S139073

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY ELKINS,

Petitioner,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY,

Respondent,

MARILYN ELKINS,

Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A111923

RESPONDENT'S RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE OR PROHIBITION

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INTRODUCTION

How can trial courts that are inundated with family law litigation get those cases to trial within a reasonable period of time?

The Superior Court of Contra Costa County has met this challenge by employing an innovation that has deep roots in equity procedure and is

frequently used in the federal courts: submission of written direct evidence subject to oral cross and redirect examination. This discretionary procedural device is prescribed by the Superior Court of Contra Costa County, Local Rules, rule 12.5(b)(3) (hereafter Local Rule 12.5(b)(3)).

Local Rule 12.5(b)(3) is authorized by Evidence Code section 765, which vests trial courts with "reasonable control over the mode of interrogation of a witness." Local Rule 12.5(b)(3) is consistent with constitutional principles. The federal courts in nonjury trials routinely allow the presentation of direct evidence by written testimony, finding no violation of due process. And family law courts are courts of equity, which have traditionally decided cases on written evidence.

Local Rule 12.5(b)(3) is also sound policy. In addition to reducing delay, the use of written direct evidence minimizes conflict by limiting the occasions for adversarial confrontation between estranged spouses, assists self-represented litigants by helping to guide them through preparation for trial, avoids surprise, and encourages settlement.

In short, Local Rule 12.5(b)(3) is a statutorily-authorized, constitutional, and pragmatic solution to the challenge of getting family law cases to trial in a timely fashion.

In this case, petitioner Jeffrey Elkins filed a writ petition in the Court of Appeal challenging Local Rule 12.5(b)(3) and a trial scheduling order (TSO) that implemented the local rule. After the Court of Appeal summarily denied the writ petition, this court granted review and ordered respondent Superior Court of Contra Costa County to show cause why Local Rule 12.5(b)(3) and the TSO should not be declared invalid for the reasons stated in the writ petition. This return by answer to the writ petition shows such cause.

RETURN BY ANSWER TO

PETITION FOR WRIT OF MANDATE OR PROHIBITION

Respondent Superior Court of Contra Costa County, in answer to the Petition For Writ of Mandate or Prohibition (hereafter writ pet.), admits, denies, and alleges as follows:

1. With regard to the paragraphs of the petition under the heading "Issue Presented," respondent admits the allegations of those paragraphs except as follows:

a. Respondent denies the allegations in the first paragraph that under respondent's Local Rule 12.5 "direct testimony and the presentation of direct evidence at trial are virtually forbidden," that under the local rule "[a]ll evidence must be '*Reiflerized*' and presented by declaration," and that in this case "precisely what resulted" was "the Court's refusal to permit a party to introduce evidence at trial" because of a "[f]ailure to comply with the Local Rules." (Writ pet., pp. 1-2.) Local Rule 12.5(b)(3) gives the trial court discretion to receive oral direct evidence "in unusual circumstances." It also affords a right of oral cross-examination, but allows the trial court to decide "contested issues on the basis of the pleadings submitted by the parties without live testimony" if the parties choose not to exercise that right. Petitioner in this case never asked the trial court to exercise its discretion to receive oral direct evidence.

b. Respondent denies the allegations in the third paragraph that the trial court sustained objections to admission of exhibits "based upon the failure to comply with the Trial Scheduling Order," that petitioner was "denied his ability to present any sort of case," and that "the trial judge deemed the matter a default." (Writ pet., p. 2.) The trial court sustained the objections because the exhibits lacked foundational support, after petitioner refused to

avail himself of an opportunity the trial court gave him to gather his thoughts during a break in the proceedings so that he could make foundational showings to support admission of the exhibits.

c. Respondent denies the allegations in the fourth paragraph that Local Rule 12.5 and the trial scheduling order (TSO) "conflict with statutory and decisional law and can result, as they did in this case, in a denial of due process." (Writ pet., p. 2.) Local rules authorizing the trial of family law matters on written direct evidence subject to oral cross and redirect examination are consistent with Evidence Code section 765 and a recent decision by the California Supreme Court, *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947. Federal and sister state authorities establish that, in family law courts specifically and in nonjury trials generally, the constitutional right of due process allows decisions on written direct testimony.

2. Respondent admits the allegations in the paragraphs of the petition under the heading "Authenticity Of Exhibits."

3. Respondent admits the allegations in the paragraphs of the petition under the heading "Beneficial Interest Of Petitioner; Capacities Of Respondent and Real Party In Interest."

4. Respondent admits the allegations in the paragraphs of the petition under the heading "Basis For Relief," except that respondent denies the allegation that "[a]ppeal is not an adequate remedy at law" because the effect of Local Rule 12.5 and the TSO "is to deny one party due process of law and essentially default them." (Writ pet., pp. 3-4.) For the reasons alleged in paragraph 1(c) of this return, there is no denial of due process here. For the reasons alleged in paragraph 1(b) of this return, petitioner was not defaulted.

5. Respondent denies the allegations in the paragraph of the petition under the heading "Absence Of Other Remedies." For the reasons

alleged in paragraph 1(c) of this return, there is no violation of procedural due process here.

6. Prior to Local Rule 12.5(b)(3), the Superior Court of Contra Costa County was setting family law trials from six to eight months out. Currently, three of the court's four family law departments are setting trials from one to three months out; the fourth department, which began regularly taking written direct evidence in January 2006, is setting trials from four to five months out, and that time is continuing to shorten.

7. In the experience of the family law judges of Contra Costa County, Local Rule 12.5(b)(3) and the court's trial scheduling orders promote fairness and assist self-represented litigants in family law actions by giving them direction as to how to prepare for trial, how to frame issues properly, and how to present evidentiary support for their positions, and thereby avoid being "blindsided" by the adverse party.

8. The family law judges of Contra Costa County have found that Local Rule 12.5(b)(3) encourages settlement of marital dissolution issues, such as custody, visitation, and property valuation and disposition, by apprising both sides, well in advance of trial, of the facts that will be presented.

