S139073

IN THE SUPREME COURT OF CALIFORNIA

Jeffrey Elkins
Petitioner,

vs.

Contra Costa County Superior Court,
Respondent

Marilyn Elkins,
Real Party in Interest.

Contra Costa County Sup. Ct. Case
No.: MSD0105226

After a Decision by the Court of Appeal,
First Appellate District, Division One, Case No. A111923

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF WITH EXHIBITS IN EXCESS OF TEN PAGES, AND PROPOSED BRIEF

ON BEHALF OF THE FAMILY LAW SECTION OF THE CONTRA COSTA COUNTY BAR ASSOCIATION

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF WITH EXHIBITS IN EXCESS OF TEN PAGES

In response to an invitation to file an Amicus Curiae Brief on behalf of the Family Law Section of the Contra Costa County Bar Association, the Board of Directors of the Family Law Section commissioned a professional survey of its members on various aspects of the Trial Scheduling Order. That survey consisted of 76 multiple choice questions and 15 write-in questions. There were 516 individual write-in comments.

The data was complex, and was used as the basis for the Brief. In order to provide complete and accurate information to the Court and the parties hereto, the Family Law Section desires to make the entire tabulated survey and complete write-in comments available to everyone. The material cannot be edited, summarized or condensed without risking distortion or omission of important information. Accordingly, this Amicus requests permission to attach the entire tabulated survey data as an Exhibit to its Brief.

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I. Introduction

The Family Law Section of the Contra Costa County Bar Association (hereinafter "Section"), submits this Amicus Brief in response to an invitation issued by the California Supreme Court on April 21, 2006. The pending Writ challenges the constitutionality of a Trial Scheduling Order issued by the Family Law Division of the Contra Costa County Superior Court on April 22, 2005. That Trial Scheduling Order provides, *inter alia*:

"IT IS HEREBY ORDERED THAT:

1. Unless otherwise approved in advance by the court, all direct testimony shall be in the form of declarations filed in lieu of direct testimony, subject to cross-examination.

2. All exhibits to be introduced at trial shall be attached to, and explained in, the declarations. Any required evidentiary foundation for the admission of the proposed exhibits shall be completely set forth in the declaration(s).

Documents and exhibits to be used, in good faith, only for impeachment[1] need not be submitted with the declarations.

3. Initial declarations by each party and by any witnesses shall be filed and exchanged not later than ten (10) court days prior to trial, together with any trial briefs which any party wishes to submit. Failure to provide initial declarations may result in there being no direct testimony on that issue and issue sanctions may result. Failure to file a brief indicates to the court that no cases are being relied on by that side. Failure to provide a declaration because a witness refused to sign it shall not excuse the filing of the unsigned declaration.

4. Responsive declarations and exhibits, any objections to exhibits, and demands for production of any declarant for cross-examination shall be filed and served not later than five (5) court days prior to trial, together with any responsive trial briefs. For any witnesses not deposed or interviewed, a short statement of the expected testimony is required…

5. The parties will prepare a binder(s) containing all the exhibits they actually plan to use at trial. The exhibits will be consecutively marked and each page is to be Bates stamped in consecutive order. Copies will be provided for each side, the witness, clerk and the court at least 2 court days before the trial.

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[1] Although the Trial Scheduling Order under review here did not require advance disclosure of impeachment evidence, later versions, including the one currently in effect, do. See Exhibit 4.

OTHER ORDERS: Failure to comply with these requirements will constitute good cause to exclude evidence or testimony at trial and/or to make adverse inferences or findings of fact against the non-complying party. Willful noncompliance may also be subject to imposition of monetary sanctions, and will be considered by the court in assessing and awarding attorney fees and costs." [The complete order is attached hereto as Exhibit 1].

The Trial Scheduling Order has gone through numerous iterations since the issuance of the one under review here.[2] A current version is attached hereto as Exhibit 4. It contains the following additional terms (among others), which were in effect at the time of the survey:

"**B.1.B. Adverse Witnesses:** Any party wishing to call the opposing party an adverse witness under Cal. Evidence Code 776, must give notice to the opposing party no later than fourteen (14) calendar days prior to trial (if served personally by hand, otherwise an extra seven (7) calendar days must be added to allow for mailing). Contemporaneous with giving notice, the requesting party will also file and serve on the opposing party *a statement of the testimony the party expects to elicit*, together with copies of

[2] In order to assure itself that the issues raised in the survey are still relevant, this Amicus obtained a recent version of the TSO, which was filed June 13, 2006. It is attached hereto as Exhibit 4, redacted for case and litigant information. The three page Trial Scheduling Order which was issued in the Elkins matter in April 2005 has evolved into a twelve page document.

deposition transcripts and exhibits which will be included in the examination. [Emphasis added.]...

B.2.B. Undisclosed Impeachment Witnesses: The Court shall disfavor the introduction of any witness for whom a declaration has not been filed. Exceptions will only be allowed to counter "surprise" testimony which could not reasonably have been anticipated and responded to in direct and responding declarations...

B.4. SUBPOENAED AND NON-COOPERATING WITNESSES: All subpoenas for trial witnesses shall be issued and served on the other side no later than ten (10) calendar days before trial, unless leave of court has first been obtained on a showing of good cause. For any non-cooperating witnesses appearing or subpoenaed without a signed declaration, a short statement of the expected testimony is required and reasons for not deposing or taking a sworn statement.

Experts not appointed under Evidence Code §730 must file declarations by the offering party who must also comply with all other provisions of the local rules and the Code of Civil Procedure relating to experts.

B.5. EXHIBITS: All exhibits to be introduced at trial shall be contained in the Exhibit binder, and fully referenced and explained in the declarations (although not attached to the declarations). Any required evidentiary foundation (including stipulations) for admission of the

proposed exhibits shall be completely set forth in the declaration(s), as all rulings will be based on the declarations alone. *All documents and exhibits that are to be used solely for purposes of impeachment or rebuttal must also be included in the Exhibits binder by each party.*" [Emphasis added.]

A current version of the Trial Scheduling Order [Exhibit 4] states that its goal is to encourage settlement by eliminating the element of surprise, to minimize delays and reduce the cost of the trial itself. The order is issued as a form document, with blanks for the caption, file number, date and time of trial, date and time of settlement conference, discovery cut-off date, and proof of service information, which are handwritten in and then signed by the judge when the trial date is assigned. There is no place for the order to be tailored to the facts of a particular case, nor for alteration of any of its terms.

A. The Family Law Section Surveyed its Members Regarding the Trial Scheduling Order

In order to respond effectively to the invitation by the California Supreme Court and to serve its membership, the Board of Directors of the Family Law Section decided to survey its members. The goal was to conduct an anonymous, confidential, and specific survey in order to obtain a sense of our members' opinions and experiences with the Trial Scheduling Order, and to provide the Supreme Court and the parties with

accurate data on the membership's experience and perception of the impact of that order on the preparation for, scheduling and conduct of trials, on litigants' rights, judicial and court efficiency, fairness of trials, access to justice, and public trust and confidence in the courts. The Trial Scheduling Order issued in the instant case is attached hereto as Exhibit 1. The transmittal letter and introduction to the membership survey are attached hereto as Exhibit 2. The complete survey and tabulated results are attached as Exhibit 3. All write-in answers are contained in Appendices A through O to Exhibit 3.

As used in this brief, Trial Scheduling Order (hereinafter "TSO") refers to one of a number of variations of an Order issued by the courts of the Family Law Division of the Contra Costa County Superior Court in 2005 and 2006, and not just the version which is under review in the instant matter. Since the order has gone through numerous iterations and has sometimes been used by some trial departments and not others, it is impossible to identify only those attorneys who have experience with the specific TSO which is the subject of the instant Writ. As a result, the survey was designed to address the key issues raised by all of the versions of the TSO which have been utilized in the past 18 months.

The confidential survey of Section members was launched May 16, 2006, and time to respond closed at 5 p.m. on June 1, 2006. As used in this

brief, "members" refers to those members of the Family Law Section who responded to the survey.

