S139073

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY ELKINS
Petitioner

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF CONTRA COSTA
Respondent

MARILYN ELKINS
Real Party in Interest

PETITIONER'S REPLY TO REAL PARTY IN INTEREST'S RETURN

REPLY TO LEGAL ARGUMENTS

I.
JEFFREY DOES NOT LACK STANDING TO CHALLENGE THESE RULES

Understandably, Marilyn[1] is less concerned with the Constitutional aspects of this case than she is with retaining the benefits of the default judgment. Thus, her arguments primarily assert that Jeffrey "acquiesced," "embraced," and "waived" any challenge to the Rules.[2] She uses these monikers repeatedly throughout her Return.[3] Like the Respondent Court, she further argues that Jeffrey lacks standing to challenge the Rules, both for the above reasons and because she alleges that Jeffrey was "relieved of all of the requirements of the trial setting order."[4] None of these assertions are accurate.

The record admittedly is somewhat unclear, but we do know that Jeffrey attempted to comply with the TSO.[5] In Marilyn's original letter brief to this Court, she alleged that his failures to comply were tactical. In her Return, she continues with the theme that Jeffrey had "embraced" the TSO and was trying to use it to his advantage by "lining up his exhibits for trial and wanted to be certain they were no

[1] As is customary, for clarity, Jeffrey refers to both parties by their first names.
[2] Again, for purposes of simplicity, Jeffrey will usually refer to both the Trial Setting Order (TSO) and Local Rules as simply "the Rules."
[3] Marilyn's Return, pp. 1, 2, 17, 18, 19, 22, 28, 34, 41-42, 43, 46, 47.
[4] Id. at pp. 2, 4, 13, 28.
[5] Marilyn's Return strongly relies on his attempted compliance. See, e.g. pp. 9, 36, 38, 39, etc.

longer discoverable."[6] What exhibits were these alleged to be? Ones requiring "sophisticated [DVD and audio-visual] equipment."[7] The answer to her allegations is: "Did Jeffrey offer any such evidence?" No. Marilyn's argument that this was sophisticated gamesmanship by Jeffrey[8] is just silly and belied by his declaration.[9] He wasn't trying to ambush her. He was trying to get the judge to listen to "the heart of the issue."[10]

Marilyn alleges at page 9 of her Return that Jeffrey complied with an earlier TSO and thus was not prejudiced by the second one – but later admits at pages 36, n.4, and 38 that although he did not comply with its terms, her counsel did not object.

The key dispute is whether Jeffrey was relieved of the TSO by the trial court. The quotation from the record on which both Marilyn and the Respondent Court exclusively rely on for their entire argument on this point is taken totally out of context:

> "I'm going to allow you at one of the breaks that we have so as not to disrupt the flow right now to rethink your argument and give me specific evidentiary foundations for these documents…."[11]

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[6] Actually, this assertion is pure speculation. A review of the transcript could just as easily be interpreted as Jeffrey's asking whether he was foreclosed from discovery.
[7] Marilyn's Return, pp. 11-12.
[8] See her allegations at pages 10-11of her letter brief that Jeffrey was taking a "calculated risk," seeking "to gain an advantage," seeking a "free pass," "dropped the ball," etc.
[9] AA, Tabs 9, 10.
[10] See discussion *infra* at p. 6.
[11] RT 9/19/05, pp. 9/27-10/2.

The Respondent Court argued that Jeffery had been "relieved" from the TSO. Marilyn goes further and asserts that he was "relieved of **all** of the requirements of the trial setting order."[12] This would lead one to believe that Jeffrey was free to use his exhibits, offer testimony and have a real trial. Let's look more closely at the transcript and see if this argument holds water. This is the sequence of events:

1. Marilyn objected that Jeffrey had not set forth in his declaration the evidentiary foundation for his exhibits.[13]
2. Jeffrey protested that he did it the same way that he did before.[14]
3. The judge explained that to get a document admitted into evidence under the TSO, the evidentiary basis and foundation for each exhibit must be set forth in the declaration. Since Marilyn's counsel objected that those exhibits don't have any foundation in Jeffrey's declaration, the judge asked: "So if you can point me to the foundations in your declarations, then we – we'll dispose of that argument quickly. If not, those – exhibits that don't have an evidentiary foundation will be stricken."[15]
4. The judge explained that without direct testimony, there's no way of knowing what a document purports to be.[16]

[12] Marilyn's Return, pp. 13, 34.
[13] RT, p. 6/11-16.
[14] RT, p. 6/17-21.
[15] RT, p. 7/4-7.
[16] RT, p. 8/21-24.