9. The provisions of the TSO in this case, with some improvements, are in the process of being promulgated within a new Local Rule 12.8 of the Superior Court of Contra Costa County, which is expected to become effective on July 1, 2006.

PRAYER

Respondent Superior Court of Contra Costa County prays that this court hold Local Rule 12.5(b)(3) to be valid.

Dated: March 29, 2006

Respectfully submitted,

HORVITZ & LEVY LLP
DAVID S. ETTINGER
JON B. EISENBERG

By _____
Jon B. Eisenberg

VERIFICATION

I, Thomas Maddock, declare as follows:

I am the Presiding Judge of the Superior Court of Contra Costa County. I have read the foregoing Return By Answer To Petition For Writ Of Mandate Or Prohibition and know its contents. The allegations of the return are within my own knowledge and I know them to be true.

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

_____
Honorable Thomas Maddock

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

A. Local Rule 12.5(b)(3).

Local Rule 12.5(b)(3) of the Superior Court of Contra Costa County gives judges discretion to require trial of family law matters on written direct evidence subject to oral cross and redirect examination.

Subdivision (b) of Local Rule 12.5 is headed "Conduct of Evidentiary Hearings and Trials." It applies in all family law actions. (Super. Ct. Contra Costa County, Local Rules, rule 12.1.) The full text of Local Rule 12.5(b)(3) is as follows:

> Subject to legal objection, amendment, and cross-examination, all declarations shall be considered received in evidence at the hearing. Direct examination on factual matters shall not be permitted except in unusual circumstances or for proper rebuttal. The Court may decide contested issues on the basis of the pleadings submitted by the parties without live testimony.

The first sentence of subdivision (b)(3) – stating that declarations are "[s]ubject to . . . cross examination" – makes clear that written direct evidence in family law actions is subject to oral cross-examination. The second sentence of subdivision (b)(3) – stating that live direct testimony shall not be permitted "except in unusual cases" – vests the trial court with discretion to receive live direct testimony in unusual cases. The third sentence of subdivision (b)(3) – stating that the trial court "may decide contested issues on the basis of the pleadings submitted by the parties without live testimony" – is invoked where the parties choose not to exercise the right of cross-

examination.[1/] Ultimately, under Local Rule 12.5(b)(3), the decision whether to receive live direct testimony or to require written direct evidence subject to oral cross and redirect examination is discretionary with the trial court.

A similar procedure is followed statewide for marital law and motion proceedings, where the rendition of a decision on written evidence is commonly called "*Reifler*-izing," after *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 485, which held that the court is not required to take oral testimony but may decide the motion solely on the basis of the written record, including supporting and opposing declarations. This procedure "expedites the hearing of a heavy domestic relations calendar, provides for a more pleasant, less formal, nonadversary atmosphere, and sets a tone much more likely to enable future settlement of litigation." (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1059, fn. 3.)

B. The trial scheduling order.

The trial judge in this case issued a pretrial "trial scheduling order" (TSO), which Contra Costa County judges now routinely issue in family law cases.

The TSO summarized the provisions of Local Rule 12.5(b)(3) for discretionary receipt of written direct evidence subject to oral cross-examination, as follows: "Unless otherwise approved in advance by the court, all direct testimony shall be in the form of declarations filed in lieu of oral

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1/ A contrary interpretation of the local rule's third sentence as authorizing denial of the right of cross-examination would conflict with the local rule's first sentence affording that right and would violate the statutory guarantee of that right. (Evid. Code, § 711; see *post*, pp. 16-17.)

direct testimony, subject to cross-examination." (Appellant's Appendix for Writ of Mandate or Prohibition (AA) Tab 2, ¶ 1 (hereafter TSO).)

The TSO further prescribed certain filing and service requirements for declarations and exhibits, including the following:

- Initial declarations were to be filed with the court and exchanged between the parties no later than ten court days before trial. (TSO, ¶ 3.)

- The declarations were to explain any exhibits to be introduced at trial and set forth any required evidentiary foundation for their admission. (TSO ¶ 2.)

- Exhibits referred to in the declarations were to be placed in binders, which were to be filed with the court and exchanged between the parties at least two court days before trial. (TSO ¶ 9.)

The TSO varied slightly from Local Rule 12.5. Subdivisions (b)(2) and (b)(5) of Local Rule 12.5 require service of declarations and exhibits at least *five* calendar days before trial, whereas the TSO imposed a *ten*-day deadline for declarations and a *two*-day deadline for exhibits. (TSO ¶¶ 3, 9.)

The provisions of this TSO are not currently published in the court's local rules, but that is about to change. The TSO's provisions, with some improvements, are in the process of being promulgated within a revised Local Rule 12.8, which is expected to become effective on July 1, 2006. (*Ante*, p. 5, ¶ 9; see Code Civ. Proc., § 575.1; *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1159.)

C. The present proceeding.

Jeffrey and Marilyn Elkins were married in 1980 and separated in 2001, after which Marilyn filed a petition for dissolution of the marriage. The date of the parties' separation was determined in a bifurcated proceeding, and a trial on property-disposition issues was subsequently scheduled for September 19, 2005. (AA Tab 4, p. 1; Tab 9, p. 1.) The trial court issued its TSO on April 22, 2005. (AA Tab 2.)

Jeffrey, appearing in propria persona, filed his initial declaration as required by the TSO on September 2, 2005. (AA Tab 10.) He filed his binder of exhibits with the court and delivered the binder to opposing counsel one court day before trial – a day later than required by the TSO. (AA Tab 11; RT 3.) Marilyn timely filed two initial declarations – by her and an expert witness – and timely filed and delivered her binder of exhibits. (AA Tab 4; RT 3-5.)