B. Protocol and Design of the Survey

In order to assure the professionalism and integrity of the survey, the Section engaged Delphi Consumer Insights, a professional survey consultant, to assist in the design and conduct of the survey. All participants were attorney members of the Contra Costa County Bar Association and the Family Law Section. No affiliate members or non-attorneys were given surveys. No members who did not actually practice in Contra Costa County participated. In order to assure anonymity, and that only one survey could be submitted by each qualified participant, each participant was given a unique URL which could be used only by that member to access the survey form, and which was disabled once a completed survey had been submitted. The URL cannot be traced to individual answers.

The survey consisted of 76 multiple-choice questions and 15 opportunities to augment and explain their answers on various aspects of the TSO. All results were tabulated by the Section's professional third party survey consultant. There are 516 individual responses to the write-in questions. It took between thirty and forty-five minutes to answer the complete survey. Of 219 members surveyed, 124 responded. The Section's

professional consultant reported that this is an astonishingly high response percentage for a voluntary survey and evidenced intense interest on the part of the participants.

The write-in answers are set forth in their entirety in Appendices A through O, attached to Exhibit 3. While a number of members referred back to their prior answers in the write-ins, the design of the survey and the quest for anonymity make it impossible to trace all of the answers of one member through the survey. With one exception, the write-in answers are submitted verbatim, complete with typographical errors.[3] Only by reading through the responses in members' own words can one get a true sense of the strong feelings the TSO has engendered in members and their clients.

II. Survey Results

A. Demographics

The survey was designed to allow analysis of the results based on certain demographic information regarding income level of clients, experience with the TSO, and percentage of practice in family law. Of those members surveyed, 73% report that the majority of their clients have total annual household income in excess of $75,000. [Question 1[4]]. Only 10%

[3] One member inadvertently self-identified, and that information has been deleted to preserve anonymity. That member's answers and comments have not been changed.

[4] Question numbers refer to the multiple choice questions contained in Exhibit 3.

indicated their clients had incomes under $50,000 per year, which suggests that poorer litigants generally were not represented by attorneys during the survey period.[5]

The majority of members (80%) reported that family law comprised 75% or more of their practice, with 51% reporting practices devoted exclusively to family law. [Question 2]. 94% reported that between 50% and 100% of their family law practice was in Contra Costa County. [Question 3]. Thus, the survey results are heavily weighted in favor of those family law attorneys who have the most experience in Contra Costa County family courts.

The majority (82%) reported having had ten or fewer cases involving a TSO, although 3% reported over twenty cases involving a TSO. [Question 4]. 90% reported having received more than one version of the TSO, sometimes receiving multiple versions in the same case. [Question 5. See O33[6]]

The data was analyzed in conjunction with the demographics. There was no discernible difference in the answers based upon client income,

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[5] Since only attorneys participated in the survey, the results do not reflect the experiences of self represented litigants, except anecdotally in the write-ins.

[6] References to write-in comments will indicate the letter of the Appendix first, and the number of the response second. All write-ins which support a statement are not individually referenced, since in some cases there are dozens of write-ins which could be cited as support for a single statement. Rather, this Amicus has chosen to cite to a representative sampling.

percentage of practice in family law, the number of TSOs or the versions of the TSO a member had received. The percentages reported in Exhibit 3 remained fairly consistent across all demographics.

The survey was detailed and comprehensive, and the results contained information and opinions on issues which will not be addressed in the body of this Brief. This Amicus has focused on those opinions and comments shared by a substantial majority (defined as 70% or more) of the members responding to the survey. This was done, not because the other issues and minority opinions were considered unimportant (and indeed, there are very thoughtful minority opinions offered[7]), but in order to focus this Brief on those issues of greatest significance to the majority of the Section's members. The Court and parties are strongly encouraged to look to the entire body of data, which is attached.[8]

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[7] Important minority opinions are at Questions 53, 63, 69, and 82, Appendices G, K and N, and F45, G3 and K2 of the write-ins.

[8] Write-in answers are critical to a full understanding of the experiences of attorneys and their clients under the TSO, and members proved eager to augment or reinforce their answers to the multiple choice questions. The questions regarding client reactions to the TSO [Question 38, Appendix C] received the most write-in comments (91 of 124) and 69 wrote in responses to additional client objections [Question 56, Appendix D]. There were 76 responses to the question about impact on their law practice [Question 36, Appendix B]. There were 61 write-in responses to question 61 [Appendix F] regarding whether they believed the TSO created a lesser standard of justice for family law litigants. The high number of write-ins underscores the high level of interest in the issues raised by the survey. To the extent possible, this Amicus has elected to use the members' own words in this Brief rather than summarizing or paraphrasing them.

B. Overall Results

The opinions expressed about the TSO were consistently negative. Only 18% of those responding reported that the TSO promotes fair trials on the merits, while 82% disagreed. [Question 62]. 85% felt that the TSO creates the impression of a lesser standard of justice for family law litigants vis-à-vis other civil litigants who are entitled to take their claims to trial with live testimony. [Question 60]. 77% felt that the TSO did not enable them to more fully present their case. [Question 79]. The write-in answers repeatedly referenced the disparity between the judicial resources allocated to families and those allocated to minor tort cases such as fender benders and slip and fall.

A minority of members liked the TSO because it improved trial preparation and organization, although many of these admitted it needed fine tuning. Even among these members there were numerous complaints about the confusion generated by multiple versions of the TSO, and uneven enforcement, whether against an opposing attorney or a self represented litigant. The most common other complaints among those who otherwise supported the TSO involved premature discovery cut offs which are earlier than those mandated by statute, and the requirement to disclose impeachment and rebuttal evidence in advance of trial.

The specific issues which generated the most comment are addressed separately *infra.*

III. Impact on Courts

The TSO has been promoted as improving court efficiency, particularly by making better use of judicial time. However, 71% answered "No" to the question: "Do you believe the TSO makes better/more efficient use of judicial time and resources." [Question 68]. 61% of the members who felt that the TSO increased judicial efficiency believed that this efficiency was gained at the cost of unrepresented litigants [Question 71], and 75% felt that it was at the cost of represented litigants [Question 74]. The minority of members who believed that the TSO made better/more efficient use of judicial time and resources saw the benefit primarily in streamlining the presentation of documentary evidence resulting in better organized evidence. [Question 69].

Of those who answered "Yes" to Question 71, that the gain in efficiency is at the cost of unrepresented litigants, 100% agree that the cost is because "unrepresented litigants are forced to prepare complex binders of evidence which exceed their ability, or risk losing meritorious claims" [Question 72]. 100% of those who answered "Yes" to Question 74 also agreed that the cost of that increased efficiency to represented litigants was "financial, in the form of increased attorney fees and the cost of preparation of declarations, foundation and evidentiary objections in writing." [Question 75].

A. Trial Scheduling

The TSO has been promoted as reducing the waiting time for trials. 78% of members disagreed that waiting time was shorter. [Question 44] Only 37% of those who said the TSO made more efficient use of judicial resources [Question 68] gave "it takes less time to get a trial date" as a reason for that efficiency. [Question 69]. Many of the members complained that judicial resources would be better utilized in promoting early settlement than forcing everyone into a trial order, which one characterized as "one size plan fits all." [L23. See also B31, B59, D12, D42, and N12].

B. Trial Conduct

1. Impact on Time of Trial

The TSO is promoted as streamlining and shortening trials. There was no consensus on whether this is true [Question 39], but 72% of those who answered "yes" to the question whether trial time was shortened felt only one-half day was saved.[9] [Question 41]. Of those members who answered yes to whether trial time was longer [Question 39], 61% said the increase was by one-half day [Question 43]. The overwhelming theme of the write-in comments was that any reduction in trial time was obtained at

[9] Several members complained that compliance with the TSO consumed weeks of their time leading up to trial, yet it appears the trial savings, if any, is less than a day. [B56, L17, O4. See discussion of impact on other clients at page 32].

an unreasonable financial cost to clients, burdensome demands on the attorney's time, and the loss of important legal rights.

80% of members agreed with the statement "the TSO sacrifices important personal rights regarding property and children to the interests of judicial efficiency." [Question 64].[10] One of the reasons for this conclusion appears to be the dominant belief among members and their clients that the judges do not have time to read the declarations and exhibits prior to trial.