5. The judge then gave Jeffrey an example and asked him for the evidentiary foundation for Exhibit 5.[17]
6. Jeffrey explained that Exhibit 5 is an accounting given to him by Marilyn.[18]
7. The judge "tentatively" ruled in Marilyn's favor.[19]
8. The judge told Jeffrey: "I'm going to allow you at one of the breaks that we have so as not to disrupt the flow right now to rethink your argument and give me specific evidentiary foundations for these documents, but I don't see it in your declaration. Particularly, the one we were specifically talking about, Exhibit 5, I don't see any specific reference to it in your declaration."[20]
9. "There being no evidentiary support for Exhibits 1 through 37, with the exception of Exhibit 3 and 12, the objections will be sustained tentatively subject to further argument after the morning break."[21]
10. The trial immediately commenced and Jeffrey rested.[22]
11. Jeffrey explained to the Court that he was not resting voluntarily, but because there was no way that he could present his case with the two exhibits on which the Court permitted him to rely:

> "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

[17] RT, p. 8/13-24.
[18] RT, p. 9/16-24.
[19] RT, p. 9/26-27.
[20] RT, pp. 9/25-10/7.
[21] RT, p. 10/19-22.

> 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?"[23]

Both Marilyn and Respondent ask this Court to infer from this exchange that Jeffrey had been "relieved" of the requirements of the TSO. He had not been, and Jeffrey does not believe that any unbiased reader can review this transcript and conclude that Jeffrey was going to be permitted to utilize his exhibits.

As to the argument that the court was giving him some additional opportunity, it is unclear exactly what Jeffrey was supposed to do at "the break," *especially since the "break" never occurred*. As seen at page 13 of the Reporter's Transcript, the Court did not take a "break," but launched *directly into the trial*. After it admitted Marliyn's declaration and exhibits into evidence, it called on Jeffrey, who rested because he could not proceed without his evidence. The Court did not tell Jeffrey that he had an opportunity to do something "at the break." It did not correct Jeffrey when he said that there was no way he could defend his

[22] RT, p. 13.
[23] RT, pp. 19/26-20/27.

case with the two exhibits he was permitted. It accepted his "default" and "took the matter under submission."

One thing is clear, however: when we examine the statement Marilyn relies on *in context*, Jeffrey had not been relieved of any of the TSO's requirements.

While it is true that some of Jeffrey's proposed exhibits would have required a testimonial foundation, some would not. Correspondence from Marilyn and her deposition would certainly have required nothing more than one question, if that, and were admissible as a matter of law either as party admission or for impeachment[24] – yet they were excluded. Jeffrey had laid a *prima facie* foundation for Exhibit 5, namely a party admission, yet it too was excluded. The Court made this expressly clear in the sentence that follows the one quoted above on which Marilyn and the Respondent Court exclusively rely: "Particularly, the one we were specifically talking about, Exhibit 5, I don't see any specific reference to it in your declaration."[25] Thus, after inquiring and then getting a *prima facie* showing of admissibility, the trial judge reaffirmed his decision to exclude it and all but two of Jeffrey's proffered exhibits.

Marilyn also argues that Jeffrey neither objected to the imposition of these Rules nor asked to proceed in an alternative manner. Again, he does not believe that any unbiased reader who looks at the record will agree. Jeffrey explained that he had come prepared to present his position but that the trial court had deprived

[24] Code Civ. Proc. §2025.620; Civil Evidence and Trials, Cal. Practice Guide (TRG 2006) ¶8:1245.

him of the ability to do so by denying him his evidence. Although the trial judge stated that he didn't understand Jeffrey's change of position,[26] even after it was explained, the trial judge did not state that Jeffrey was mistaken and had been relieved of any of the TSO's requirements. What did the judge say? "Well that may be correct advice."[27]

Marilyn's arguments that Jeffrey embraced the TSO, was not prejudiced by it, did not object to it, etc. are simply not supported by the transcript or common sense. Jeffrey did not "embrace" the TSO – he was a victim of it.

[25] RT, p. 10/3-6.
[26] RT, p. 19/10-14.
[27] RT, p. 20/7-8.