At the outset of the September 19 hearing, Marilyn's counsel, Daniel S. Harkins, objected to the admission of exhibits in Jeffrey's binder that had not been mentioned in Jeffrey's declaration.[2/] (RT 3-4.) Jeffrey advised the court that he wanted to cross-examine Marilyn and her expert witness on their declarations. (RT 5.)

The judge asked Jeffrey to "point me to the foundations in your declarations" and said "those exhibits that don't have an evidentiary foundation will be stricken." (RT 7.) Mr. Harkins commented that Jeffrey's declaration referenced only two of the exhibits contained in his binder. (RT 7-8.) The judge then proceeded to explain the foundational deficiencies to

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2/ In the earlier bifurcated proceeding to determine the date of the parties' separation, Jeffrey had fully complied with a trial scheduling order like the present TSO by timely filing declarations with all exhibits attached. (See letter of Paige Leslie Wickland to Cal. Supreme Court dated Dec. 23, 2005.)

Jeffrey by using one of his exhibits as an example, saying "there's no way of knowing what this document is without any . . . direct testimony [in the declaration] saying what this is or what it purports to [be]." (RT 8.) Jeffrey responded by explaining that the exhibit "refers to an accounting . . . given by my wife to me" and that "this document was presented by Ms. Tammy Gallerani when she was representing me as a document cache for completing this trial." (RT 9.)

The judge then said: "Tentatively, I am going to rule in favor of Mr. Harkins. 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 the specific evidentiary foundations for these documents, but I don't see it in your declaration. . . . [¶] There being no evidentiary support for Exhibits 1 through 37 with the exception of Exhibit[s] 3 and 12, the objections will be sustained tentatively subject to further argument after the morning break." (RT 9-10.)

By affording Jeffrey an opportunity to present the necessary evidentiary foundations in open court after the morning break, the trial court in effect relieved Jeffrey of the requirements of the TSO with which he had failed to comply – explanation of exhibits in his declaration and timely filing and exchange of binders. Jeffrey, however, expressly declined this opportunity. In an about-face, he told the judge that he "rests completely . . . [o]n everything." (RT 14.) Jeffrey also withdrew his prior request to cross-examine Marilyn and her expert witness. (RT 15.) And Jeffrey said he did not wish even to offer his declaration into evidence. (RT 16.) He never asked the court to exercise its discretion to allow him to present live direct testimony.

The court then heard closing argument by both Mr. Harkins and Jeffrey. (RT 16-23.) The court did not, as Jeffrey claims in his petition for review, "deem[] the matter a default." (Pet. for review, p. 3.)

On September 23, 2005, the court signed Marilyn's proposed "Order After Trial," which resolved the disputed property-disposition issues in Marilyn's favor and terminated the parties' marital status. (AA Tab 3.)

On November 8, 2005, Jeffrey – now represented by counsel – filed a "Petition For Writ of Mandate or Prohibition" with the Court of Appeal, challenging Local Rule 12.5(b)(3) and the TSO. The Court of Appeal summarily denied the writ petition. (*Elkins v. Superior Court*, Court of Appeal No. A111923.) Thereafter, Jeffrey filed a notice of appeal from the "Order After Trial." (*In re Marriage of Elkins*, Court of Appeal No. A112491.) The appeal is currently pending in the Court of Appeal; no briefs have yet been filed.

In the writ proceeding, Jeffrey filed a petition for review with this court. After Marilyn filed an informal letter opposing review and Jeffrey filed an informal reply letter, this court granted the petition and ordered respondent Superior Court of Contra Costa County "to show cause in this court why Contra Costa County Local Rule 12.5(b)(3) and the trial scheduling order in the present case should not be declared invalid for the reasons stated in the petition for extraordinary relief."

LEGAL DISCUSSION

I.

LOCAL RULE 12.5(b)(3) IS CONSISTENT WITH STATUTORY AND CASE LAW GOVERNING TRIAL COURT PROCEDURES.

A. Evidence Code section 765, vesting trial courts with "reasonable control over the mode of interrogation of a witness," authorizes factual determinations on written direct evidence.

We first address the question whether Local Rule 12.5 is consistent with statutory and case law governing trial court procedures. The answer is yes. The provisions in Local Rule 12.5 for discretionary receipt of written direct evidence subject to oral cross and redirect examination are authorized by Evidence Code section 765.

Subdivision (a) of Evidence Code section 765 provides: "The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment."

This statutory provision is consistent with the broader proposition that "courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) "In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers which

enable them to carry out their duties, and which exist apart from any statutory authority. . . . That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation . . . in order to insure the orderly administration of justice." (*Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 19, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 880, 890, quoted in *Rutherford v. Owens-Illinois, Inc., supra,* 16 Cal.4th at p. 967.)

A provision similar to Evidence Code section 765 appears in rule 611(a) of the Federal Rules of Evidence, which states: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

In *In re Adair* (9th Cir. 1992) 965 F.2d 777, 779, the Ninth Circuit upheld a local rule of the district court for the Central District of California, which at the time stated that in "any matter tried to the Court, including matters in Bankruptcy," the judge "may order that testimony on direct examination of a witness be presented by written narrative statements subject to cross-examination of the declarant at trial." (U.S. Dist. Ct., Local Civ. Rules, Central Dist. Cal., former rule 13.6.)[3/] The Ninth Circuit held this procedure "is consistent with" rule 611(a) of the Federal Rules of Evidence and "is a permissible 'mode' of presenting direct testimony under Rule 611(a)." (*In re Adair, supra,* 965 F.2d at p. 779; see Richey, *A Modern*

3/ The current version of this local rule states: "In any matter tried to the Court, the judge may order that the direct testimony of a witness be presented by written narrative statement subject to the witness' cross-examination at the trial. Such written, direct testimony shall be adopted by the witness orally in open court, unless such requirement is waived." (U.S. Dist. Ct., Local Civ. Rules, Central Dist. Cal., rule 43-1.)