2. Judges Lack Sufficient Time to Read and Absorb Voluminous Declarations and Exhibit Binders Prior to Trial

Question 84 asked for various reasons why members did not support the TSO. 75% agreed with the statement "I have no way of knowing whether the judge has fully read the declarations and attachments," 78% agreed with the statement "There is no corresponding time set aside for the judge to read and analyze voluminous declarations and evidence binders," and 78% felt that "time for the judge to read declarations before trial is critical to my effective cross-examination." [Question 84].

Many reported that it was clear on the day of trial that the judge *had not* read them. "In all but 2 trials, [it] became obvious that the Judge had not

[10] "I feel for the predicament of the court which faces scores of pro per litigants daily and burgeoning caseloads. The solution for this needs to come, not from a TSO, but a complete re-evaluation of the importance of family law and the protection of rights inhering in family law cases by our legal system." [O25].

read or carefully reviewed the declarations beforehand." [C70]. One complained of "the failure of the Court to be familiar with declarations and trial briefs before the start of the hearing/trial." [D31]. "The judge did not read the documents." [D46]. One reported a client's "outrage that after the money was spent the bench officer asked if we were in court to get a trial date." [D52]. "[T]he judge will UNLIKELY read carefully all of the declarations and study all of the documentary evidence before the "trial" commences and thus, won't "know" the case prior to it commencing." [D61]. "[T]oo often judges have not read declarations and rule on trial testimony." [F1]. "The real problem is that the Judges do not appear to have or spend the time before Trial studying the declarations, and have been exposed to testimony later excluded." [K23. See also B5, C57, E18, L28, and O28].

"My experience with the trial scheduling order in two of the family law department[s] was that neither jurist took (or had) the time to read or be familiar with the 150-500 pages of declarations, trial briefs and exhibits (which were discussed in the declarations prior to the hearing). Therefore, when the hearing starts with Petitioner calling their first witness by submitting the 20-40 page declaration in lieu of direct testimony (along with 50-100 pages of exhibits referred to in the declaration) and opposing counsel immediately proceeds with cross-examination, the Judge is completely lost." [O15].

3. The Trial Scheduling Order Deprives Litigants of their "Day in Court"

Only 8% of the members reported that their clients feel that the TSO allows them to have their day in court. [Question 54].[11]

Litigants cannot have their "day in court" without an assessment of credibility, which the TSO makes impossible. [C40, D2, D17, D40, D58, E6, E17, E19, F8]. "Without live testimony the judge has absolutely no way to determine which witness is telling the truth. It is a matter of basic due process. The question really is, what process are family law litigants due?" [F21]. Many reported that their clients felt deprived of a fair trial because the judge was hearing, not the witness's words, but the attorney's. [C60, D2, F8]. Several opined that the advantage goes to the lawyer who is the better writer, rather than the more credible witness. [Question 64 and C60, D40, D49, F8, F48].

Members uniformly report that their clients are stunned to be told that they will not get to tell their story to the judge. "You've got to be kidding. What happened to my day in court..." [C26. See also D40]. "Shock, anxiety and outrage that they will not get to testify." [C57]. "Disbelief that he/she could not tell their "story" directly to the Judge." [C68]. Numerous write-ins referenced their clients complaining that they had been denied their right to have their case heard by a judicial officer. They report their

[11] The phrase "day in court" appears 27 times in the write-in answers.

clients become hopeless of having a fair trial under the TSO. One complains that the "entire family law bench blindly impose[s] the trial scheduling order procedure which is costly and essentially thwarts either party's ability to have a "day in court" and test the credibility of the other party and witnesses." [O15].

The write-in comments continuously reference the importance to litigants of having the ability to "tell their story," and how essential this is to their feeling that they have had their "day in court." 79% agreed with the statement that "The TSO doesn't give family law litigants a chance to tell their own story, which impacts their acceptance of adverse rulings. [Question 84, L12]. Clients "want to know that the judge has heard their stories. Feel that the other side would not be credible." [D2]. "Most feel they are not getting their day in court." [D18]. Clients ask "Why can't I be allowed to tell the judge my side of the story[?]" [D24] and fear "that the judge won't really "hear" what their position is." [D30]. "Clients want to be able to tell their story to the Judge, not just be cross-examined. They do not feel heard." [D42].

One member reported clients' reactions as "Fear that court would not read their declaration thoroughly; fear that court would not be able to focus in (sic) the truly important issues, because of the size of the declarations; belief that the court would not get to know the client through testimony and that the client would not truly be "heard" through cross-examination alone."

[D67]. Another stated that the TSO creates the "appearance of indifference to the real issues central to family law which mean that the litigant wants to be able to "be heard" and to gain some closure and to believe that the court ruled after an accurate and fair assessment of the case." [E17]. "The[y] almost universally want, if a trial is necessary, to be able to "tell the judge" what "really" happened. They are now deprived of partaking in any human interaction in the courtroom, ex[cept] for the unpleasantness of cross. They want to have a TRIAL, as they understand it...All in all, they despise it [the TSO]." [E9].

4. The Declarations Required by the Trial Scheduling Order Make it More Difficult to Settle Cases

While the threat of the TSO was reported to provide an incentive to settle cases before incurring the cost of compliance [B16, B32, C21],[12] only 19% report that their compliance with the TSO was helpful in settling their cases and only 18% report their opponents' compliance was helpful in settling cases. [Question 53]. On the other hand, many complained that the declarations made it harder to settle cases. Declarations are often filled with inflammatory or inadmissible evidence, which further polarizes the parties, increases the animosity and reduces the likelihood of settlement. [B19, B27,

[12] See discussion at page 39.

B50, D1]. They reported that the declarations caused litigants to harden their positions:

"The TSO consumes more than a full month before trial, creating (in larger cases, at least) a "greased slide" to trial, eliminating the best opportunity to help the clients recognize that a settlement is preferable to "exposing the family's dirty linen" in a public forum. Onc[e] the trial declarations are prepared in the strongest possible language, the anger levels rise and the trial ensues. Any hope of helping the parties create a new relationship based upon mutual respect (usually for the benefit of the children as much as the parties) is incinerated in the heat of trial, and the family rancor is perpetuated." [L17].

"They promote an adversarial approach to these cases, which is needlessly painful for our clients and often their children." [L15].

There is a strong perception that by increasing the level of animosity, the declarations required by the TSO increase conflict and push litigants toward trial: "Cases are going to trial that could have settled without the TSO." [L15]. Not only do they report that settlement is more difficult after the declarations are served, some complain that the TSO requires them to divert all resources into girding for conflict at precisely the time when they should be trying to settle. [C53]. "Every client exposed to the TSO felt we should be working toward settlement, not preparing for trial." [D42]. Several commented that the system is skewed toward trial, when judicial

resources focused on early intervention to promote settlement would be more helpful. [B31, B59, D12, F9, K15, N12, O34].

There is also the issue of whether the trial which results is really a "trial" as that word is understood, and several members reported that trials on declarations aren't real "trials" at all. [B5, C31, D60, E9]. The write-in comments about client perceptions (contained in Appendices C and D) underscore the commonly held belief by litigants that they have been deprived of a true trial. One stated, "each item of each declaration can and will be dissected and opposed. The big picture is lost. Spontaneity is lost, the nuances are lost, there is no trial." [B5]. "The worst part is the inability to have the case unfold in court." [O8]. "Trials are for the rich and everyone else is out of luck." [L16]. 77% agreed with the statement "The TSO treats substantive family law issues like law and motion matters." [Question 84].

In summary, one member said it best: "In the interest of expediency, it [the TSO] eliminates justice." [O11].

5. The Trial Scheduling Order is Not Uniformly Enforced

Even among those who support the TSO, there were numerous complaints of uneven enforcement. The overwhelming majority of members complained about uneven enforcement which resulted in unfair trials. [Questions 23-27 and 50-52]. 81% reported that they had had cases in which the other side had not fully complied with the TSO. [Question 23].

While some complained that the rules weren't enforced against self-represented litigants [Question 52],[13] many also complained of opposing counsel not being held to the same standard [Question 51], who sometimes purposely delayed compliance for tactical advantage. [D7, D32, D52].

