, this time citing *Hall v. Superior Court* (2005) 133 Cal.App.4th 908, a case in which the court held that a lower court's rule memorialized in a memo directed to attorneys was invalid because not published in accordance with Code of Civil Procedure §575.1(c).

But the case order at issue herein is distinguishable from the memo to attorneys in *Hall v. Superior Court,* and equally distinguishable from the order disapproved in a case that Jeffrey cites for another point, *Kalivas v. Barry Controls Corporation* (1996) 49 Cal.App.4th 1152.

In *Hall v. Superior Court,* the lower court applied a local policy requiring all "*Pitchess* motions" to be filed and heard 30 days before trial. The source of the policy was a memo dated almost three years earlier and directed to attorneys from the supervising judge of the Compton courthouse that stated that "all motions are to be calendared and heard at least 30 days

prior to the trial date." (*Hall v. Superior Court, supra* 133 Cal.App.4th at 913.) In discussing two prior writ proceedings attacking the same policy, the appellate court quoted from a legal newspaper article in which the spokesman from the Los Angeles Superior Court characterized the policy as "the local rule in Compton." (*Id.* at 914, fn. 10.) So far as the opinion discloses, the memo was not specific to any particular case, and was neither filed nor served on the parties in *Hall* or in any other case.

Kalivas v. Barry Controls Corporation concerned a "courtroom local rule" that led counsel to believe that a pending summary judgment had been taken off calendar, causing him not to file opposition or to appear at the motion hearing. On appeal, the court found counsel's procedural omissions excusable and also found that the rule conflicted with the summary judgment statute and violated Code of Civil Procedure §575.1(c). (*Kalivas v. Barry Controls Corporation, supra* 49 Cal.App.4th at 1154.) The form of the court rule in *Kalivas* was a document entitled Order Re Opposed Motion for Summary Adjudication providing, among other things, that the parties were ordered to prepare and jointly sign a single document setting forth specified information and stating that "the pending motions(s) is/are ordered off calendar." (*Id.* at 1155 (emphasis in original deleted).) The "order" was stamp signed, had no date, and did not contain the number or name of the case. (*Ibid.*) According to one of the parties, the clerk handed two copies of the "order" to one of the counsel; according to the other

party, the court instructed the clerk to provide counsel with an example of an order that would be issued to give them a "head start" on the procedures that would be ordered. (*Id.* at 1155-1157.) So far as the opinion discloses, no such order was actually made in the case.

In the present matter, in contrast, the TSO is not a memo or a generic set of provisions untethered to a specific case that is simply provided to counsel in identical form for every case in that court or courtroom in a manner indicating that this is the general rule applicable to all cases in a given court or courtroom. Rather, the TSO is an actual order issued in the case, with the case name and number, and was filed and served on both parties. In this case alone two different TSOs have been filed and served on the parties, and both of these differ in significant ways from the TSO entered in November 2005 in a different case that Jeffrey attached as Exhibit One to his petition for review, further refuting any generic status.[2] Marilyn submits that the reference in subdivision (c) of Code of Civil Procedure §575.1 to a judge adopting "a rule which applies solely to cases in that judge's court" is reasonably read as meaning a rule with identical provisions that applies without change to all cases in that judge's court, and

[2] Although the April 2005 TSO (AA Tab 2) resembles the February 2005 TSO (RA Ex. B) in many respects, it also differs from the earlier TSO in that it contains additional provisions not present in the earlier order.

that the April 2005 TSO does not constitute such a rule within the meaning of that subdivision.

Further, Marilyn has been unable to discover a published decision applying Code of Civil Procedure §575.1(c) to an order filed in a particular case and served on the parties to that case. Nor does this case present a compelling reason to create a rule that filed case orders served on parties are subject to the publication procedures of this statute. As the court noted in *Simmons v. City of Pasadena* (1995) 40 Cal.App.4th Supp. 1, 5, the main purpose of the publication requirement is to insure that parties are given notice of the rules to which they will be held.[3] Here, the parties were given the best possible notice by having each TSO served on them. Indeed, although self-represented parties are to be held to the same standards as those represented by counsel, as a practical matter it is far more likely that an unrepresented litigant will be aware of the terms of an order served on him than that he will research the published local rules.