Management Technique For Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial (1983) 72 Geo. L.J. 73, 78 (hereafter Richey) ["Statutory authority to require parties to submit direct testimony in written form prior to the actual trial derives most specifically from Rule 611(a) of the Federal Rules of Evidence."].)

If a judicial determination of issues on written direct evidence subject to oral cross and redirect examination is permissible under rule 611(a) of the Federal Rules of Evidence, it should follow that the procedure is likewise permissible under the similar provisions of Evidence Code section 765, subdivision (a).[4/]

California law prescribes two safeguards where a matter is tried on written direct evidence. First, a prepared written statement by a witness must be *sworn*, as is a declaration. (*Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1513 [finding error, though harmless, in trial of child dependency proceeding on unsworn, nonstipulated offer of proof, because "nonstipulated offers of proof are not testimony" and "[a]n unsworn statement of counsel is not evidence"].) Second, the adverse party must be afforded an opportunity to cross-examine the witness. (Evid. Code, § 711 [affording right

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4/ Additionally, in marital dissolution actions where (unlike here) a status judgment dissolving the marriage is rendered in a bifurcated proceeding separate from the determination of non-status issues such as property disposition (see Fam. Code, § 2337, subd. (a)), the provisions of Local Rule 12.5(b)(3) are also authorized by Code of Civil Procedure section 2009, which allows motions to be decided on affidavits. That is because the decision on the non-status issues is statutorily deemed to be an order on a motion (see Code Civ. Proc., § 1003 [order is a written directive "not included in a judgment"], not the court's final judgment (see *Bank of America v. Superior Court* (1942) 20 Cal.2d 697, 701 [there can be only one final judgment in an action]), which is the separately-rendered status judgment dissolving the marriage (see *In re Marriage of Fink* (1976) 54 Cal.App.3d 357, 366).

of confrontation and cross-examination "[a]t the trial of an action"]; see *Denny H. v. Superior Court, supra,* 131 Cal.App.4th at p. 1513 ["A party's right to confrontation is . . . delineated in Evidence Code section 711"].) Both those safeguards are afforded by Local Rule 12.5(b)(3), which requires declarations and provides for cross-examination unless the parties choose not to exercise that right. (See *ante*, pp. 8-9.)

B. The discretionary requirement of written direct evidence in family court trials is consistent with this court's recent decision in *In re Marriage of Brown and Yana.*

Case law from the Courts of Appeal has previously suggested that in certain instances of "critical pretrial matters" involving a "real and genuine dispute" in a family law case, there may be a right to an evidentiary hearing on a motion. (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 110, 114.) One case, *In re Marriage of Dunn* (2002) 103 Cal.App.4th 345, 348, said that this includes modification of a child custody order, which may require an evidentiary hearing "if necessary." Another case, *In re Marriage of Campos* (2003) 108 Cal.App.4th 839, 843, held there was a right to an evidentiary hearing in that case on whether to allow a "move-away" by the custodial parent and child.

This court recently addressed this issue within the context of a proposed move-away in *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947. The question presented in *Brown and Yana* was: "What right, if any, does a noncustodial parent have to an evidentiary hearing to relitigate custody over a proposed move away?" (*Id.* at p. 959.) This court said: "Consistent with *Dunn*, we hold an evidentiary hearing in a move-away situation should be held only if necessary." (*Id.* at p. 962.) The trial court need not take oral evidence

"if the noncustodial parent's allegation or showing of detriment to the child is insubstantial in light of all the circumstances presented in the case, or is otherwise legally insufficient to warrant relief." (*Ibid.*) "[A]n evidentiary hearing serves no legitimate purpose or function where the noncustodial parent is unable to make a prima facie showing of detriment in the first instance, or has failed to identify a material but contested factual issue that should be resolved through the taking of oral testimony. *As in other family law contexts*, application of this procedure in move-away cases fosters the goal of judicial economy and reduces litigation costs and unnecessary distress for the parents and children involved." (*Ibid.*, italics added.)

The *Brown and Yana* opinion's reference to "other family law contexts" suggests that other family law issues besides a proposed move-away may be tried without affording the litigants an absolute right to present oral testimony. Local Rule 12.5(b)(3) is consistent with that suggestion. The local rule also aligns with *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1247, where this court, in holding that there is no right to oral argument when an appellate court issues a peremptory writ in the first instance, observed that a "hearing" in a "legal sense" does "not necessarily encompass oral presentations."

Brown and Yana narrowed the scope of *Campos*, saying: "*Campos* does not stand for the proposition that a noncustodial parent who opposes a move away has an *absolute* right to an evidentiary hearing for purposes of establishing detriment to a child or determining the best interest of a child. Reasonably viewed, *Campos* simply recognized the duty of the trial court to consider all relevant issues in a move-away case. Where, as here, a trial court in a move-away case diligently inquires into the matter of detriment in a formal court hearing, and duly considers the noncustodial parent's claims, evidence, and offers of proof but properly finds them insufficient to establish the detriment required for a custody modification under the changed circumstances

rule, the court does not err or abuse its discretion in denying custody modification without taking the further step of holding an evidentiary hearing." (37 Cal.4th at p. 965, italics added.) This establishes the absence of an *absolute* right to present oral testimony in a family law case.

Brown and Yana concluded that, given the circumstances of that case, the trial court "acted *well within its discretion* to deny [the] request for an evidentiary hearing." (37 Cal.4th at p. 965, italics added.) Thus, *Brown and Yana* exemplifies the discretionary nature of decisions in family law cases whether to permit a trial of issues on written direct testimony. Such decisions are subject to appellate review for abuse of discretion, but no such abuse can be demonstrated here, because Jeffrey never asked the trial court to *exercise* its discretion to hear live direct testimony. (See *ante*, p. 12.)

II.

LOCAL RULE 12.5(b)(3) IS CONSISTENT WITH CONSTITUTIONAL PRINCIPLES.

A. Federal and sister state cases establish that the constitutional right of due process allows decisions on written direct evidence in nonjury trials.