Uneven enforcement creates a sense of unfairness on a number of levels. The litigant who pays her attorney to fully comply and provide the entire trial in documentary form feels betrayed by the system if the other side isn't held to the same standard. First, her legal fees will be significantly higher than those of her opponent. Second, by disclosing all of her rebuttal and impeachment evidence, she will have provided a roadmap of her case to her opponent without receiving the benefit of a reciprocal roadmap to his case. And she may well resent her attorney for having insisted that she comply. [D40]. Several referred to the poor attorney client relations which result from attempting to comply with the TSO. These relations are only further strained when the requirement is not uniformly enforced against their opponent, whether represented or not. [See discussion of client relations at page 32]. One member opined that uneven enforcement violates equal protection [E9], and one described it as "a crap shoot" whether it will be enforced in a given case. [M23].

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[13] Even though the TSO was enforced against the Appellant here, members to the survey repeatedly complain of cases where it was not enforced against a non-complying opposing attorney or self-represented litigant.

At Appendix M, many members offered opinions as to why enforcement of deadlines was uneven.[14] The answers run the gamut from a reluctance to default a party due to the mistake of the lawyer [M15], a recognition of the limitations of pro pers [M5, M20, M26], the desire to hear all evidence so they can make a decision on the merits, [M8], and the desire to do equity [M18], to a recognition that the TSO places unreasonable burdens on attorneys [M1, M28], to favoritism [M3, M6, M33] and arbitrariness. [M4, M19].

"Rightly or wrongly, I feel that I'm one of the attorneys who always follows the deadlines. Quite simply, I'm afraid not to. Those who are more daring than I am and do not follow the deadlines rarely receive any repercussions from failing to do so." [M33].

"Because the Judge's (sic) readily admit they don't want to trample on someone's right to be heard in court, especially pro per litigants. Thus defeating the purpose of the TSO!" [M5].

"There are many explanations depending on the circumstances, most of which are not good because there is not a level playing field." [M22].

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[14] The responses to Questions 24-27 regarding whether issue or fee sanctions were requested or granted are split. It appears that there may be an issue with whether fee sanctions for noncompliance or incomplete compliance fall under Family Code §271, or rather under §2030. And one must ask, what is the benefit to the complying party if the noncompliant one does not have the ability to pay? Although the TSO threatens fee and issue sanctions for non-compliance, where is the authority? Where is the application?

C. The Trial Scheduling Order Creates a Lesser Standard of Justice for Family Law Litigants

The overwhelming majority of members (85%) believe the TSO creates the impression of a lesser standard of justice for family law litigants *vis-à-vis* other civil litigants who are entitled to take their claims to a live trial before the trier of fact. [Question 60]. 80% agreed that it creates second class justice for family law matters. [Question 64].When given an opportunity to augment their answers to Question 60, 61 members took advantage of it. Their responses are in Appendix F, and the tone is one of palpable outrage, which is best conveyed by quoting some of them verbatim:

"Everybody is entitled to their day in court, unless s/he is getting a divorce." [F6].

"The court allows litigants in fender benders to spend days in the courtroom using up public dollars for less than a $100,000 case and our cases with millions of dollars at stake have TSO's (sic) shoved down our throats and force us to use minimal court time for our cases and require us to trust that the judges have actually read all of the required material submitted." [F16].

"It does not make sense that a run of the mill car accident type personal injury case is allowed a week or more for a jury trial, while a

custody case that impacts a child's life forever has limited live testimony and is provided very little trial time." [F17].

"Most regular people only encounter the court system for a family law matter, yet the court system provides family law matters the least amount of time. Our society needs to assess its priorities when making decisions regarding court resources." [F17].

"In any civil case you can present your witnesses to explain evidence and rebut the other side if necessary. This TSO does not allow that, and injustice runs rampant." [F20].

"[A]ll I can deduce is that he [the author of the TSO] believes family law matters are less important than such pressing civil ones as neighbor's property line disputes, or car accidents. In FL, we are dealing with cases that involve the most intimate and important aspects of our clients' lives: their property, their income, and MOST importantly, their children. The TSO acts to further the belief, already prevalent, that the judicial system does not care about them..... Is deciding which parent the children will live with less important than deciding who should pay whom for a slip & fall?" [F25].

"A dissolution proceeding is the most important and frequently the only litigation that most people engage in. It impacts their lives and their families. My clients deserve to be treated with dignity and not like second hand (sic) citizens." [F31].

"No other civil proceeding takes away the client's trial rights like this." [F34].

"Most clients know that if this were any other type of trial, they would have the right to tell their story on the stand, not be forced to do it in a declaration and then have their only words heard by the judge be responses to cross examination." [F37].

"The stark differences in the level of attention given to a civil case of similar magnitude, particularly jury cases, leave a very bad taste in the clients' mouths." [F43].

"Family law should, if anything, be given more court resources and a higher priority than other areas of the law because it involves issues central to our social fabric--the economic stability of families, the needs and provisions for children, the apportionment of responsibility for child rearing and accountability for abuse and violence perpetrated by those with whom we are most vulnerable. Instead of acknowledging this priority, we give family law short shrift, place burdensome requirements and restrictions on litigants and then short staff those departments of our courts." [F44].

"All civil litigants want their day in court. The TSO implies the family law litigants are unimportant." [F56].

"I don't think families and children should have less effective access to the courts than someone who is rear-ended by a UPS truck. The Supreme Court needs to look at this from the perspective of balancing that need for

efficiency against the overriding commitment to families and children, and the larger societal issues of access to justice." [N10].

"It makes no sense, societally, ethically, or practically, that a $15,000 fender bender gets better attention from our court system than a case of serious alleged child abuse (or the division of a $5 million marital estate). The failure to accord family law, its litigants, and its dedicated judiciary the time, resources and attention that it merits is really the gravamen of the problem." [O25].

"I'm sick of the courts treating family law litigants as second class. Families and children should be protected by the courts, and given preference, not shunted off into a law and motion system solely to promote judicial efficiency.... Systems which work for complex civil litigation just don't serve families, yet families are expected to adapt to the system rather than having their own unique legal interests and problems respected by the courts. Just because ABC Corp. can afford to litigate this way (and write off their fees as a business expense) doesn't mean families should be expected to finance the same style of litigation, especially with after-tax dollars that are better spent on the children." [L16].

And finally, "Family law litigants already understand that a 2 inch crack in a concrete foundation will get more time in court via a construction defect case than FL litigants will get to determine support, child custody, property division and any other items for determination. The TSO only

further clarifies for FL litigants the spot they maintain on the litigation resource food chain." [F58].

D. The Trial Scheduling Order Restricts Access to Justice

81% of members believed that the TSO hinders litigants' access to justice. [Question 81]. More members (12%) thought it neither hindered nor promoted access to justice than thought it promoted access to justice (only 6%). The TSO impacts not just the poor but the middle classes. Family law legal fees are after-tax, after child support, after mortgage, and after everything else. The theme of limiting access to justice permeated the write-in answers.

One member states "my clients cannot afford [to] get involved in protracted litigation. They have very little money for retainers. If they had an additional 5K it would be cheaper for them to get a private judge. The[y] do not have 5K to 10K to spend on a paper chase which only excludes them from the judicial process and equity." [C34].

"Procedure comes at a price that the poor cannot afford." [F27].

"I'm against it as it only provides justice for litigants who can afford it." [K16].

"You get the best justice money can buy." [C71].

"Not fair – it is creating an unequal system of justice." [O10].

"[It] further contributes to making access to court too expensive for the middle class litigant." [L1].

"Although convenient for the court, the added expense and cost preclude "justice" in all cases but those that can afford it." [F41].

"There is no societal or legal justification for requiring that family law litigants conduct their trials in writing -- a requirement that strips away the court's opportunity to assess veracity. The most affluent client who can afford to employ the best staffed law firm with the most resources gains a decided advantage." [F44].

"...mandating that all the work is in writing means that the middle-class litigant cannot afford the process and family law proceedings are not "elective" litigation." [F46].