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[3] "In summary, local rules should be developed in consultation with the bar, and the procedures for their adoption, filing, distribution, and maintenance should be followed. Compliance with these procedures will ensure that local rules will be properly disseminated to the bar and public so that they can be fully aware of the standards to which they are bring held. Unless a court provides proper notice of its rules, it cannot expect attorneys and the public to comply with them." (*Simmons v. City of Pasadena, supra* 40 Cal.App.4th Supp. at 5.)

D. Any Defects in the TSO or Its Promulgation Were Harmless Here

Even if this Court were to hold that the TSO entered in the Elkins case in April 2005 was subject to Code of Civil Procedure §575.1(c) and that it was in error because not published, Jeffrey cannot establish that such error was prejudicial to him because he was fully aware of the TSO and its provisions, and publication would have added nothing to his knowledge.

Jeffrey also claims that the court erred by holding Jeffrey to the literal terms of the TSO regarding his trial exhibits and that this error resulted in his default. (Petition at 27, 32; letter brief at 4.) Jeffrey's contention is based on a distortion of the record. The record, read resolving ambiguities in favor of the judgment, as this Court is required to do, establishes that the trial judge relieved Jeffrey of all of the TSO requirements and gave Jeffrey the opportunity, at trial, to lay the necessary foundation for his proposed exhibits but that he failed to do so.

1. Jeffrey Was Not Prejudiced By Lack of Publication of the TSO Because He Had Full Notice Of the TSO and Its Terms

As Jeffrey concedes in his petition (at 28) and as the record reveals, Jeffrey was well aware of the April 2005 TSO because it had been served on him. His knowledge was also shown in his compliance with its terms both by timely filing a declaration in lieu of direct and a trial brief, to which he attached some exhibits, and by his delivery of the trial binder (albeit not

in a timely manner) required by the order. Consequently, even if this Court were to conclude that the TSO should have been published, Jeffrey cannot establish any prejudice to him resulting from this error.

2. Jeffrey Was Not Harmed by the TSO Requirements Regarding Trial Exhibits Because The Court Relieved Jeffrey of These Requirements and Because the Provisions Were Not the Basis for the Exclusion of His Exhibits

Jeffrey also appears to claim that the TSO was unconstitutional as applied to him because it prevented him from putting documents not previously attached to or explained in his declaration into evidence. But whatever flaws might exist in the TSO procedure, and Marilyn submits there are none, were harmless in the circumstances of this case because the TSO provisions regarding exhibits were not applied to Jeffrey, as Marilyn will now demonstrate. To do so, it is necessary to examine the TSO provisions and what actually happened below in some detail.

The pertinent provisions of the TSO served on the parties and filed on April 23, 2005 required party or witness declarations in lieu of direct testimony to attach, explain, and give the evidentiary foundation for all exhibits to be introduced at trial (AA Tab 2, ¶2); that initial declarations with attached exhibits and trial briefs be filed and exchanged no later than 10 court days prior to trial (¶3); that any responsive declarations with attached exhibits, objections to exhibits, responsive trial briefs, and demands for cross-examination be filed no later than 5 court days before

trial (¶4); and that at least 2 court days before trial parties exchange and deliver to the court a binder of the exhibits they intend to offer at trial (¶8).

It is apparent that the evidentiary foundation to be laid in any declaration attaching exhibits is merely the most basic identification of a document, its source, and its relation to the case, such as Marilyn gave in her initial and responsive declarations and as Jeffrey gave in his initial trial brief.[4] For example, the first exhibit attached to Marilyn's initial declaration is the appraisal of the family residence. (AA Tab 4, Bates stamp pp. 1-23.) Marilyn provides a basic foundation for this document in her declaration by stating that it is an appraisal performed by Tom Blair and that he appraised the value of the house at $975,000. (AA Tab 4, Marilyn's declaration at ¶2). Judge Baskin's statements to Jeffrey regarding the problem caused by Jeffrey's never having mentioned or attached to pretrial pleadings the majority of his proposed exhibits explained the basic nature of the required foundation:

> [THE COURT]: So let's give a typical example of what I'm talking about with foundation, Mr. Elkins. Take a look at your Exhibit Number 5 as an example. . . .Exhibit Number 5 . . . is not referred to in your declaration. So there's no way of knowing what this document is without any testimony—direct testimony saying what this is or what it purports to [be].

[4] In his pleadings filed in connection with both the February 2005 and the September 2005 trial, Jeffrey explained and attached his exhibits to his trial briefs rather than his declarations. Marilyn did not object to this minor variation on procedure in either trial but rather treated the exhibits attached to trial briefs as if they had properly been attached to Jeffrey's declaration.

