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December 28, 2005

Honorable Chief Justice and Associate Justices
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: Elkins v. Superior Court, Supreme Court No. S139073
Reply to Real Party in Interest's letter of December 23, 2005

Honorable Justices:

Real Party in Interest's (Marilyn's) letter of December 23, 2005 highlights the need for an order directing the Superior Court of Contra Costa County to amend its Local Rules and to the Honorable Trial Judge to amend his "Trial Setting Order" to comport with traditionally accepted notions of Due Process. (As the two sets of rules are bookends, they will be collectively referred to herein as "the Rules.") Although Marilyn would have this Court believe that the Rules are benign, *pro per* friendly rules designed to assist self-represented parties through the daunting process of trying to represent oneself in the Contra Costa County Family Law Department, a review of the Rules and her letter describing them show that they are anything but benign.

Marilyn lists several pages of sophisticated procedural gambits that Jeffrey might have taken to get around the Rules.[1] Her discussion simply highlights the unfairness of the Rules as applied. Jeffrey was *in propria persona*. Although it is true that he is technically required to comply with the same rules as attorneys, there must be some discretion exercised by the trial judge in the application of its rules to accommodate the many *pro pers* seeking the help of the courts.

In its report of March 14, 2003 entitled "Family Law: Limited Scope Representation," the Judicial Council reported that "as many as 80 percent of the litigants in family law matters are self-represented."[2] That is a staggering number of people affected by the Rules who are totally unequipped to set forth "completely" the "evidentiary foundation" for each exhibit in their declaration. Yet, as seen in the outcome of this case, even a relatively sophisticated *pro per* litigant can unintentionally fail to comply and end up being defaulted.

Marilyn argues that under the Rules the trial judge has discretion to permit oral testimony. Agreed, except that we saw how that discretion was exercised despite the devastating effect that it had on one of the litigants. Marilyn's

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[1] For example, Marilyn correctly points out that under the challenged Trial Scheduling Order if there were any legitimate impeachment exhibits, Jeffrey could have used them. The answers to that argument are: 1) Jeffrey had no such exhibits, and 2) The standard Trial Scheduling Order has since been changed and it is now required that even impeachment documents be exchanged in advance – making them of limited value for impeachment.

[2] http://www.attorneyassisteddivorce.com/id12.html.

argument that this was sophisticated gamesmanship by Jeffrey[3] is just silly and belied by his declaration.[4] He wasn't trying to ambush her. He was trying to get the judge to listen to "the heart of the issue."[5]

Contrary to being the "*pro per* friendly" rules that Marilyn portrays them to be, the Trial Scheduling Order is complex and difficult even for an attorney to comply with literally. In fact, Marilyn utterly failed to comply with the requirement that her declaration "completely set forth .. [the] evidentiary foundation for admission of the proposed exhibits ...."[6] Although she referred to the exhibits in her declaration, not a single time does she "set forth ... [the] evidentiary foundation for [their] admission," "completely" or otherwise.[7] Had the judge sustained an objection by Jeffrey to the admission of all of her exhibits for failure to comply with its Trial Scheduling Order one wonders if she would be defending it.

Even if the Rules somehow are deemed to pass constitutional muster, they may be unconstitutional as applied. In this case, the manner in which the Rules were applied denied Jeffrey of his right not only to a fair trial, but to any trial at all. The application of the Rules was going to deny Jeffrey the right to even say a

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[3] See her allegations at pages 10-11 that he was taking a "calculated risk", seeking "to gain an advantage," seeking a "free pass," "dropped the ball," etc.
[4] AA, Tabs 9, 10.
[5] See discussion *infra* at p. 6.
[6] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2.
[7] See, AA, Tab 4, pp.1-9.

word at his own trial.[8] Marilyn calls this a *pro per* friendly rule. Most would call it something else.