"I cannot afford to take on a moderate means case or pro bono case as the cost factor is too high, the time constraints are unreasonable and I cannot adequately represent my client(s)." [O22].

"I cannot imagine how a family with earnings of less than $250,000 per year could get through a dissolution action represented by counsel, coping with the existing TSO." [O24].

"While most of my clients are well-off, it still isn't fair to subject them to this expense. It is unconscionable with the middle-class or poorer litigant, who has no ability to pay these increased fees, and yet cannot effectively comply without professional assistance. This means that trials

are for the rich, and everybody else is out of luck. The procedures are so complicated that form has overtaken substance, which is the right to a trial by a live trier of fact, who has the ability to assess credibility and make a decision on the merits." [L16].

"There has to be a balance between rules that streamline and improve procedure, and a system that allows the common person to be heard on reasonable claims for a reasonable amount of litigation resources." [K28].

"The TSO is a well-intentioned effort to make family law courts more efficient, but its result is Draconian – it is slashing away the ability of many middle class litigants to pursue their rights." [E15].

"Good intention, horrible result," [O3]. [15]

IV. Impact on Attorneys

The survey contained a number of questions about the practical impact of the TSO on attorneys, their office operations, interactions with their clients, changes in the way they practice, and practical experiences. The overwhelming majority reported a negative impact of the TSO.

[15] It is clear that the members believe that at the very time when the Judicial Council and the Administrative Office of the Courts are simplifying forms and procedures to make the courts more accessible to litigants, the TSO goes in the opposite direction.

A. The Trial Scheduling Order Has a Negative Impact on Law Office Operations

93% reported that the TSO had impacted their office operations. [Questions 34 and 35]. 76 of those responding, representing over half of the total, took the time to write additional comments on the impact. [Appendix B]. Although there were some positive comments, which focused primarily on increased organization, the majority complained of unreasonable burden imposed on attorneys and their staffs by the TSO, and the negative impact on their day to day office operations. The negative impacts cover a variety of issues.

B. Financial Cost to Attorneys

The overwhelming majority of members (94%) stated that the TSO had increased the cost of their services to clients. [Question 28]. 89% said the increased cost was $5,000 or more per case. [Question 30]. One reported that "costs to clients have doubled or tripled on many small and/or moderate cases, which in turn, makes clients upset." [B67]. 84% reported that it is more expensive to clients to prepare evidence by declaration than to offer live testimony. [Question 64].

The inability of clients to pay for this increased cost appeared repeatedly in the answers. Numerous members reported that they ended up bearing the increased cost themselves. If the client could not afford to pay,

or simply refused, they were forced to choose between abandoning the client and absorbing the cost. Many felt they had no choice but to absorb the cost themselves. [B37, B63, C19, C33, C65, C68, E22, J4]. This has imposed an increased financial burden on attorneys. One reports "accounts receivable in family law are astronomically high. This makes it worse." [L11]. Another states "This costs me a fortune because my clients cannot afford the cost of litigation, and they either roll over or I eat huge fees." [K3].

"Because I have to anticipate everything in advance, I have to over-prepare, often to the extent that I don't feel I can bill my client for the full amount. That extra preparation is on my own time, because I can't augment later and don't want to take a chance on being sued because I didn't anticipate every possible objection to my evidence." [J6].

This issue is also reflected in office administration. 67% reported that they had increased costs which could not be passed on to clients. [Question 35]. 92% reported more staff time tracking deadlines, and 97% reported more staff time preparing paperwork. [Question 35]. Some referenced outsourcing document assembly tasks, or tying up office resources while preparing declarations and exhibit binders. [B64, B65].

C. The Trial Scheduling Order has a Negative Impact on Client Relations

Poor client relations resulting from the TSO was a common theme in the write-in answers. Many clients blame the attorney for the increased work, assuming that it is done solely to increase the legal fees, [C1, J6], or blame their own attorney for being a "sucker" for complying with the TSO, incurring the cost, and showing their hand to the opposing party who did not comply, gained an unfair advantage, and suffered no adverse consequence. [D40].

The negative impact on client relations spreads to other clients who are unable to obtain effective assistance from their attorney for two weeks or more because that attorney was utterly consumed with preparing declarations and evidence binders on another case. [B6, B33, B56, B57, B58, B64, J4, O4].

Many referred to client outrage at the increased cost. The words "shock" and "dismay" appear repeatedly. [C12, C18, C25, C35, C82] One stated "clients object to paying for an exercise in futility." [D50]. The increased costs have resulted in an increase in fee liens [C37], and higher retainers. [C21].

This feeling was summed up by one member: "They feel cheated by the system and on some level blame me." [J6].

D. Personal Stress and Frustration

Attorney frustration was also a central theme in the write-in answers. The word "burdensome" appears throughout the write-ins. The flavor of attorney frustration can only be fully appreciated by reading through Appendices B, C, D and O.

Members found that the requirement to anticipate every possible claim, provide all rebuttal, anticipate all foundation and any possible evidentiary objections, and disclose all possible impeachment, to be particularly onerous. Many felt that this was an expensive and unnecessary exercise which unreasonably increased the work they had to do and the cost to their clients, without providing a corresponding benefit. 83% agreed with the statement that the increased cost to clients is an unnecessary exercise/expense. [Question 53]. One stated "any Judge who stood in our wingtips and had to do multiple TSOs in a month would not be in favor of the TSO." [O3].

One member stated "It [the TSO] is a killer for sole practitioners." [B6]. Another states, "I do not have staff, so I have spent non-billable time complying with the order, especially preparation of exhibits, trial binders, etc." [B46]. "The TSO is particularly burdensome for the sole practitioner family law attorney, in that the additional trial preparation time often forces counsel to neglect other clients during the weeks immediately preceeding (sic) trial just to adequately meet all of the requirements of the TSO." [O4].

Another reported, "It has increased my workload to the point I am considering whether to continue doing complex family law cases. Not worth it." [B22].

"Our office is in chaos trying to comply with the TSO for cases which are going to trial this month (May), and we have to have all of our discovery out on cases that won't go to trial until late September!" [O8].

"The TSO is a terrible disservice to family law litigants, and is causing tremendous stress to family law attorneys throughout the County." [L15].

Fear of malpractice appeared to be a contributing factor to the overall stress [B41], and one member stated "a minor error in the body of a declaration can result in disaster for the client. It will probably increase my exposure for malpractice claims." [B37].

In the words of one member: "[The] stress level of practicing family law has significantly increased." [B73].

E. The Trial Scheduling Order Has Required Attorneys to Change the Way They Practice

Many members reported that they could not take on as many cases as they had in the past. [B13, B20, B22, B31, B66]. Others have had to change the types of cases they take. "The effect of the TSO is so burdensome and unconstitutional and renders the cases so expensive that I am considering

limiting the number of cases I do in family law. I cannot afford to take on a moderate means case or pro bono case as the cost factor is too hight (sic), the time constraints are unreasonable and I cannot adequately represent my client(s)."[O22]. One stated, "I have changed the way I practice taking on fewer low income and Spanish-speaking clients than I would have because I know they won't be able to pay for the TSO." [C78].

Several reported that they had to do less full service representation and were taking more unbundled cases because the clients couldn't afford full service. [B13, B29]. One stated "The TSO has been good for unbundled and mediation business, because the public is seeking alternatives to Court trials." [B29].

"... because I know the cost of the TSO I won't take them on as full clients at most I would take them on only as limited scope representation because I cannot keep writing off costs." [E22].

F. The Cost of Complying With the Trial Scheduling Order Has Caused Many to Opt Out of the Public Court System

Numerous members reported that their response to the cost of compliance with the TSO is to advise their clients to opt out of the public system.

"I now take very few cases which remain in the court system; we use rental judges or get out of the case." [B26]. 40% reported their clients

elected to go to a private judge who would not use the TSO, and an additional 24% went to mediation or other alternative dispute resolution. [Question 37. See also B7, B68, C16, C60]. "I tell them that the implications are that if they can afford it to get out of the public system." [C7]. "Most of my clients can afford to and do opt out of the system." [G4].

Others can't afford the option of private judging: "My practice is generally lower middle class and the TSO takes them out of the Courthouse." [B45].