(RT 8:13-24.) Such a foundation is of course also required by the rules of evidence. (Evidence Code §§350, 1400, 1401; 2 Witkin, California Evidence (4th Ed), Documentary Evidence, §§2, 3, pp. 136-167 (at minimum, documentary evidence must meet the test of relevancy and authentication; that is, that the document is the writing the proponent claims it to be.))

The need for such a preliminary foundation is illustrated here by the confusion caused by the absence of such basic information for so many of Jeffrey's proposed exhibits. See, for example, Jeffrey's proposed exhibits at AA Tab 11, exhibits 2, 5, 9, 14, 16, 17, 18 and 19, all of which are either untitled documents entirely without internal identification or which give no indication whatsoever of what they are or how and by whom they were created (or both). Without some identification of otherwise-nonsensical documents, it is impossible to determine if a given document is relevant to an issue in the case or for the other party even to frame objections to it. What the TSO envisions is that each party will attach all of the documents he or she will be introducing at trial to the filed declarations, that the declaration will identify what the document is and who prepared it as well as its relation to the issues in the case, and that legal objections—for example, that the document constitutes inadmissible hearsay—will be made in written objections at least 5 court days prior to trial for documents

attached to the initial declarations, or orally at trial for documents attached to responsive declarations.

On September 2, 2005, Jeffrey filed a four-paragraph opening declaration and a trial brief. (AA Tabs 9 and 10.) This was timely under the TSO because filed 10 court days before the September 19 trial, and indicates that Jeffrey was aware of, and was following, the terms of the TSO. As he had for the date-of-separation trial, Jeffrey attached his exhibits to his trial brief rather than to his declaration. He attached three exhibits: an August 1998 letter from himself to himself regarding compensation for managing the litigation facing the company he had founded (called CalTech); a memo memorializing the parties' mediated custody agreement; and a letter from Marilyn's counsel memorializing the parties' agreements regarding child support, spousal support, and division of Marilyn's pension. (AA Tab 9.) Also on September 2, 2005, Marilyn filed a 27-paragraph, 9-page declaration to which she attached 14 exhibits, all of which were identified in the declaration. (AA Tab 4.) Marilyn's trial brief elaborated on the factual points made in her declaration. (AA Tab 5.)

In the date-of-separation proceedings, just six months earlier, Jeffrey had forcefully responded to Marilyn's opening declaration and trial brief on that issue with a trial brief rebutting Marilyn's point by point and attaching several exhibits, including three responsive declarations. (RA Ex. D.) In the September 2005 property proceedings, for reasons which he never

explained, Jeffrey filed nothing in response to Marilyn's opening pleadings, leaving her factual and legal assertions unrebutted and her exhibits unopposed. Marilyn timely filed a brief responsive declaration to rebut Jeffrey's short opening declaration and attached two rebuttal exhibits.

Marilyn provided Jeffrey with a binder of her trial exhibits, all of which she previously attached to her declarations, on Thursday September 15, two court days before the Monday trial, but Jeffrey did not provide her with his binder until Friday afternoon, September 16, just one-half court day before trial. (RT 3:12-4:10, 12:17-13:1.) Although untimely, this conduct of Jeffrey's evidenced his knowledge of the TSO terms, including his understanding that trial exhibits were to be provided to opposing counsel in binders prior to trial. Jeffrey's binder contained, with one exception, documents that had not been attached to Jeffrey's previously filed declaration or trial brief. (RT 3:14-16.)

At the outset of the property trial, Marilyn objected to all but two of Jeffrey's proposed trial exhibits, on the grounds that they were not in his declaration, that is, that the declaration did not attach or set forth the evidentiary foundation for these exhibits. (RT 3:12-16, 6:11-8:9.)[5] In considering Marilyn's objection, the court began by looking at the TSO

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[5] The record is confusing as to just how many exhibits were in Jeffrey's binder at trial. Marilyn's counsel indicated there were 37 exhibits, 36 of which had not been attached to Jeffrey's declaration. (RT 3:12-16.) In his writ petition Jeffrey puts the number of exhibits at 36. (Petition at 2.)

requirement that the evidentiary foundation for exhibits must be provided in the declaration submitted in lieu of direct testimony. (RT 6:11-7:7.) It is not surprising that the court did so, as neither party had ever objected to the terms of the TSO and as both parties had complied with similar provisions in the TSO that had issued just a few months earlier for the trial on the bifurcated issue of date of separation.