II.
THE OPERATION OF THE RULES DEPRIVED JEFFREY OF ANY RIGHT TO BE HEARD

Marilyn argues that Jeffrey was not deprived of a fair hearing or his day in court. She argues that he could have asked to present his testimony orally so that the judge could judge his credibility.[28] These arguments are just arguments, utterly unsupported by the record. As seen in the preceding section, the trial judge was applying the Rules literally and strictly – at least as to Jeffrey.[29] The Rules do not permit such *ad hoc* requests. As stated in Marilyn's Return, the requirement to present oral testimony must be "approved in advance by the court."[30] Jeffrey did not know that through the gambit of not calling him as a witness, Marilyn's counsel was going to deny him the right to be heard.[31] Although, as noted by Marilyn, the Rules themselves state: "[s]ubmission of matters on the pleadings should not be considered if there are issues of witness credibility before the

[28] See, e.g., Marilyn's Return, p. 45.
[29] Nowhere in Marilyn's pleadings did she even attempt to set forth "completely" the "evidentiary foundation" for each exhibit in her declaration. Thus, she did not comply with the Rules either. The difference was that Jeffrey, being in *pro per*, did not know to object.
[30] Marilyn's Return, p. 16 (emphasis added). See also her discussion of this on page 18 of her Return, where she says that the TSO permits oral testimony, "merely on approval in advance." How one is expected to make this request when one doesn't know that s/he will be denied his or her right to testify and still comply with the Rules is not explained.
[31] RT, p. 4/16-25.

court,"[32] that was precisely what happened. Note that the trial judge did not interject any comment when Marilyn's counsel stated:

> "[S]ince Mr. Elkins did not submit a second declaration if I don't cross-examine him, which I would not do based on the declaration, he's not entitled to offer any further evidence. If that's the case, then it will be Mr. Eggers being cross-examined, Ms. Elkins' cross-examined, and that's the only witnesses that are left."[33]

Jeffrey's taking the stand to offer live testimony to refute Marilyn's declarations is implicitly forbidden by the Rules. TSO ¶4 requires that Responsive Declarations be filed. Presumably, any rebuttal would be required to be in the responsive declarations. In fact, this is made express in the Proposed Local Rule 12.8.F.2.

We get back to the key, underlying issue herein, namely are these Rules interfering with the right of the citizens of Contra Costa County to have their "day in court"?

> "*The concept of parties being given their day in court has real as well as symbolic meanings.*"[34]

Jeffrey does not believe that one can read this transcript and believe that he had his "day in court."

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[32] Marilyn's Return, p.16, fn.1.
[33] RT, p. 4/16-25.
[34] *Medix Ambulance Serv. v. Superior Court* (2002) 97 Cal.App.4th 109, 111-112, 118 Cal.Rptr.2d 249 (emphasis added).

III.
THE RULES DO NOT COMPLY WITH THE STATUTORY REQUIREMENTS FOR ORDER OF PROOF OR REQUIREMENTS TO ISSUE EVIDENTIARY SANCTIONS

Marilyn incorrectly argues that the Rules do not violate any statutory mandates.[35]

Order of Proof: She alludes to Evidence Code section 772 and then asserts that the TSO "does not change the *order* of proof."[36] She says this without explanation, which is understandable since she is incorrect. Evidence Code section 772 (a) provides that the examination phases of a witness are "direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination." Obviously, the statute also envisions a sequential presentation with the moving party's proceeding first. As stated in California Practice Guide: Civil Trials and Evidence:

> "Unless the judge directs otherwise, nonjury trials proceed in the same order as jury trials (CCP § 607; [citation]). [CCP § 631.7]
> Thus, unless the court for special reasons directs otherwise, a nonjury trial proceeds in the following manner:
> • Plaintiff begins with an opening statement;
> • Defendant makes an opening statement or, alternatively, may reserve its statement until the opening of the defense case in chief;
> • Plaintiff then produces evidence on his or her case in chief;

[35] Marilyn's Return, p. 20.
[36] Ibid.

• If defendant has reserved its opening statement, it then presents such statement;

• Defendant then produces evidence on its case in chief;

• The parties, beginning with plaintiff, then offer *rebuttal evidence only* (unless the court, for good reason and in furtherance of justice, permits them to 'reopen' their case in chief to offer additional evidence);

• The evidence is then closed and plaintiff commences with argument;

• Defendant then offers its closing argument;

• Plaintiff then has the right to conclude the argument and the case is submitted for decision. [CCP § 607]"[37]

The Rules, on the other hand, require that both parties' direct examinations be submitted *simultaneously*, as are their Responsive Declarations — in other words, *simultaneous direct and redirect*, followed by cross-examination.

While it is true that the trial judge always retains discretion to alter the order of proof "for special reasons",[38] here the Rules have repealed the statutory order of proof, from which the judge may deviate, and replaced it with the Contra Costa County order of proof, from which the judge may deviate. Marilyn provides no authority permitting this revision of the statutory order of proof.