ISSUE SANCTIONS: The Rules provide for issue sanctions to be issued *sua sponte* by the trial court on the day of trial, without prior notice, for failure to comply line-by-line with the Rules.[9] This is not hypothetical, as it was exactly what was done to Jeffrey in this case. His exhibits were excluded, not because they were inadmissible, but because he had gotten them to opposing counsel on Friday as opposed to Thursday and because "the evidentiary foundation for admission of the proposed exhibits [was not] completely set forth in the declaration(s)...."[10]

Many of his proffered exhibits were so obviously admissible that to have objected to them on evidentiary grounds would have made Marilyn's attorney look silly. There was no need to do so. They were excluded *en mass* for Jeffrey's failure to attach them to his declaration, set forth their evidentiary foundation, include them again in a separate binder, serve them on opposing counsel X days in advance, etc. This does not serve due process – it puts hurdles in the way of a fair trial.

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[8] RT, p. 4/16-25.
[9] AA, Tab 2, ¶3.
[10] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2.

The Rules are very clear that failure to comply with them literally may result in "issue sanctions."[11] There is no such provision in California's statutes. Issue sanctions are serious and are ordered only in response to egregious conduct of the type specified in Code Civ. Proc. §2023.010. Section 2023.030 requires that issue sanctions only be ordered "after notice to any affected party, person, or attorney, and after opportunity for hearing" and then only when someone is "engaging in conduct that is a misuse of the discovery process." Section 2023.040 specifies that the notice of motion shall be supported by a "memorandum of points and authorities, and accompanied by a declaration." Witkin describes what is required in order to obtain issue sanctions, as follows:

> "The notice of motion for a sanction must identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought."[12]

Nothing like that occurred here. Jeffrey showed up at court believing that he was going to have his day in court in which he would present his evidence to the judge and have a decision based on it. Instead, he was defaulted and, according to him, left with nothing.[13]

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[11] AA, Tab 2, ¶3.
[12] 2 Witkin, California Evidence, Ch. X, § 263 (1.[§ 263] Contents of Motion for Sanctions).
[13] RT, p. 20/20-24 (AA, Tab 12).

Although there is nothing in our statutes permitting this type of draconian procedural exclusion of evidence, that is what is happening under the Rules.

Although Jeffrey has been unable to find a California case discussing the mass exclusion of evidence in this context, cases discussing discovery sanctions, which is the effect of the court's order herein, make it clear that the sanction must be appropriate to the offense and cannot amount to a terminating sanction without very good cause. In *Newland v. Superior Court*, in a slightly different context, the Court of Appeal stated:

> "The rule that a sanction order cannot go further than is necessary to accomplish the purpose of discovery is some 35 years old in California, and is rooted in constitutional due process."[14]

Quoting from an old U.S. Supreme Court case, the *Newland* stated:

> "'While under the statute the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law. "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.'"'"[15]

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[14] *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613, 47 Cal.Rptr.2d 24.
[15] *Id.* at p. 614.

Let's be clear. Jeffrey's exhibits were not excluded because they were inadmissible. They were excluded because Jeffrey failed to literally comply with the Trial Scheduling Order. Let's look again at the transcript of the proceedings set forth in Jeffrey's Petition for Review, pages 11-15.

On Petition page 11, the Court states that it is going to deal with Marilyn's objection that Jeffrey's declaration fails to set forth the evidentiary foundation for his exhibits. Note that the objection is not that the exhibits are inadmissible, only that Jeffrey did not set forth the "evidentiary foundation in [his] declaration." The Court then explains that paragraph 2 of the Trial Scheduling Order requires that the "evidentiary basis and foundation for each exhibit" must be set forth in the declaration so the at the other side can see if exhibits have an evidentiary basis. So, unless Jeffrey could point the judge to the foundations in his declarations, those exhibits that don't have an evidentiary foundation will be stricken.

On page 12, Jeffrey explains that his "declaration and trial brief basically gets to the heart of a couple of issues." Although the judge says that he understood that, that question was not the heart of the issues before the Court. The judge's question was whether Jeffrey's declaration showed that his exhibits had an evidentiary foundation. Jeffrey, of course, feels that the emphasis should have been on the "heart of the issues."