Several mentioned the pressure to leave the public courts and use alternative dispute resolution methods. The TSO "Encourages alternative dispute resolution processes for those who don't have money to burn." [B15].

V. Impact on Litigants

A. Compliance with the Trial Scheduling Order Imposes an Unreasonable Financial Burden on Litigants

1. Compliance with the Trial Scheduling Order Unreasonably Increases the Cost of Trial

A current version of the TSO states that one of its goals is to reduce the cost of trial [See Exhibit 4, page 1]. However, members almost unanimously agree that the TSO has significantly *increased* the cost of trial

to litigants. An overwhelming 94% of members felt that compliance with the TSO increased the cost of their services to their clients. [Question 28]. 84% agreed with the statement that "it is more expensive to prepare evidence by declaration than by live testimony." [Question 64]. 89% of members reported that the TSO increased the cost of trial more than $5,000 for their services. [Question 30]. 83% agreed with the statement "the increased cost to clients is an unnecessary exercise/expense." [Question 53]. Only 5% reported that the benefit to their clients was worth the increased cost. [Question 53].

Although the vast majority of complaints about excessive cost centered around the preparation of lengthy declarations and exhibit binders, the requirement of deposing adverse witnesses, or providing an explanation of why they did not, engendered comment. 88% agreed with the statement that the "requirement that I am expected to depose every adverse witness or provide an explanation why I didn't assumes that clients can afford to have every potential witness deposed." [Question 84]. 87% stated their clients usually *cannot* afford to pay them to depose all adverse or potential witnesses. [Question 84, L4, L9].[16] Others complained that the TSO has increased the cost of expert witnesses. [Question 33].

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[16] In addition to cost, several pointed out that there are tactical reasons why one might not depose adverse witnesses, such as to not alert them to your strategy [L19]. Another complained that the decision to depose or not is attorney work product, and the reason why a specific deposition was not taken is protected from disclosure. [E12].

The unreasonable financial cost and disproportionate relationship of cost to benefit was a compelling theme in the write-in responses. The word "cost" itself appears 122 times in the written responses. Many members reported that their clients could not afford to pay them to comply with the TSO and elected instead to go to a private judge who would not require it, to surrender meritorious claims [see discussion *infra,* at page 39] or to fire their attorneys and proceed in pro per because they could not afford the legal fees. [Question 37]. There was a strong feeling that the TSO added unnecessary layers of expense even in relatively simple cases.

"It's hard to explain to a client why the cost of their divorce just went up $10,000 to $15,000 or more solely because I have to present their case to the judge in one form rather than another." [J6].

"They are forced through a labyrinth with great walls to climb, at great expense." [F55].

"The additional work resulting from having to put on a trial which is essentially all in written form exponentially increases the cost of that trial and obliterates the possibility of going to trial for many, many litigants." [E15].

72% of the members said that the requirement of a formal noticed motion to obtain changes in the TSO violated their clients' rights, and 67% felt that the requirement of formal written objections to evidence and

motions to strike rather than live objections in court violated their clients' rights. [Question 58].

The excessive, unreasonable and unnecessary cost to litigants was such a universal theme that it will not be belabored here, but will be obvious to even the most casual reader of the write-in responses.

2. The Cost of Compliance with the Trial Scheduling Order Forces Litigants to Surrender Meritorious Claims

Part of the cost of compliance to litigants is the increased attorney fees they must pay. However, another important cost is the loss of meritorious claims which they surrender because they cannot afford to pursue them. 87% reported the increased paperwork places pressure on clients to settle solely because they can't afford the cost of pursuing meritorious claims. [Question 64]. Numerous write-ins reported the client's reaction was to settle at all costs. [C3, C14, C17, C23, C30, C38, C41, C43, C47, C62]. At least 18 of the write-ins in Appendix C report that clients gave up important claims solely because they couldn't afford to pursue them. One reported that a client had agreed to a termination of spousal support which would not likely have been granted by the court, solely due to an inability to afford the increased cost of going to trial. [C6]. Several mentioned that the TSO favors the litigant in the stronger financial position, who can afford to outlast the party with less money. [C85]. "[L]itigants who

have lots of money to "wait out" the other party, find the TSO another opportunity for leveraging unfair settlements." [O34]. "It is common, especially for the stay at home parent who relies on a temporary order of support, to feel they have been out-gunned, and they give up rather than proceed with a fair and reasonable claim." [C85].

When litigants perceive they have lost because no one will listen to their concerns, or have had to make concessions solely because they cannot afford to enforce their rights, they become embittered, and public confidence in the fairness of the system is further eroded.

B. The Trial Scheduling Order Impairs Litigants' Rights and Denies Them a Fair Trial on the Merits

The overwhelming majority of members (85%) felt that the TSO impaired their clients' rights in some way. [Question 57]. Those who answered yes to Question 57 were asked to explain which specific rights were impaired in Question 58. Their answers include the right to a fair trial on the merits, the right to have the trier of fact assess the credibility of witnesses, the right to confront witnesses, the right to meaningful cross examination, the right to due process and the equal protection of the law. [Appendix E].

Appendix E invites members to list other ways in which they believe the TSO violates their clients' rights. The concept of due process appears repeatedly. [E4, E10, E13, E28].

1. The Trial Scheduling Order Prevents An Assessment of Credibility of Witnesses

An assessment of the credibility of witnesses is essential to a fair trial on the merits. 92% agreed that credibility is often critical in family law matters where a key issue may turn on conflicting testimony of the parties without outside corroboration, and 88% agreed that the TSO inhibits the ability of the trier of fact to assess that credibility. [Question 64]. This theme was repeated throughout the write-in comments. The word "credibility" appears 36 times in the write-ins.

"Most cases turn on the credibility of witnesses, especially custody cases. The TSO prevents the court from being able to hear enough live testimony from witnesses to assess their credibility and develop a true impression of the party." [E6].

"The credibility of a party is often critical to the decision-maker, not the volume of work put on paper." [F42].

"As boring and tedious as direct examination can be, it still gives the judge an opportunity to assess credibility. Attorney drafted declarations are not the client's testimony..." [O28].[17]

One member complained that his client's rights were violated because he was deprived of an opportunity "to have court evaluate credibility of clients' testimony that is impossible to evaluate with written declarations that are simply a meassurement (sic) of an attorney's wordsmithing, not the honesty or accuracy of the clients." [E1].

"Credibility is huge. Family law cases usually boil down to he said/she said. Listening to direct and cross examination is the only way for the Court to assess who is telling the truth." [F10].[18]

The conclusion is inescapable that under the TSO, members believe that litigants are deprived of a meaningful judicial assessment of credibility, which is an essential component of their right to have issues decided on the merits.

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[17] One of the factors which makes testimony by declaration so expensive is that each word is parsed and nuanced, packaging the litigant's position in the most favorable light. With each revision and review, the "testimony" becomes more attenuated from a spontaneous statement of the truth. There is a strong belief that "The declarations give lawyers a chance to testify for their clients." [E19].

[18] This is an overarching theme in the write-ins, especially those addressing the deprivation of rights. See also B5, B48, B71, D5, D40, E25, E27, F8, F25, F38 and others.

2. The Trial Scheduling Order Allows Manipulation of Evidence

Under the TSO, it is possible to prevent the other party from being heard at all, simply by declining to cross examine, and relying on the likelihood that the judge has not had the time to read the opposing party's declarations. [See D40, E2, E7].

"More time is focused on whether to call the opposing party for cross-examination (rarely done) than on how to present a clear picture to the court." [D40]. In their answers to Question 53, 47% reported that the TSO has allowed their opponent to prevent the court from evaluating their client's credibility by declining to cross examine them, and 39% admitted to having used this tactic themselves to prevent the court from evaluating an adverse witness's credibility. [Question 53].