Requirements for evidentiary/issue sanctions: Although Marilyn's Return quotes numerous times from Jeffrey's December 28, 2005 letter brief to the Court, she ignores the entire discussion about the statutory and case law requirements to issue evidentiary sanctions. She further ignores that no statute, rule or published

[37] Wegner, et al, California Practice Guide: Civil Trials and Evidence (TRG 2006) ¶16:7.

opinion has approved the wholesale exclusion of trial exhibits for the violation of a court-made rule such as this one challenged here.

The Rules provide for issue and/or evidentiary 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 them.[39] This is not hypothetical — it was exactly what was done to Jeffrey in this case. His exhibits were excluded not because they were inadmissible, but rather "the evidentiary foundation for admission of the proposed exhibits [was not] completely set forth in the declaration(s)…."[40]

These judge-made Rules are very clear that failure to comply literally with them may result in "issue sanctions,"[41] but there is no statutory authority for this. Issue sanctions are serious and are ordered only in response to egregious conduct of the type specified in Code of Civil Procedure section 2023.010. That section 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

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[38] Evid. Code §772.
[39] AA, Tab 2, ¶3.
[40] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2.
[41] AA, Tab 2, ¶3; see also Proposed Rules, ¶12.8.F.1 a).

> 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."[42]

Nothing like that occurred here. Jeffrey appeared 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."[43]

There is nothing in our statutes permitting this type of draconian procedural exclusion of evidence, yet 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 Respondent 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."[44]

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

[42] 2 Witkin, California Evidence, Ch. X, § 263 (Contents of Motion for Sanctions).
[43] RT, p. 20/20-24 (AA, Tab 12).
[44] *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613, 47 Cal.Rptr.2d 24.

> 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."'"[45]

Jeffrey's exhibits were not excluded because they were inadmissible, they were excluded because Jeffrey failed to comply, literally, with the Trial Scheduling Order.

Marilyn's argument that Jeffrey's exhibits were "nonsensical"[46] is itself nonsensical, since he wasn't given the opportunity to use them to cross-examine the witnesses against him. Perhaps some exhibits might have been excluded, perhaps not – we'll never know, and that's the precise point. The trial court never made a determination as to the relevance or admissibility of Jeffrey's exhibits *on their merits.* There was no balancing of interests. There was only a strict application of the Rules without regard for the fact that it resulted in a quasi-default with no showing of any prejudice to Marilyn. Had there been any prejudice to her, she could have received a continuance as discussed in *Marriage of Hoffmeister*[47] and Jeffrey could have been sanctioned monetarily for the inconvenience. But to essentially default Jeffrey by utilizing the Rules to assess

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[45] *Id.* at p. 614.
[46] Marilyn's Return, p. 37.
[47] *In re Marriage of Hoffmeister [Hoffmeister I]* (1984) 161 Cal.App.3d 1163, 208 Cal.Rptr. 345.

evidentiary sanctions against him without considering whether some less drastic option was available simply does not comport with substantial justice.

Another case, *Hernandez v. Superior Court,* contains a very pertinent discussion of this tension between the need to balance the courts' legitimate goal of calendar efficiency with the need to do "substantial justice:"

> "Strict adherence to these delay reduction standards has dramatically reduced trial court backlogs and increased the likelihood that matters will be disposed of efficiently, to the benefit of every litigant. [Citation.] Here, the trial court's orders promote judicial efficiency by maintaining strict time deadlines. [¶] But efficiency is not an end in itself. Delay reduction and calendar management are required for a purpose: to promote the just resolution of cases on their merits. [Citations.] Accordingly, decisions about whether to grant a continuance or extend discovery 'must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency.'"[48]

This concept of "substantial justice" is missing in the Rules. There is no dispute that they promote efficiency; the question is whether this is how we want courts to decide disputes that affect perhaps our most important values.

[48] *Hernandez v. Super. Ct. (Neal)* (2004) 115 Cal.App.4th 1242, 1246, 9 Cal.Rptr.3d 821.

IV.
THE PROCEDURE CERTAINLY DOES PREJUDICE SELF-REPRESENTED PARTIES

Marilyn presents the Rules as benign, *pro per* friendly rules designed to assist self-represented parties through the daunting process of self-representation in the Contra Costa County Family Law Department. However, a review of the Rules and her Return describing them shows that they are anything but benign.