On page 13, the judge states that since Jeffrey does not set forth the required evidentiary foundation, "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." He then chooses an example "at random" from Jeffrey's binder of exhibits. Interestingly, he does not choose Marilyn's deposition transcripts (Exhibits 8 and 11), the emails from Marilyn (Exhibits 4, 6, 7), or correspondence from the 730 expert (Exhibit 12), all of which would have been admitted without question. Instead he chose Exhibit 5 and asked Jeffrey what it was. Jeffrey explained that is "an accounting … given by my wife to me…." In other words, it was the admission of a party opponent.[16] This is another exhibit that would have come into evidence without objection after a 30 second explanation.

On page 14, the judge then "tentatively" rules in favor of Marilyn and permits Jeffrey to "rethink your argument and give me specific evidentiary foundations for these documents." Jeffrey then tries to explain that he was operating under the same rules as before but is rebuffed.

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. As the judge himself said, if Jeffrey had been able to testify as

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[16] Evid. Code §1220.

to the documents, the Court could have determined their admissibility.[17] But, since Jeffrey didn't know that out of court statements made by his wife qualified as exceptions to the hearsay rule under Evid. Code §1220, they were simply excluded. He was not given the chance to take the stand and explain them. With nowhere to go, Jeffrey did the only thing that he could do and threw in the towel and his default was taken. When he explained his rationale to the judge, the judge agreed:

> "MR. ELKINS: … My concern is that I came into the trial with the intent of presenting my position, and I'm being cut out of that completely with only reliance on two exhibits which are – no way can defend my position. So I might as well give up my position and leave it to the best well-being of my family."
>
> THE COURT: Well, that may be the correct advice….
>
> MR. ELKINS: Your Honor, if you take a spreadsheet and add up and deduct everything that Mr. Harkins is asking for, I am left with nothing. Zero dollars. Zero house. Zero car. Nothing. So what's the difference?"[18]

Marilyn asks this Court to bless this procedure and outcome and hold that due process was served. In doing so she relies heavily on *In re Adair* (9th Cir. 1992) 965 F.2d 777, a case that approves limiting direct testimony to declaration

[17] RT, p.8/21-24 (AA, Tab 12).
[18] RT, pp. 19/26-20/27 (emphasis added).

in bankruptcy cases. California likewise permits the exclusion of oral testimony in motions, but no California case has ever permitted its exclusion in the ultimate trial. Second, *Adair* could not address the issue of whether the Rules are constitutional as applied. The application of the Rules denied Jeffrey the right to even take the stand in his own divorce trial and denied him the right to virtually all of the evidence that he wished to use in cross-examining Marilyn and the 730 expert. Third, if Marilyn is correct, we can simply do away with most trials in California Family Law matters – or in all civil matters for that matter. Why is family law different than any other bench trial? Finally, the issue of whether these rules comport with due process under the California Constitution is for this Court to decide.

There is one other related small point that is interesting here. The California Evidence Code does not permit an attorney to ask a leading question on direct or redirect examination."[19] Why? Witkin explains it as follows:

> "A leading question is one that "suggests to the witness the answer that the examining party desires." (Ev.C. 764.) The dangers of improper suggestion are obvious, and such questions are normally excluded on direct examination and redirect examination. (Ev.C. 767(a)(1); [citations].)"[20]

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[19] Evid. Code §767 (a)(1)
[20] 3 Witkin Calif. Evid. Ch. XI, §165 (a.[§ 165] Nature and Rule of Exclusion.)

Although presumably this rule is applied in family law trials in all other counties, in Contra Costa County each party's entire direct examination consists of not only leading questions, but answers that are written by his/her attorney as well.

Appeal is Not an Adequate Remedy at Law: Jeffrey has filed a protective appeal, however, that is not an adequate remedy at law. What occurred below was an institutional due process violation that can only be corrected via an extraordinary writ. As stated in Jeffrey's Petition, writs are recognized as the proper vehicle to correct due process violations. In addition to the cases cited therein, two recent cases have reiterated this point.[21] One of them, *Hall v. Superior Court* is particularly instructive because therein the Los Angeles Superior Court's practice of requiring all motions be filed and heard 30 days before trial was held invalid because it was not properly promulgated in accordance with statute or Cal. Rules of Court.