Next, we address the question whether Local Rule 12.5(b)(3) is consistent with constitutional principles. Again, the answer is yes. The federal courts in nonjury trials routinely allow the presentation of direct evidence by written testimony subject to oral cross and redirect examination.

"The use of written testimony 'is an accepted and encouraged technique for shortening bench trials.'" (*In re Adair, supra,* 965 F.2d at p. 779, quoting *Phonetele, Inc. v. American Tel. & Tel. Co.* (9th Cir. 1989) 889 F.2d 224, 232.) "Accordingly, we have held that a district court did not abuse its discretion in accepting only declarations and exhibits on a particular issue where the parties were afforded 'ample opportunity to submit their evidence.'" (*Ibid.*, quoting *Vieux v. East Bay Regional Park Dist.* (9th Cir. 1990) 906 F.2d 1330, 1342.) A procedure that permits oral cross and redirect examination "preserves an opportunity for the judge to evaluate the declarant's demeanor and credibility." (*Ibid.*)

The procedure is commonly allowed in bankruptcy actions because it "is essential to the efficient functioning of the crowded bankruptcy courts." (*In re Adair, supra,* 965 F.2d at p. 779; accord, *In re Geller* (1994) 170 B.R. 183, 186.) Some bankruptcy courts have adopted local rules expressly requiring the presentation of direct evidence by written testimony subject to oral cross and redirect examination. (E.g., U.S. Bankr. Ct., Local Rules,

Eastern Dist. Cal, rule 9017-1; U.S. Bankr. Ct., Local Rules, So. Dist. Fla., Local Forms, form LF-63-AJC; U.S. Dist. Ct., Local Rules., Dist. Nev., rule 9017.) The procedure is commonly called an "alternative direct testimony procedure."

This procedure is not limited to bankruptcy actions but can be used in any federal nonjury proceeding. For example, in *Kuntz v. Sea Eagle Diving Adventures Corp.* (D. Haw. 2001) 199 F.R.D. 665, the district court required submission of direct testimony by declaration in a nonjury trial for personal injury: "The court has found that live cross-examination and live redirect examination of witnesses have provided ample opportunity for this court to assess their demeanor and credibility. When parties have chosen not to cross-examine a witness, credibility of that particular witness has not been in question." (*Id.* at p. 666.)

Other federal opinions have expressly endorsed the procedure outside the bankruptcy context. (See, e.g., *Bellaire Gen. Hosp. v. Blue Cross Blue Shield* (5th Cir. 1996) 97 F.3d 822, 825-826 [action for breach of contract and/or violation of ERISA]; *Ball v. Interoceanica Corp.* (2d Cir. 1995) 71 F.3d 73, 76 [action to recover ship pilot fees].) In a few federal district courts, the procedure is expressly authorized for all civil cases by local rules of court. (See U.S. Dist. Ct., Local Civ. Rules, Central Dist. Cal., rule 43-1; U.S. Dist. Ct., Local Rules, D. Mass., rule 16.5.)

In *In re Stevinson* (1996) 194 B.R. 509, the court expressly rejected a *due process* challenge to the alternative direct testimony procedure: "The objection that requiring direct examination by declaration somehow violates due process of law is . . . without foundation. All that is necessary for a trial procedure to satisfy due process is to provide the parties with fair notice and an opportunity to submit their evidence to an impartial arbiter. . . . As an efficient means of managing ever increasing dockets, the bankruptcy court is

well within the ambit of due process in requiring direct examination by declaration followed by the opportunity for cross-examination and redirect questioning." (*Id.* at p. 512; see *U.S. v. Raddatz* (1980) 447 U.S. 667, 677 [100 S.Ct. 2406, 2413, 65 L.Ed.2d 424] [guarantees of due process call only for a "'hearing appropriate to the nature of the case'"].)

This procedure is also used in family law matters in the State of Washington, where courts have likewise found that it comports with due process. "[D]ue process does not require the court to take oral testimony. Procedural due process requires that the state may not deprive a liberty or property interest without giving reasonable notice and an opportunity to be heard to the person who is to suffer the deprivation. [Fn. omitted.] However, the forms of procedural due process vary according to the exigencies of the particular situation. [Fn. omitted.] The due process clause does not grant parties an inherent right to present oral evidence." (*In re Marriage of Henches* (Wash.Ct.App., Nov. 6, 2000, No. 41887-4-I) 2000 WL 1667394 at *3;[5/] see also *State ex. rel. McGuire v. Howe* (1986) 44 Wash.App. 559, 565 [723 P.2d 452, 455] ["there is no inherent right to offer oral evidence in support of a litigant's defense"].)

A treatise on federal trial practice summarizes: "In a bench trial, either party may offer, or the court may require, direct testimony by *written submission*. . . . [¶] . . . But the witness should still be cross-examined at trial in order to provide an opportunity to assess the witness' demeanor." (Jones et al., Cal. Practice Guide: Fed. Civil Trials & Evidence (The Rutter Group 2005) ¶ 9:15, p. 9-2, original italics; see also ¶ 17.15.2, p. 17-5 [court may require direct written testimony "so long as the court preserves an opportunity to

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5/ A copy of this unpublished opinion is included in a separately-bound "Appendix Of Cited Authorities" filed with this return. (See Cal. Rules of Court, rule 977(c).)

observe a declarant's demeanor and gauge his or her credibility during *oral cross-examination*" (original italics)].) The treatise lists this point as one of several strategy matters "to be considered when deciding whether to waive a jury and try the case to the court." (*Id.* ¶ 17:1, p. 17-1.)

Surely the federal courts are not routinely violating due process rights by requiring presentation of written direct evidence in nonjury trials.

B. Courts of equity, such as family law courts, have traditionally decided cases on written evidence, a practice endorsed by the United States Supreme Court.