Marilyn lists several sophisticated procedural gambits that Jeffrey might have taken to get around the Rules. These include her *speculation* and Marilyn cites no legal authority or any provision in the challenged Rules for that after specifically excluding Jeffrey's exhibits for failure to set forth their evidentiary foundation in his declaration, the trial judge would nevertheless have permitted Jeffrey to use them in his cross-examination of Marilyn and the expert[49] – which was their purpose all along. Moreover, when Jeffrey explained that he was resting because he was denied the right to use his exhibits to cross-examine the witnesses against him, the judge opined: "that may be the correct advice."

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 the 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."[50] 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.[51]

Marilyn's argument that the Rules do not mean what they say, namely: "Any required evidentiary foundation for admission of the proposed exhibits shall be completely set forth in the declaration(s)…"[52] is silly. That is what the Rules say, and the Respondent Court does not deny this requirement. The Respondent Court's defense is that Jeffrey was "relieved" of the requirement and hence lacks standing to challenge it. Marilyn's argument, that all that is required is "merely the most basic identification of a document, its source, and its relation to the case," is certainly not supported by the language of the Rules or the Court's Return. To buttress her argument, Marilyn notes that was all she did in her pleadings. Yet this point highlights that the Rules were not evenly applied – because Jeffrey, a *pro per*, did not know to object. Moreover, Jeffrey certainly supplied the basic

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[49] Marilyn's Return, p. 46.
[50] California Judicial Council Report of March 14, 2003, "Family Law: Limited Scope Representation" (http://www.attorneyassisteddivorce.com/id12.html).
[51] Although Marilyn objects to this word, "default" is the term used by the trial judge when describing the proceeding. (RT, p. 17/10.)
[52] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2.

evidentiary foundation for Exhibit 5 when he explained it was an accounting done by his wife and given to him. Since a major trial issue was related to accounting, Jeffrey had certainly met Marilyn's reduced standard, yet the Exhibit was still excluded.

Jeffrey hopes that this Court will speak to the issue of self-represented litigants in family court. While Marilyn is correct that the law is that *pro pers* are technically held to the same standards as attorneys, it is also true that in family law matters, where "as many as 80 percent of the litigants in family law matters are self-represented,"[53] some consideration must be given to their limited ability to comply literally with the exceedingly complex Rules imposed by the Respondent Court. A self-represented litigant may know what he wants to tell the judge, but to expect him or her to be able to set forth "completely" the "evidentiary foundation" for each exhibit in their declaration is unfair and unrealistic. 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. Moreover, the Rules envision the filing of evidentiary objections and motions to strike to the other party's declarations, yet do not say this explicitly. They do not put litigants on notice that they can object to statements contained in the other party's declarations and failure to do so waives any objections.

[53] See fn. 49, *supra*.

At some point when the Rules become so difficult to comply with they become an impediment to a fair trial and violate Due Process. Jeffrey believes that these Rules have crossed over that line.

While the Court may not want to open up that can of worms, at the very least the realities discussed above need to be factored into the *Mathews v. Eldridge* balancing test for when the right to present oral testimony can be denied.[54] The second prong of that test is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards…."[55] As we have seen here, the risk is high and additional safeguards should be required.

[54] See complete discussion in Reply to Respondent Court's Return, section IV.
[55] *Mathews v. Eldridge, supra,* 424 U.S. 319 at p. 335.

V.
MARILYN'S ARGUMENT THAT THE RULES DO NOT VIOLATE DUE PROCESS FAILS TO CONSIDER ANY OF THE FACTORS REQUIRED TO BE BALANCED BEFORE THE RIGHT TO PRESENT ORAL TESTIMONY CAN BE DENIED

Marilyn's argument that the "trial by declaration" procedure is constitutional because it was approved in the *Adair*[56] bankruptcy case is unnuanced and fully answered in Jeffrey's Reply to the Respondent Court's Return, which discussion is incorporated herein.[57] It is interesting that, like the Respondent Court, she too quotes case law that stems from *Mathews v. Eldridge*[58] yet fails to discuss the balancing test contained therein.

Her argument that the Rules are not unconstitutional as applied because they technically *permit* a party to *request* oral testimony misses the point. The Respondent Court provided no examples of when oral testimony would be permitted. Both Marilyn and the Respondent Court agree that it would require "unusual" circumstances. We know from this case that being prevented from introducing one's exhibits resulting in a quasi-default did not constitute "unusual" circumstances.