The petitioner in that case sought a writ of mandate to compel the superior court to permit her to file a *Pitchess* motion and to rule on the merits of her motion. She claimed that the criminal division of the South Central District enforced an invalid local rule requiring all pretrial motions, regardless of nature or type, be both filed and heard 30 days before trial, and for this reason the court

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[21] *Bricker v. Super. Ct. (Stunich)* (2005) 133 Cal.App.4th 634, 35 Cal.Rptr.3d 7 [mandamus appropriate to compel Superior Court's compliance with due process principles] and *Hall v. Super. Ct. (People)* (2005) 133 Cal.App.4th 908, 35 Cal.Rptr.3d 206.

refused to calendar her *Pitchess* motion filed 30 days before trial. The Court of Appeal concluded that the Superior Court's apparent practice of requiring all motions to be filed and heard 30 days before trial was invalid because it was not properly promulgated in accordance with statute or with the California Rules of Court.

Moreover, to the extent that the court was relying on its local rule rather than "making individualized assessments of the needs and complexities of each case," the court's local practice or policy was "similarly suspect." Accordingly, a writ of mandate was issued.

Note that Marilyn has not responded to Jeffrey's argument that the Trial Scheduling Order violates Code of Civil Procedure §575.1 (c) requirement that individual judge's rules must be published "as part of the general publication of rules required by the California Rules of Court." This is the point made strongly in *Hall v Superior Court*:

> "These same requirements apply even if a proposed rule pertains only to a particular judge's courtroom or only to a particular branch or district of the superior court. The statute specifies individual judges' rules and branch and district rules are local rules of court and subject to the adoption, publication, comment, and filing requirements specified by statute and the California Rules of Court."[22]

Marilyn does not argue that the Trial Scheduling Order has complied with this requirement.

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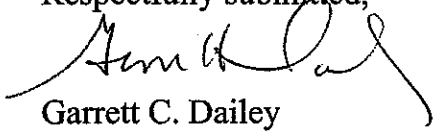
[22] *Hall v. Super. Ct. supra,* 133 Cal.App.4th at pp. 914-915.

Conclusion: Jeffrey admits that the Rules aid court efficiency, which is generally a virtue. But the goal of our system of justice is justice – not just efficiency. If the parties' attorneys agree to a trial utilizing these procedures, then the Court can reward them with an expedited trial as they do in Marin County.[23] But to default a litigant who attempted to comply with Rules, especially when the objecting party failed to completely comply herself, is simply unfair and a denial of fundamental due process.

If this rule is unchallenged, it is likely to spread to other counties and before long there simply won't be any trials in family law cases, unless you can afford to go into the private judging system. Jeffrey does not believe that these Rules comply with due process either literally or as applied.

He asks that this Court accept the case for Review.

Respectfully submitted,



Garrett C. Dailey

Cc: All via facsimile and mail
Fancher & Wickland
Harkins & Sargent
Jeffrey Elkins
The Honorable Barry Baskin (by mail only)

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[23] Marin County Superior Court Uniform Local Rules (2005), Rule 6.28B [expedited trials – evidence submitted by declaration *per stipulation*]; see also Marin County Rule 6.33 [testimony of all witnesses in child custody and visitation (except parents) to be by declaration]. (http://www.co.marin.ca.us/depts/MC/main/localrules-2005.cfm)

PROOF OF SERVICE

I, BRENDA K. BUTLER, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 2915 McClure Street, Oakland, California 94609; I am employed in Alameda County, California. I am familiar with my employer's practices for the collection and processing of materials for mailing with the United States Postal Service, and that practice is that materials are deposited with the United States Postal Service the same day of office collection in the ordinary course of business.

On December 28, 2005, I served a copy of the following document(s): **LETTER DATED DECEMBER 28, 2005, TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT**

On the addressee(s):

___X_ **BY MAIL --** by placing a true copy of the above-referenced document(s) enclosed in a sealed envelope, with postage fully prepaid, in the United States mail at Oakland, California, addressed as set forth below, on the date set forth above.

___X_ **BY FACSIMILE --** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, on the date set forth above, before 5:00 p.m.

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Honorable Barry Baskin (by mail only)
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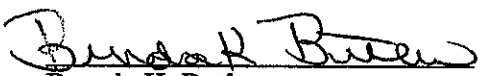
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 28, 2005, at Oakland, California.



Brenda K. Butler