Jeffrey's petition for review asserts that "a local rule requiring 'trial by declaration' is the antithesis of what we know and think of being a 'trial,' which is a form where the trier of fact listens to the testimony, looks the parties in the [sic] their eyes, and weighs credibility and then determines the truth." (Pet. for review, p. 24.) Jeffrey's letter replying to Marilyn's informal opposition to review asks: "Why is family law different than any other bench trial?" (Letter of Garrett C. Dailey to Cal. Supreme Court dated Dec. 28, 2005, p. 10.)

The answer is twofold.

First, family law is *not* different from any other bench trial. In *any* bench trial, the judge may require submission of written direct evidence subject to oral cross and redirect examination – in federal courts under rule 611(a) of the Federal Rules of Evidence, and in California state courts under subdivision (a) of Evidence Code section 765.

Second, family law courts are *courts of equity*. (*In re Marriage of Calcaterra and Badakhsh* (2005) 132 Cal.App.4th 28, 38; *In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, 1360; see *Sharon v. Sharon*

(1885) 67 Cal. 185, 193 [asserting appellate jurisdiction in divorce cases based on former constitutional provision for Supreme Court jurisdiction "'in all cases in equity'"].) What Jeffrey has in mind as "what we know and think of being a 'trial'" (pet. for review, p. 24) is the traditional trial in the English *common law courts*, which heard live testimony. The English courts of equity, in contrast, traditionally tried cases only on written evidence.

"[C]ommon law trials were public events that relied principally on in-court testimony by persons familiar with the pertinent events, while the 'basic rule of the classic chancery system' [fn. omitted] was to make decisions on the basis of written materials developed during discovery or submitted by the parties." (Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure* (1989) 50 U. Pitt. L.Rev. 725, 726 (hereafter Marcus), quoting Millar, Civil Procedure of the Trial Court in Historical Perspective (1952) p. 270.) "Equity did not take testimony in open court, but relied on documents . . . ." (Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective* (1987) 135 U. Pa. L.Rev. 909, 918 (hereafter Subrin).)

Equity's practice of taking only written evidence was modeled on a similar trial practice in the English ecclesiastical courts. (Marcus, *supra*, 50 U. Pitt. L.Rev. at p. 730.) In the mid-18th Century, Blackstone described a "species of trial" called *trial by certificate*. (Blackstone, Commentaries On the Laws of England (1765-1769) pp. 330, 333.)[6/] Trial by certificate was available "where the evidence of the person certifying is the only proper criterion of the point in dispute." (*Id.* at p. 333.) This means an issue turned on the evidence of a single witness, such as whether a person was "absent with

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6/ The Blackstone treatise is available online at: http://www.yale.edu.lawweb/avalon/blackstone/bk3ch22.htm (as of Mar. 23, 2006.)

the king in his army out of the realm in time of war," which was "tried by the certificate of the mareschall of the king's host in writing under his seal." (*Id.* at pp. 333-334.) In matters under ecclesiastical jurisdiction, cases turned on the evidence of a cleric and thus could be tried on the cleric's written certificate. This included *family* matters, such as marriage and bastardy, which were heard in the ecclesiastical courts. "[I]f a man claims an estate by descent, and the tenant alleges the defendant to be a bastard," or "if on a writ of dower the heir pleads no marriage," the matter could be tried by certificate. (*Id.* at p. 335.)

Thus, the trial of family law cases on written evidence is firmly rooted in Anglo-American legal history – in both the ecclesiastical courts and the courts of equity, where "[t]he use of written direct testimony has venerable precedent." (Marcus, *supra*, 50 U. Pitt. L.Rev. at p. 745.).

In America, before and during the gradual merger of our law and equity courts, federal statutes and court rules governing equity procedure were repeatedly changed, seesawing between the use of written and oral testimony. The First Judiciary Act of 1789, section 30, provided that "'the mode of proof by oral testimony and examination of witnesses in open court shall be the same . . . in the trial of causes in equity . . . as of actions at common law.'" (Marcus, *supra*, 50 U. Pitt. L.Rev. at p. 731.) Thus, the early federal equity courts were required to adopt the law court practice of hearing oral testimony. But that state of affairs quickly changed. In 1802, the Act was amended to permit federal judges to take written evidence if the states in which they held court did so. In 1822, federal equity rules were adopted which allowed federal judges to take written testimony subject to a guaranteed opportunity to present oral testimony. In 1842, however, the equity rules were changed to return the law to the traditional equity practice in which only written evidence was

permitted. In 1893, the rules were relaxed to allow oral testimony in the court's discretion. (*Id.* at pp. 731-732.)

Despite this vacillation, "[d]uring the nineteenth century, the [United States] Supreme Court made it clear that oral testimony in equity cases was not favored even if permitted." (Marcus, *supra*, 50 U. Pitt. L.Rev. at p. 733.) In 1875, the Court said: "While . . . we do not say . . . the circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now *they are not by law required to do so* . . . ." (*Blease v. Garlington* (1875) 92 U.S. 1, 7-8, italics added.)

In 1913, the federal equity rules were changed yet again to require oral testimony. (See Marcus, *supra*, 50 U. Pitt. L.Rev. at pp. 734.) But, once again, the repudiation of equity procedure was short-lived. In 1938, the Federal Rules of Civil Procedure were adopted, replacing the 1913 equity rules. The new Federal Rules of Civil Procedure, which remain the law today, were "revolutionary" in that they made "equity procedure available for all cases" (Subrin, *supra,* 135 U. Pa. L.Rev. at p. 913) and adopted "a procedural system dominated by equity" (*id.* at p. 975).

Equity procedure thus is now the dominant federal approach, which explains why federal courts in nonjury trials routinely allow the presentation of written direct testimony subject to oral cross and redirect examination. As Professor Richard L. Marcus observed in 1989, "judicial creativity in the 1980s has sparked interest in innovations reminiscent of the equity approach. . . . The common pattern presented here is that judges are shaping adjudication to rely on something other than in-court testimony of witnesses." (Marcus, *supra*, 50 U. Pitt. L.Rev. at pp. 737-738.)