It is interesting to speculate what might constitute "unusual" circumstances. The Respondent Court presumably knows what would constitute an "unusual" situation, but did not posit any. Marilyn tries to fill in the blank by positing two

[56] *In re Adair* (9th Cir. 1992) 965 F.2d 777.
[57] See Reply to Respondent Court's Return, section IV.

situations: first is where someone is denied the right to testify by a tactical move, such as when Marilyn's trial attorney kept Jeffrey from being able to testify; and the second is complex cases. Before discussing these, Jeffrey needs to point out that not only is there absolutely no factual basis for Marilyn's speculations, but at page 3 of her Return, her attorney affirms that he lacks information to discuss the local practice of the Court on the use of the TSO in cases other than her own.[59]

The first situation Marilyn suggests, namely when otherwise denied the right to testify, is, as discussed above, directly contradicted by the Rules, which require any such request to be approved "in advance."

The second is very problematic. What she is arguing, again without and factual basis and in direct contradiction to the Rules, is that if you are wealthy and have "complex" issues, you can have a "real" trial, whereas "Rule 12.5 applies only in the average case…."[60] Thus, if you are average, you are subject to this Rule, whereas if you are wealthy, you are not. The equal protection ramifications of such an argument are staggering, but presumably there will be no need to brief them since there is nothing in the Rules or the record to support such an assertion. What we do know is that "we have no rule in California that the rich in their

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[58] *Mathews v. Eldridge* (1976) 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893.
[59] She also relies on unsupported allegations such as "a judge rarely has the advantage of daily transcripts…." (Marilyn's Return, p. 26.) Where this alleged fact comes from is not explained.
[60] Marilyn's Return, p. 26.

divorces get more time for justice than the poor in theirs."[61] Finally, this argument is utterly counter-intuitive: The court cannot give Jeffrey the two hours he requested to cross-examine Marilyn and the expert, but can give complex cases many days of court time?

In summary, neither Marilyn nor the Respondent Court show how the Rules balance the Due Process of litigants with the legitimate needs of the Court nor why no additional procedural safeguards were warranted, as required by *Mathews*, which Marilyn did not cite, and by *Lammers*,[62] which she did.

[61] *Blumenthal v. Super. Ct. (Blumenthal)* **(**2006) 137 Cal.App.4th 672, 684, 40 Cal.Rptr.3d 509.
[62] *Lammers v. Super. Ct. (Lammers*) (2000) 83 Cal.App.4th 1309, 1327, 100 Cal.Rptr.2d 455.

VI.
CREDIBILITY BY DECLARATION

Marilyn agrees with the Respondent Court that just as motions can be heard by declaration, so too can trials. Jeffrey covered this thoroughly in his Response to the Respondent Court's Return and incorporates that discussion herein.

The only point to which Jeffrey will reply is to Marilyn's strong reliance on the permissibility of *Reiflerized* motion hearings. First, that issue is not before the Court in this case. This case did not involve a "motion," and thus no attack has been made on motion procedures. Second, the Due Process balancing required by *Mathews v. Eldridge* applies to *all* hearings that can affect people's important rights. Recall that in *State ex rel. McGuire v. Howe*,[63] relied on by the Respondent Court, a denial of the right to present oral testimony in the equivalent of our *Reifler* hearings was approved after a *Mathews* balancing test. Without its citing *Mathews*, Jeffrey believes that this Court reached a similar result in *Marriage of Brown v. Yana*[64] when it held that there was no right to a full evidentiary hearing in a motion to block a move-away unless the objecting parent first made a *prima facie* showing of detriment. Presumably, once that showing is made, the parent is entitled to an evidentiary hearing.[65] Note that there is no exemption in the Rules for custody or move-away cases.

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[63] *State ex rel. McGuire v. Howe* (1986) 44 Wash.App. 559, 565, 723 P.2d 452, 455.
[64] *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 38 Cal.Rptr.3d 610.
[65] *In re Marriage of Brown and Campos* (2003) 108 Cal.App.4th 839, 134 Cal.Rptr.2d 300, as limited by *In re Marriage of Brown & Yana, supra*, 37 Cal.4th at p. 965.

VII.
THE TSO VIOLATES THE PRIVATE JUDGE RULE AND THIS ERROR WAS CERTAINLY NOT HARMLESS

The Respondent Court basically conceded that its TSO did not comply with statutory law, but argued that by the time that this Court rules, the issue will be "moot" since it is incorporating it into a local rule, "with some improvements."[66] Marilyn, on the other hand, argues that the TSO was not a judge-made rule but even if it were, it was harmless as to Jeffrey and was "cured" in the trial proceedings [presumably because she feels that Jeffrey was "relieved" of the TSO].