Jeffrey claimed that he was just going by the rules from that earlier trial, when he claimed the parties "did nothing but present exhibits such as trial book until the day of trial." (RT 6:17-21.) This was not credible, because in the earlier trial Jeffrey had in fact attached his trial exhibits to his pretrial pleadings and had timely delivered his exhibits binder prior to trial (Answer *ante* at ¶¶12(d)-12(h)), and for the pending trial, as we have seen, Jeffrey had attached exhibits to his trial brief, and had delivered, however untimely, his binder of exhibits prior to trial, all of which evidenced his understanding that exhibits were required to be presented and explained prior to trial.

There are 37 subtabs in AA Tab 11, but no document appears following subtab 37. What is clear is that Marilyn did not object to Jeffrey's exhibit 3 and exhibit 12. Both were admitted at trial not only because Marilyn did not object to them but because Jeffrey's exhibit 3 was also attached to Marilyn's declaration (as Exhibit H, see AA Tab 4), and the expert report that was Jeffrey's exhibit 12 was in evidence pursuant to Contra Costa Local Rule 12.6(e)(1), and were admitted at Marilyn's request. (RT 13:26-14:10.)

Ultimately, Jeffrey's claimed misunderstanding and his lack of compliance with all of the TSO provisions did not matter, because the trial court did not hold Jeffrey to these provisions. The court did not even consider applying the TSO requirement that documents to be offered at trial be attached to declarations filed 10 court days before trial, or the requirement that binders of exhibits be delivered to counsel and court two court days before trial. Instead, the court focused solely on the problem created by Jeffrey's failure to mention all but one of the new documents in his trial pleadings such that "there's no way of knowing what this document is. . . or what it purports to [be]." (RT 8:21-24.)

Rather than strictly enforce this provision of the TSO against Jeffrey, however, the court only preliminarily ruled that Marilyn's objections regarding lack of basic foundation would be sustained. The court then immediately invited Jeffrey to cure this defect by giving the evidentiary foundation for each document orally at trial:

> THE COURT: . . .I've reviewed your declaration. Tentatively, I am going to rule in favor of [Marilyn's attorney]. ***I'm going to allow you*** at one of the breaks. . . ***to rethink your argument and give me the specific evidentiary foundations for these documents***, but I don't see it in your declaration. . . the objections will be sustained tentatively subject to further argument after the morning break.

(RT at 9:25-10:3, 10:21-22, emphasis added.)

Jeffrey did not act on the court's invitation by providing a basic foundation for his exhibits, either through argument, or offer of proof, or by

requesting the opportunity to take the stand to do so in brief direct self-examination. Instead, prior to the break, when the court queried Jeffrey as to whether he had questions for Marilyn on the issue of dissolving the status of marriage, Jeffrey answered by abruptly resting his entire case. (RT at 14:11-17.)

Thus, Jeffrey's exhibits were excluded not through application of the TSO, but rather because Jeffrey first failed at trial to establish any evidentiary foundation for his exhibits although explicitly given the opportunity to do so, and then rested his case. Consequently, any errors that this Court might find to exist in the issuance or terms of the TSO were harmless here. (*Lammers v. Superior Court, supra,* 83 Cal.App.4th 1at 1329-1330).

IV. The Court Properly Excluded Jeffrey's Exhibits for Which He Laid No Foundation At Trial

Marilyn objected to 34 of Jeffrey's proffered exhibits because he had not provided any foundation for them. (RT 8:7-9.) Because the court relieved Jeffrey of the TSO requirements and instead permitted him to establish the foundations at trial, Jeffrey was in precisely the same position he would have been in had Rule 12.5 and the TSO not existed. That is, he was required under statutory rules of evidence to lay the proper foundation for his documentary evidence at trial. In effect, the court gave Jeffrey two opportunities to make the necessary showing—first, to lay the foundation in

his declaration, and second, to lay the foundation at trial. He failed to do either. His real complaint, then, is not about the TSO's procedure for laying a foundation, as this was excused, but what he feels is the unfairness of having to come up with the necessary evidentiary foundations for his exhibits on the day of trial. (See Jeffrey's December 28, 2005 letter brief at 8, where Jeffrey says, "How a self-represented party is supposed to be able to provide the Court with 'specific evidentiary foundations' for exhibits in the hallway during a break is not explained.") This complaint has no merit.