If, in 1875, the United States Supreme Court could endorse the intermittent and currently prevailing federal practice of trying equity cases on

written evidence, then surely there is no constitutional impediment to that practice in state court family law trials today.

III.

LOCAL RULE 12.5(b)(3) IS SOUND POLICY.

A. Local Rule 12.5(b)(3) is essential to the fair, efficient and expeditious resolution of family law cases in Contra Costa County.

Finally, we address the various policy justifications for Local Rule 12.5. First and foremost, it promotes the efficient and expeditious resolution of family law cases.

The last two decades of the 20th Century saw an explosion of family law litigation in California, with the total number of cases increasing by 184,657, or 63 percent, between 1981 and 2000. (Aikman & Viscia, Exploring the Work of the California Trial Courts: A 20-Year Retrospective (2003) p. 73.)[7/] Just like in the bankruptcy courts, "[t]he luxury of unlimited court time is no longer with us." (*In re Geller, supra,* 170 B.R. at p. 186; see *ante*, p. 20.)

California's trial courts have struggled to keep pace. The judges of Contra Costa County have responded with Local Rule 12.5, which is designed to streamline procedures in family law matters so that they can be brought to trial within a reasonable period of time.

The Superior Court of San Francisco County has done the same, adopting a similar local rule for family law trials: "Unless the Court, in its

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7/ This publication is available online at: http://www.courtinfo.ca.gov/reference/4_12supct_retro.htm (as of Mar. 23, 2006).

discretion, enters other orders in a specific case, the direct testimony of any witness shall be presented by declaration executed under penalty of perjury. . . . The party offering the witness' declaration shall make the witness available for cross-examination at the time of the hearing, if requested by the opposing party seven calendar days prior to trial." (Super. Ct., S.F. County, Local Rules, rule 11.14(A); see *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1427, fn. 5 [citing, with approval, prior version of San Francisco local rule authorizing offers of proof in lieu of direct testimony at any law and motion hearing "or any other hearing *or trial* at the Court's discretion" (italics added)].)

In Contra Costa County, this procedure has achieved its objective. Prior to Local Rule 12.5(b)(3), the court was setting family law trials from six to eight months out. That delay has now been substantially reduced. Currently, three of the court's four family law departments are setting trials from one to three months out; the fourth department, which began regularly taking written direct evidence in January 2006, is setting trials from four to five months out, and that time is continuing to shorten. (*Ante*, p. 5, ¶ 6.)

Delay reduction in family law trials by submission of written direct testimony is a worthy objective which, as in move-away cases and other family law contexts, "fosters the goal of judicial economy and reduces litigation costs and unnecessary distress for the parents and children involved." (*In re Marriage of Brown and Yana, supra,* 37 Cal.4th at p. 962.) As one Court of Appeal said within the context of family law trials on the issue of child support: "Family law calendars, especially district attorney child support calendars, are so large that the system would collapse if every motion or trial on the issue of child support required a full-scale evidentiary hearing." (*County of Alameda v. Moore, supra*, 33 Cal.App.4th at p. 1427.) Thus, "informality in conducting hearings *and trials* in district attorney support *and*

marital dissolution cases . . . is encouraged to expedite the proceedings . . . ." (*Id.* at pp. 1423-1424, italics added.) An important condition is that "decisions on disputed factual issues in such cases must be based upon evidence presented in declarations under penalty of perjury, by offers of proof or through oral testimony." (*Id.* at p. 1424; but see *Denny H. v. Superior Court, supra*, 131 Cal.App.4th at p. 1514 [acknowledging "dicta" in *County of Alameda v. Moore* regarding "practice of using nonstipulated offers of proof" but noting that nonstipulated offers of proof are not evidence].) That condition is satisfied by Local Rule 12.5(b)(3).

Another policy justification is that, like *Reifler*-izing in law and motion hearings, Local Rule 12.5(b)(3), by limiting the occasions for adversarial confrontation between estranged spouses, "provides for a more pleasant, less formal, nonadversary atmosphere" (*In re Marriage of Stevenot, supra,* 154 Cal.App.3d at p. 1059, fn. 3), "while minimizing personal conflict between the parties" (*County of Alameda v. Moore, supra,* 33 Cal.App.4th at p. 1424).

Yet another policy justification is that, in the experience of the judges of Contra Costa County, Local Rule 12.5(b)(3) and the court's trial scheduling orders assist self-represented litigants in family law actions by giving them direction as to how to prepare for trial, how to frame issues properly, and how to present evidentiary support for their positions, and thereby avoid being "blindsided" by the adverse party. (*Ante*, p. 5, ¶ 7.) Although self-represented litigants are generally held to the same standards as attorneys (see, e.g., *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 65), the judicial system benefits as a whole when litigants, represented or not, are guided through a fair process as efficiently as possible.

The federal courts have found similar benefits from trying cases on written direct evidence. Judge Charles R. Richey, one of the federal judges who pioneered this innovation in the 1980s, observed: "Written direct

testimony prepared in advance . . . eliminates unfair surprise and 'trial by ambush,' techniques whose time has past [*sic*] in the modern-day quest for the highest quality of justice." (Richey, *supra,* 72 Geo. L.J. at p. 74.)

Finally, the judges of Contra Costa County have found that Local Rule 12.5(b)(3) encourages settlement of marital dissolution issues, such as custody, visitation, and property valuation and disposition, by apprising both sides, well in advance of trial, of the facts that will be presented. (*Ante*, p. 5, ¶ 8.)