It has been said that history is written by the winners, and that is certainly true in this case. The trial court never found out what Jeffrey could have shown by way of cross-examination, so it was left with Marilyn's unchallenged evidence. Jeffrey made a timely request for a Statement of Decision[67] that the judge acknowledged but never issued.[68] Thus, we do not know what findings he made based solely on Marilyn's evidence. We know only that the judge signed Marilyn's proposed order, complete with hand-written uninitialed ink changes.

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[66] Respondent Court's Return, p. 5.
[67] RT, p. 10/23-24.
[68] Thus, a reversal will be required on this ground in any event. (See, e.g., *In re Marriage of Reilley* (1987) 196 Cal.App.3d 1119, 1125-1126, 242 Cal.Rptr. 302 [Failure to issue properly requested statement of decision is reversible error]; *In re Marriage of S.* (1985) 171 Cal.App.3d 738, 747, 217 Cal.Rptr. 561 [Failure to issue properly requested statement of decision renders subsequent order void]; *Miramar Hotel Corp. v. Frank B. Hall & Co*. (1985) 163 Cal.App.3d 1126, 210 Cal.Rptr. 114; *In re Marriage of Wood*

Although Jeffrey disagrees that, given the nature of this proceeding, it is necessary to dispute Marilyn's factual allegations in her Return, out of an abundance of caution he does so herein. He disagrees that this is a case where the substantial evidence rule applies. How could it when he was essentially denied the right to present his side of the case?

Marilyn's argument that Code of Civil Procedure section 575.1 (c) does not apply in this case is just that – argument. The statute is quite clear. It permits individual judges to adopt rules for their individual courtrooms, provided the rules are published "as part of the general publication of rules required by the California Rules of Court." The Court acknowledges that this is such a rule. Marilyn cites no authority for the proposition that an unpublished judge's rule is permissible if it is served. Her attempts to distinguish *Kalivas v. Barry Controls Corp.*[69] are unavailing. There, "[t]he Court Clerk handed [Kalivas's counsel] two copies of said Order [with a stamped signature of the judge]."[70] There as here, the objecting counsel had knowledge of the private order. That is no different in any material way than what occurred here.

The argument that this case does not present a compelling reason to create a rule that a private-judge rule served on the parties is subject to section 575.1 misses the point – that is already the law. What she is asking is the opposite: that

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(1983) 141 Cal.App.3d 671, 681, 190 Cal.Rptr. 469.) **Note that neither Marilyn nor the Respondent Court dispute this point.**

[69] *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161-1162, 57 Cal.Rptr.2d 200.

this Court create an exception that will eviscerate the Legislative intent with regard to section 575.1, namely that if judges are going to promulgate private rules such as this, that they be vetted by proper procedures. The Court admits that was not done here and Jeffrey asserts he was denied his Due Process rights as a result.

Moreover, there is no doubt that Jeffrey was prejudiced by the TSO. It denied him his rights to present evidence, without any prior notice. There was no motion for sanctions, simply a denial of his right to use his evidence based on the unpublished, private judge rule.

Finally, the allegation that the TSO is not a "generic set of provisions" is absolutely untrue. First, the Respondent Court did not deny that it was and has now elected to make these procedures part of its local rules. It doesn't get any more "generic" than that. Second, Marilyn's counsel has denied knowledge of the practices of the court in other cases.[71] Third, the two TSOs in this case for drastically different issues were essentially identical.[72] The one attached to the Petition for Review from a different case is a later version showing the "improvements" to which the Respondent Court referred to in its Return, namely making it more complex and requiring that 776 and rebuttal evidence be disclosed in advance.

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[70] Id. at p. 1155.
[71] Marilyn's Return, p. 3.
[72] See trial judge's comments at RT, p. 11/5-6; see Marilyn's Return, p. 9, ¶ d.

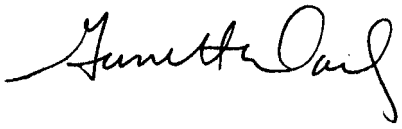
Marilyn's argument that the April TSO does not constitute a private judge rule within the meaning of section 575.1 is without merit.

CONCLUSION

Jeffrey now realizes that the stakes in his case are far greater than him. The future of family law, and perhaps all civil bench trials, rides on the outcome of this case. Nevertheless, like Marilyn, he too must focus on the narrow issue of what happened to him below. As stated repeatedly throughout his briefs, he simply does not believe that one can read the transcript and conclude that he had his "day in court," literally or symbolically. In addition to overturning the Rules herein, he asks that the judgment of the Superior Court be reversed and that he be given the opportunity to present his case in a meaningful manner.