Only evidence that is relevant is admissible. (Evidence Code §350.) And a writing is required to be authenticated before it may be received into evidence. (Evidence Code §§1400, 1401.) Where, as here, an objection to documentary evidence has been made for a lack of these basic evidentiary foundations, the burden is on the proponent of the documentary evidence to establish its relevance to an issue in the action and its authenticity. (2 Witkin, *supra,* Documentary Evidence at §§2, 3, pp. 136-167.) Obviously, the proponent must meet this burden no later than the day of trial when he offers the documents as evidence. Jeffrey failed to meet this burden. Accordingly, the court did not err in excluding the 34 exhibits to which Marilyn had objected, and Jeffrey's request that this Court set aside the judgment on this ground must be rejected. (Evidence Code §354.)

Because Jeffrey failed to make the necessary showing, and then abruptly rested his case, the court never had the opportunity to reach the other objections that Marilyn had reserved. (RT 8:9-12.) Jeffrey's assertion, however, that most of his proposed documentary evidence was "obviously admissible on its face" (Petition at 21) is simply not true. At least 12 proffered exhibits —the documents appearing in AA Tab 11 as exhibits 1, 10, 16, 17, 18, 19, 20, 23, 26, 27, 34, and 35—were inadmissible as hearsay statements of third parties not present at trial. Another 7—exhibits 24, 25, 28, 29, 30, 31, and 33—were pleadings from lawsuits involving the company Jeffrey had founded. These could be considered by the court only if Jeffrey timely and properly asked the court to take judicial notice of them. (Evidence Code §§452, 453.)[6] The excerpts from Marilyn's deposition—exhibits 8 and 9—were not admissible because Marilyn was not an unavailable witness. (Evidence Code §1291.)

The remaining exhibits might or might not have been admissible, but in any case Jeffrey has not shown that their exclusion was prejudicial. Most were of limited relevance on minor or undisputed issues, such as the emails between the parties (AA Tab 11 exhibits 4, 6, and 7) and what

[6] Though inadmissible as evidence, many of the first group of exhibits could have been used in Jeffrey's cross-examination of Michael Eggers, which was apparently Jeffrey's intent. (Petition at 32.) The lawsuit pleadings were of limited relevance since the existence of the lawsuits was undisputed and since they were discussed at length in Eggers' report, which was in evidence. (AA Tab 11 exhibit 12.)

appear to be Marilyn's early spreadsheets (AA Tab 11 exhibits 2 and 9) which appears in final form in Marilyn's exhibit G (AA Tab 4).

V. The Court Did Not Deny Jeffrey a Fair Trial But Rather Gave Him Every Opportunity To Present His Case

Jeffrey's contention that he was denied a fair trial in other respects because of what Jeffrey claims was the court's literal imposition of the court rule and order is similarly flawed. For example, Jeffrey claims that Marilyn's decision not to cross-examine him resulted in a trial where he never took the stand. But this result flowed from Jeffrey's conduct and not the challenged rules.

First, Jeffrey chose to file a very brief declaration that by his own admission addressed only a couple of the issues, and chose not to file any responsive declarations, so that Marilyn simply felt no need for cross-examination. (RT 4:19-21.) Then, when Marilyn indicated that she would not be questioning him (RT 4:19-25), Jeffrey simply failed to request the opportunity to present oral testimony under the TSO or under the "unusual circumstances" and "proper rebuttal" exemptions of Rule 12.5(b)(3). Jeffrey could have, but did not, request brief oral direct to give the court the opportunity to assess his credibility on the stand on the grounds that his not being cross-examined and therefore not presenting any live testimony constituted unusual circumstances. Or Jeffrey could have, but did not, take the stand to offer live rebuttal to Marilyn's declarations. The court's

willingness to offer Jeffrey the opportunity to establish the foundation of documents orally at trial indicates that the court would have reacted favorably had Jeffrey requested brief oral direct. In any event, this Court cannot presume that the trial court would have denied Jeffrey's requests.

Similarly, the "default judgment" about which Jeffrey complains does not exist, and the resulting judgment was most certainly not a "sanction" for Jeffrey's failure to abide by the TSO. Rather, as we have seen, Jeffrey was excused from the TSO requirements regarding exhibits. The judgment resulted from Jeffrey's failure to lay the basic foundation for his exhibits, though given the opportunity to do so, and Jeffrey's decisions regarding the rest of his evidence.