3. Advance Disclosure of Impeachment and Rebuttal Evidence Violates Litigants' Right to Meaningful Cross Examination

Although not a part of the TSO under scrutiny here, later versions, including the version of the TSO in use at the time the survey was conducted, require the pretrial disclosure of all impeachment (14 days) and rebuttal (7 days) evidence, together with a summary of testimony to be elicited from adverse witnesses, including testimony of the opposing party under Evidence Code §776.[19] The tenor of the comments addressing this

[19] See Exhibit 4, paragraph 5: "All documents and exhibits that are to be used solely for purposes of impeachment and rebuttal must also be included in the

requirement can only be described as outrage. 95% felt that the requirement for advance disclosure of impeachment and rebuttal evidence violates clients' rights. [Questions 58. See also Questions 54, 64, 65, and 84]. 86% agreed with the statement "Submitting a statement of the testimony I expect to elicit from any adverse or subpoenaed witness gives them a roadmap of my case and impairs my client's right of cross examination." [Question 84].

The most common complaint was the loss of an opportunity for meaningful cross-examination. The loss of the right of effective cross examination, either under Evidence Code §776, or of other adverse witnesses was repeatedly characterized as unconstitutional by members, whether speaking for themselves or citing their clients' reactions to the TSO.

87% of members felt that advance disclosure of impeachment gives the untruthful witness an advantage of additional time to craft a more persuasive lie. [Question 64.]. This was repeated in numerous write-in answers. [C68, D45].

"Clients feel revealing their rebuttal evidence only gives untruthful opposing parties a week to prepare another lie before court." [D40].

"The requirement that documents and exhibits to be used for rebuttal purposes be included in the Exhibits binder eviscerates any opportunity to

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Exhibits binder by each party." Pursuant to paragraph 6, these binders are to be provided to the opposing party simultaneously with the initial declarations, at least fourteen days prior to trial.

meaningfully impeach an opposing witness. Rather, the inclusion requirement provides an unethical opposing witness the opportunity to fabricate an explanation for what would otherwise be clearly dishonest, contradictable testimony. (My clients actually "get" this concept and will raise the issue on their own)." [D50].

"Because I was forced to put impeachment evidence in early, the other side was able to come up with an "explanation." Had this occurred on the stand, I'm confident the opposing party could not have come up with such an "explanation." [D63].

"[T]he disclosure of impeachment evidence is particularly offensive." [E14].

"Advance disclosure of impeachment is simply indefensible, especially when credibility is so often the lynchpin in family law litigation. Advance roadmap for 776 makes it meaningless." [L16].

"Spontaneous, unrehearsed cross-exam is a critical tool for stripping away layers of contrived testimony.... The TSO minimizes the opportunity for such spontaneous challenges." [F44].

77% of members felt that the requirement of rebuttal by declaration violates their clients' rights. [Question 58].

Giving an adverse party or witness a summary of testimony to be elicited eliminates meaningful cross examination. [D50, L27]. Clients know

they are being deprived of the right of cross examination by revealing a roadmap of the expected testimony. [D14, D23].

The issue of cross examination relates back to the oft-repeated complaint that judges do not have time to read multiple declarations and foundational evidence binders in advance of trial. [See discussion at page 14].

4. The Inability to Cure Foundational Errors and Omissions Violates Litigants' Right to a Fair Trial

All versions of the TSO require all document foundation to be in declarations, and the foundational documents to be in the Evidence Binders.[20] There is no provision allowing foundational errors or omissions to be cured at trial.

87% felt that the inability to cure foundational errors or and omissions in declarations violated their clients' rights. [Question 58].

"Lost an issue on Spousal support that we were not allowed to prove up at trial as we did not have the documents timely. That will go on appeal and directly affected my clients (sic) right to support and maintain her

[20] The current version of the TSO attached hereto as Exhibit 4, provides at paragraph 5 that: "All exhibits to be introduced at trial shall be contained in the Exhibit binder, and fully referenced and explained in the declarations (although not attached to the declarations.) Any required foundation (including stipulations) for admission of the proposed exhibits shall be completely set forth in the declaration(s), as *all rulings will be based on the declarations alone.* " [Emphasis added.]

standard of living based on the true, not declared, income of respondent. Unconstitutional prevention of your "day in court." [E7].

5. Declarations in Lieu of Direct Testimony Violate Litigants' Right to a Fair Trial On the Merits

Several members described that upon being told they will not have the fundamental right to tell their story in their own words their clients reacted with "shock," "outrage," "anxiety," and "disbelief." [C57, C68]. One client was quoted as saying "I guess I do not get my day in court, but I can have my day on paper." [C40].[21] [See discussion of "day in court" at page 16].

One complained that clients were deprived of "The right to have the Court read and absorb the trial testimony so that it can make knowledgeable and intelligent rulings." [E18]. They feel their right to have their matter heard by a judicial officer has been denied. [C75]. They feel the courts do not care about them and their families. [F25, F56].

When required to submit testimony by declaration, clients do not feel heard. This was repeated time and time again in the write-ins. They become embittered and cynical at what they believe to be a deprivation of their right to tell their story to the judge. One member stated, "Sadly, my clients have

[21] One wonders whether this is impacted by the almost universal belief, discussed *infra*, that the judge cannot possibly read and assimilate everything in advance.

lost all illusion that the court system offers any hope of "justice" or "fairness" and see the process as a game to be played." [D40]. Another reported "clients do not have confidence in a trial of this nature. They do not get to tell "their story." The lawyer gets to tell it for them." [B5].

One member wrote, "DUE PROCESS – the rights of a client to be heard in a MEANINGFUL MANNER, as opposed to on paper where an attorney writes the words." [E4].

Where the judge does not hear and weigh the evidence, by definition, there can be no fair trial on the merits.

6. The Trial Scheduling Order Deprives Litigants of Statutory Discovery Rights

Some members complained that the TSO establishes shorter discovery cutoffs than those mandated by Code of Civil Procedure §2024.020. They complain of being deprived by local rule of important statutory rights. They also indicate that the already burdensome requirements of the TSO are exacerbated by shorter than normal discovery deadlines.[22]

"The judges are cutting off discovery way before the code of civil procedure deadline of thirty days before trial. This is wrong!" [O8].

"Early discovery deadlines (shorter than normal statutory limits) reduces my ability to conduct discovery. With this reduced discovery we

[22] See the face sheet of the TSO in Exhibit 4.

have an increased burden of producing our entire case by declaration." [B24].

"I cannot have my discovery completed by the time frame provided by the TSO." [B48]

"The court should not set the discovery deadlines or otherwise change the CCP rules. My experience is that the trial court sets an unreasonable deadline (which is much ealier (sic) than the CCP deadline of 30 days before trial) and then will not agree to move the deadline even when both attorneys agree that it must be moved. There are often cost issues involved and often both attorneys will agree to delay a specific type of discovery while settlement efforts are proceeding." [B51].

"Discovery cannot be terminated prior to 30 days before Trial except by stipulation." [B66, F40].

One member notes that since family law evidence, (income, custody, and the like) is often in flux, the early discovery deadline may require the use of stale evidence at trial. "Discovery may continue to a date within 30 days of Trial, absent a stipulation to shorten or extend it. Since income, custodial and other issues are often in flux, a significant problem exists in trying to pin those all down with certainty and try that case, which changes as the trial date approaches and as information is derived from the other side. In fact, your trial tactics and strategies are fixed in advance and not

allowed to be molded by the presentation of the Evidence and arguments or contentions of the other side, which grossly hinders the process." [N17].

"[I]n family law, the incomes and custodial issues are always in flux. Hence, a moving target. The conlusion (sic) is obvious, that a moving target is not conducive to a TSO but might be fine in a business case or even a personal injury case where the injuries have stabilized." [B66].

The overwhelming consensus of the members was that in its quest for judicial efficiency, the TSO is violative of litigants' most cherished rights: the right to a fair trial on the merits, the right to have the trier of fact assess and weigh the evidence and determine the credibility of witnesses, the opportunity to be heard, and the right to meaningfully confront and cross examine witnesses. This leads to the inevitable question: what is the impact on litigants' faith and trust in a system which is administered in this way?

C. The Trial Scheduling Order Undermines Public Trust and Confidence in the Legal System.

At other locations in this Brief this Amicus has addressed the issues of the prohibitive cost of compliance with the TSO, the belief that it favors the wealthy, and the perception that it deprives litigants of a fair trial on the merits, and robs them of important constitutional rights.