Dated: May 17, 2006

Respectfully submitted,



Garrett C. Dailey
Attorney for Petitioner

JEFFREY'S REPLY TO MARILYN'S ALLEGED ADDITIONAL FACTS

In paragraph 12 of her Return, Marilyn alleged additional facts to which Jeffrey replies, as follows:

a. The argument that Jeffrey represented himself "out of choice" is absolutely untrue. The restraining order on the Merrill Lynch account applied to both parties, and neither was allowed to withdraw funds from the account without either a court order or written agreement of both parties. The allegations that Jeffrey had received $786,726 for his personal use from the Merrill Lynch account, Marilyn had received $433,255 for her personal use, and that $525,199 had been used to pay business attorneys were contested by Jeffrey and Judge Kennedy ordered a third party accounting be done. It was never done and therefore the correct figures were never verified. Marilyn had made mistakes in allocating moneys (e.g., she attributed travel to Southern California and Chicago by Jeffrey as personal expenses, when they were actually business expenses to take depositions). Marilyn discussed in her deposition how her allocations were based on whim rather than fact.

The $145,000 taken from the Merrill Lynch account in July 2003 included business expenses. The $50,000 Jeffrey received was mostly used to pay back borrowed family moneys.

Jeffrey was in fact represented at this time by Tammy Gallerani, Esq.

Jeffrey denies that he received $981,726 from the community account, and no accounting was ever performed nor numbers verified.

b. Tammy Gallerani, Esq. substituted out on August 10, 2004, and Jeffrey became self-represented. The $5,000 that he received for attorney fees was in fact paid to Ms. Gallerani.

c. Jeffrey did attempt to find a new attorney but was unable to do so for two reasons: He found that most of those that he called had been conflicted out by Marilyn (who seemed to have interviewed almost every family law attorney in the county) or because the attorney would not take the case so late with a short time before a bifurcated trial. Robert Sanders, Esq. agreed to represent him and took a retainer, but when Marilyn heard his name, she said there was a conflict because she had consulted him. She produced a cancelled check as proof and Jeffrey had to start looking again.

d. Jeffrey admits these allegations, but asks this Court to note that the first TSO was signed and issued by Judge Baskin on January 20, 2005. A Certificate of Mailing signed by the Deputy Clerk, O. Bazile, says that the TSO was mailed to both parties on **January 20, 2005** for a trial date of **February 10, 2005** and a Settlement Conference on **February 2, 2005**.

e. Marilyn says here that Jeffrey complied with the TSO, yet elsewhere she says that he did not but that her attorney failed to object. Jeffrey alleges that he tried, in good faith, to comply with the TSO.

f. Admitted.

g. Mrs. Balin, Jeffrey's mother, is in her late 70's and resides in Florida. He admits the allegations herein.

h. Jeffrey does not recall the dates and has no way to verify or dispute this.

i. Jeffrey does not recall this and has no way to verify or dispute it.

j. Jeffrey disputes that he was "lining up his exhibits for trial and wanted to be sure they were no longer discoverable…." He asked about whether discovery was closed to find out if discovery was closed.

k.-l. The documents speak for themselves.

m. Jeffrey alleges that he answered Mr. Harkins' question when asked and disputes the statement and the implication that "his only reply was a smile."[73]

n. Admitted. Jeffrey thought that providing the exhibits in a binder to Marilyn's attorney on Friday before a Monday trial complied with the TSO.

Jeffrey strongly disputes the allegation in paragraph 11 that "Marilyn's request for attorney fees was based on Jeffrey's litigation conduct that increased

[73] This is a perfect example of a credibility-based dispute. If this were relevant to anything herein,which it is not, how could this be judged from the declarations?

Marilyn's litigation costs…." The court did not issue the requested Statement of Decision, so we don't know the basis for the Court's reasoning. The exhibit cited to is Marilyn's attorney's declaration, which Jeffrey had hoped to dispute in his planned cross-examination of Marilyn.

Dated: May __, 2006

_____
Jeffrey Elkins

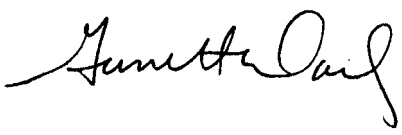
VERIFICATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on May __, 2006 at Oakland, California.

_____
Jeffrey Elkins

CERTIFICATE OF COMPLIANCE

I, Garrett C. Dailey, attorney for Petitioner Jeffrey Elkins, hereby certify that, pursuant to Cal. Rules of Court, rule 14(c)(1), this brief contains approximately 7,185 words, including footnotes, as computed by the Microsoft Word 2003 word counter.



Garrett C. Dailey