These decisions started with Jeffrey interposing no objection when Marilyn offered her declarations and exhibits into evidence (RT 13:26-14:7), followed by Jeffrey resting his case "on everything" prior to the break. (RT 14:16-17). Then, when the court invited Jeffrey to cross-examine Marilyn, Jeffrey spontaneously rescinded his earlier request to do so (RT 14:28-15:4), thus depriving himself of the opportunity to have her lay the foundation for exhibits (like Tab 11 exhibits 2, 4, 6, 7, 9) that apparently were created by her or in which she participated, or to use these exhibits or Marilyn's deposition statements (Tab 11 exhibits 8 and 11) to impeach her declaration statements (if they do) or to impeach statements she might have made on cross-examination.

When the court next queried whether it understood Jeffrey's rescission correctly, Jeffrey also withdrew his request to cross-examine the joint expert, Michael Eggers (RT at 15:17-23), thus depriving himself of the opportunity to use the seven documents he identifies for this purpose in his petition (at 32); though most were inadmissible, they could have been used to cross-examine the expert. At this point, when the court offered Jeffrey the opportunity to present his case, Jeffrey again rested, and then rebuffed the court's invitation to admit his declaration into evidence. (RT 16:2-19.)

When Jeffrey next disavowed a stipulation he had entered only that morning with Marilyn's counsel and took a dramatically different position on the disposition of the family residence (RT 17:8-20:6), the court urged Jeffrey to get legal advice ("I would, again, recommend, as I have always recommended to you, to get legal advice") and took the matter under submission rather than make an immediate ruling in reliance on Jeffrey's unexpected position changes or on Marilyn's proposed order after trial. (RT 20:7-27, emphasis added.) The court invited Jeffrey to take the week and either settle the issues or ask the court to rule on the proposed orders, thus giving Jeffrey another opportunity to lay the foundation for his exhibits and request their admission or to seek other relief prior to the court deciding the case. Once again, Jeffrey did not avail himself of this

opportunity. The court did not err in rendering judgment on the only evidence it had.

Although Jeffrey appears to acknowledge that unrepresented parties are not entitled to special treatment (see Jeffrey's petition for review at 27 and his letter brief at 2), he also seems to feel that this rule is unfair, as illustrated by his surprise that as an unrepresented party he needed to be able to lay evidentiary foundations and to know the rules of evidence when challenged at trial. But as this Court correctly noted in *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 979, "Procedural law cannot cast a sympathetic eye on the unprepared, or it will soon fragment into a kaleidoscope of shifting rules." In addressing the defendants' therein "ill-advised self-representation," this Court went on to say:

> Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties in the litigation.

(*Id.* at 984-985.) This sentiment applies with special force to a self-represented party like Jeffrey, who could well afford counsel but chooses to represent himself. "[A] lay person, who is not indigent, and who exercises the privilege of trying his own case must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse." (*Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1009.)

VI. Conclusion

For all of the foregoing reasons, Jeffrey's petition for writ of mandate should be denied and the judgment below should be affirmed.

Certification re Length of Brief

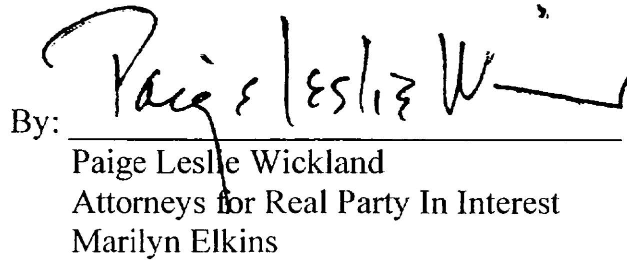
The undersigned certifies that the foregoing brief is 11,644 words in length.

Dated: April 3, 2006

Respectfully submitted,

FANCHER & WICKLAND

HARKINS & SARGENT



By: ______________________________
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1 **PROOF OF SERVICE**

2 I, Emily Loeschinger, hereby declare:

3 My business address is 155 Montgomery Street, Suite 1400, San Francisco,
4 California, in the City and County of San Francisco. I am over the age of eighteen years and I am not a party to the within action.

5

6 On April 3, 2006 I served the foregoing document entitled **Real Party In Interest's Return By Answer To Petition For Writ Of Mandate Or Prohibition;**
7 **Supporting Memorandum Of Points And Authorities** on the individuals listed below by enclosing a true copy in a sealed envelope addressed as follows and by the method
8 indicated below:

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16

17 ☒ **VIA UNITED STATES POSTAL SERVICE.** I placed the above-described sealed
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22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct, and that this declaration was executed on April 3, 2006 at San Francisco, California.

24

25 Emily Loeschinger