A number of members addressed themselves to the larger issue, the impact on society if public trust and confidence in the legal system is lost. The theme of public trust and confidence permeates the write-in answers.

Litigants do not believe that judges will read the voluminous declarations and exhibits, which can be hundreds of pages for a half-day trial. [B2, D6, D31, D61]. Several members reported that it was clear on the day of trial that the judge *had not* read the declarations. [C70, D46, D52 F1, K23, O15] .

Even if the judge has read the declarations, clients have a strong belief that they are ruling, not on the evidence of witnesses, but on a story written by a lawyer. [C40, C60, D2, F8, F22]. "My experience is that judges to (sic) not retain written information as well as oral testimony; written testimony does not connect the way oral testimony does;" [L28]. Even if inappropriate evidence is later stricken, clients do not have faith that the judge was not already prejudiced. In a live trial, the judge can stop prejudicial evidence on the spot. When it is in a declaration, it is difficult for clients to believe they can unring the bell. [D48, D61, O18].

"I have had clients become extremely embittered over the cost of pursuing their rights, and, in a number of instances, simply "throw in the towel" and lose valuable rights because the cost of pursuing them was too high. While the court may view this as a victory, because the trial "went away," in the long run, this disserves society as the public becomes

understandably cynical and embittered about the prospect of obtaining a fair and equitable outcome in a dissolution proceeding." [C62].

"Client's rights should not depend upon which county has jurisdiction."[L6].

"... at least under the old system the day in court didn't cost so much money, and the clients felt they were heard. There is a strong belief among my working-class clients that the TSO is a tool to keep them out of court, so that people with money can have greater access to the judges without waiting." [D65].

Many members report clients becoming cynical and embittered They "have a strong suspicion that the rules won't matter at trial." [D65].

"The client perceives the process is a game of chicken, and the party with the most limited financial resources blinks first." [C85].

"Clients will not pay for the paper mill this creates... cost of credibility to the clients when you try to defend and explain this system." [J1].

"...[E]ven if a party loses in court, there is a resolution if s/he feels that s/he has been heard. Being heard has a cathartic effect. Feeling like you are not heard and cannot be heard has the opposite effect....What happened to the due process notion of the right to the opportunity to be heard?" [L12].

When asked to elaborate on the cost of the TSO to represented litigants, one member cited "loss of faith in the courts by the perception that

results can be "bought" by the party who can better afford to pay their lawyer to comply with the TSO." [I4].

"This helps the court initially by winnowing down the trial caseload, but ultimately it destroys clients' (society's) belief that a just outcome may be had with the court's assistance." [E15].

One member reported that clients "feel cheated by the system." [J6].

"I think it is a travesty of justice as currently established." [K9].

"If our courts do not become more responsive to the needs of family law litigants, we run the risk of the majority of our citizens losing faith in the integrity of our legal system. This isn't just about represented v. pro per, or rich v. poor. Every family law litigant is impacted, and few can afford to pay for complete compliance with the TSO. It is about whether the courts really are there for all, fair, accessible and available regardless of whether litigants can afford to pay lawyers tens of thousands of dollars more than a live trial would cost. As a policy matter, if we can't serve individual family law litigants in the present system, we should say so and fashion something better, rather than complicating it to such a degree that they are unable to comply, and then telling them we are doing it for their own good so they can get to what passes for a trial quicker than in the past. The reality is that what results is not a "trial" in any sense of their being able to have their day in court for the real-life issues of custody, property, and support which are so fundamentally important to them. If we really are

to serve families, we must make the courts more humane, not less so under the guise of judicial efficiency." [O21].

"I believe it is an unmitigated disaster, confirms beliefs that the judicial system works much better for the rich than those with less resources and increases disdain for the entire system and process. I believe that FL litigants should be entitled to at least as much "justice" as a person who is suing the grocery store because they slipped on a wet floor! The TSO deprives them even of the little court time they had before." [K11].

"Political science 101 teaches that a system only remains in power as long as its constituency believes that the system is responsive to the needs of its citizenry. If functionally illiterate individuals feel they are precluded from having their day in court because they are unable to filed (sic) the requisite declaration that tells their story, justice has not been served.... my fear is that their problems will be resolved in a more direct method - in the streets. I sincerely hope that I am wrong about this one." [F29].

"Family law cases are emotional, difficult, and the results have a significant impact on the individual litigants, but also the family, extended family and community resources and the ability of these families to live healthy, productive lives and to contribute to the society instead of draining the resources of society. The litigant gets the clear impression that the bench wants to distance itself from all of the trama (sic), and emotion, and

yes, drama, and pain of the facts of each case and personal interaction with the parties." [L21].

These are strong statements by the individuals who interact with family law litigants on a daily basis, and observe their reactions and hear their words first hand. The sense is inescapable that the TSO, well intentioned as it may be, is seriously undermining the public's faith and confidence in the family law system.

VI. Conclusion

The visceral reaction of the members to the TSO demonstrates the fundamental impact of the TSO on cherished rights and procedures. Whether they are for or against the TSO, all members recognized that family law is not given equal status with other areas of civil law, whether contract or tort, which deal with a historical incident, and the issue is who pays, who gets compensated, and how much. Each divorce has a profound present and future financial and psychological impact, not only on the two adults, but on their children, and in most cases these impacts continue long beyond the granting of a Judgment of dissolution.

There also is a consensus that resources allocated to deal with these most personal and fundamental legal rights are woefully inadequate. It is, in fact, a disgrace, and the system has not only failed families, but has failed society itself. The price for inadequate judicial resources is being paid by

the wrong stakeholders – the ones who can least afford it and have the most to lose. If the courts cannot protect our most vulnerable litigants, who can they protect? No one's interest, whether the court's, attorney's, or individual litigant's (whether represented or not), is served by creating a process which places huge barriers in everyone's path, with Draconian rules to be enforced erratically, and then tells them that they lose because they did not know how to play the game or could not afford the cost.

VII. Questions for the Court

In making its ruling on the within Writ, this Amicus asks the Court to consider the following:

To what degree may efforts to achieve judicial efficiency be obtained at the financial cost of litigants, the loss of litigants' rights, or the financial cost to the attorneys who represent them?

To what degree can courts limit or eliminate the right to live testimony?

To what degree can courts limit or eliminate the right to meaningfully confront and cross examine witnesses, offer impeachment, and impugn credibility?

To what extent can the courts treat one class of civil litigants differently than another?

To what degree can courts alter statutory discovery deadlines by local rule?

What is the nature of a litigant's right to a "day in court" and what are acceptable limitations, if any?

What is the cost to society if litigants cannot trust the trier of fact to have heard all of the evidence, evaluated credibility and ruled on the merits of a claim?

What is the cost to society if family courts are perceived as available only to the rich, and out of range for everyone else?

What is the cost to society if the courts are unable to effectively and meaningfully address the most intimate of legal issues, those involving litigants' children, income, physical protection, and property?

The answers to these questions reach to the very heart of the integrity of the legal system and its ability to protect families and treat them fairly.

Dated: July 13, 2006

Respectfully Submitted,

_____

LEE C. PEARCE, Chair
Amicus Committee of the
Family Law Section of the
Contra Costa County

CERTIFICATE OF WORD COUNT

I, Lee C. Pearce, hereby certify that, pursuant to California Rules of Court, Rules 14 and 29.1(b)(1), the text of this brief consists of 13,435 words as counted by the word processing program used to generate this brief.

Date: July 13, 2006

By: _____

LEE C. PEARCE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA

I am employed in the County of Contra Costa, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1333 N. California Blvd., Suite 540, Walnut Creek, California, 94596

On July 13, 2006, I served the foregoing documents described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF WITH EXHIBITS IN EXCESS OF TEN PAGES, AND PROPOSED BRIEF and EXHIBITS TO AMICUS CURIAE BRIEF** on the interested parties in this action as follows:

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[X] **(BY MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Walnut Creek, California.

[ ] **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

[ ] **(BY FACSIMILE)** I faxed a true copy to the above-named documents to the offices of the addressee.

Executed on July 13, 2006, at Walnut Creek, California.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[ ] **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

SHARIE HUNTER