Professor Marcus pointed out a potential downside to written direct evidence: "[A] procedure that relies on lawyers' submission of written or substitute materials could well be taken not to be a 'day in court' by litigants." (Marcus, *supra,* 50 U. Pitt. L.Rev. at p. 776; see also *Medix Ambulance Service, Inc. v. Superior Court, supra,* 97 Cal.App.4th at p. 112 ["In spite of the need for efficiency, courts should not lose sight of the need that parties be given their 'day in court.'"].) But any such potential downside is countered by the many policy justifications for the practice: delay reduction, conflict minimization, assistance for self-represented litigants, avoidance of trial by ambush, and encouragement of settlement.

Professor Marcus concluded: "Assuming that in an ideal world the common law mode of trial is preferable, that ideal may have little meaning to litigants enmeshed in a judicial system that lacks resources and time to afford them the ideal trial." (Marcus, *supra,* 50 U. Pitt. L.Rev. at p. 783.) "The use of written direct evidence may save trial time that would otherwise be wasted on things that do not need to be presented orally. [¶] This sort of innovation is entirely consistent with the common law trial tradition." (*Id.* at p. 787.) Judge Richey similarly concluded: "Written direct testimony in advance of trial may not be the orthodox manner of proceeding in court, but, as the authorities have clearly pointed out, techniques that are the culmination of extensive experience of trial judges are implicitly authorized by the *goal* of the Rules of

Evidence – the expeditious accomplishment of justice." (Richey, *supra,* 72 Geo. L.J. at p. 83, original italics.)

This is the sort of pragmatic jurisprudence that Justice Oliver Wendell Holmes, Jr. must have had in mind when he said: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (Holmes, The Common Law (1881) p. 1.)

B. Credibility issues are commonly decided on declarations, no less reliably than on live testimony.

Jeffrey's petition for review asks: "How does one weigh credibility from a declaration, undoubtedly written by the party's attorney?" (Pet. for review, p. 22.) The answer is that *it happens all the time*.

There are many situations where credibility issues are decided on declarations: e.g., whether to grant a preliminary injunction, what amount of attorney's fees to award, or whether to grant a new trial based on juror misconduct. Those situations are so common that this court has recently been called upon to determine the proper standard of appellate review of such credibility determinations – substantial evidence or de novo review. (*Fair v. Bakhtiari,* review granted Jan. 12, 2005, S129220 [on appeal from order denying motion to compel arbitration, Court of Appeal did not defer to trial court's factual findings made on written declarations].)

In trial court *writ* proceedings, "the trial court has broad discretion to decide a case on the basis of declarations and other documents rather than live, oral testimony." (*California School Employees Assn. v. Del Norte County*

Unified Sch. Dist. (1992) 2 Cal.App.4th 1396, 1405.) Even in original writ proceedings before the Court of Appeal, the appellate court will sometimes make factual determinations based on declarations supporting the petition. (See, e.g., *McCarthy v. Superior Court* (1987) 191 Cal.App.3d 1023, 1030 & fn. 3.) Such procedure is entirely consistent with Anglo-American legal history, given the fact that "equitable principles apply" in writ proceedings. (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 671.)

Jeffrey's point that "hundreds of thousands of dollars changed hands" on this proceeding (pet. for review, p. 36) is irrelevant. Millions of dollars can change hands on post-trial attorney's fees motions, but that does not mean they cannot be decided on declarations. If there were a constitutional due process right to present oral testimony whenever property is at stake, then awards of attorney's fees on declarations would be unconstitutional, which is surely not the case.

Similarly, whether to grant a preliminary injunction can be an "extremely important decision[]," yet "courts have long been supposed to be able to determine the proper weight to give to affidavits." (Marcus, *supra*, 50 U. Pitt. L.Rev. at p. 771.) Live testimony is not required. (*City and County of San Francisco v. Evankovich* (1977) 69 Cal.App.3d 41, 55.)

Recent psychological research has cast doubt on the notion that credibility is more reliably assessed on live testimony than on written evidence. As Professor Marcus observed in 1989, such research "indicates that most people do a poor job of using demeanor evidence to determine whether a declarant is lying or telling the truth." (Marcus, *supra,* 50 U. Pitt. L.Rev. at p. 758.) Most researchers "report that people are not much better than chance in detecting lies. [Fn. omitted.] If that is accurate, there seems to be little compelling reason to favor adjudication methods that stress live testimony." (*Id.* at p. 760.)

Recent studies confirm that "behavioural differences between liars and truth-tellers are generally few in number and unimpressive in size," and that "people are not very good at detecting deception" by observing demeanor. (DePaulo & Morris, *Discerning lies from truths: Behavioural cues to deception and the indirect pathway of intuition*, in Deception Detection In Forensic Contexts (2005, P.A. Granhag & L.A. Stromwall, eds.) 15, 31.)[8/] "Across hundreds of experiments, typical rates of lie/truth discrimination are slightly above 50%. For the grand mean, 54% is a reasonable estimate" for detecting deception based on observation of demeanor. (Bond & DePaulo, *Accuracy of Deception Judgments* (2006) Personality and Social Psychology Review (in press), manuscript p. 38.)[9/] In other words, "the average person discriminates lies from truths at a level slightly better than s/he could achieve by flipping a coin . . . ." (*Id.* at p. 39.)

One study even "found that subjects whose main communication experience was written learned more from written than oral presentations . . . . Since judges presumably are well familiar with receiving information in written form, these results support using that mode for them." (Marcus, *supra,* 50 U. Pitt. L.Rev. at p. 765.) That alone is a compelling justification for using written direct evidence in nonjury trials.

8/ This book chapter is available online at: http://www.people.virginia.edu/~wlm7a/deception_proof.8-2-04pdf.pdf (as of Mar. 23, 2006).

9/ The manuscript of this in-press article is included in the separately-bound "Appendix of Cited Authorities" filed with this return.

IV.

WHETHER THE TRIAL SCHEDULING ORDER IS CONSISTENT WITH STATUTES GOVERNING ADOPTION OF LOCAL COURT RULES WILL SOON BE A MOOT POINT, AND IS ONE THAT JEFFREY LACKS STANDING TO ASSERT.

The remaining issue – whether the trial scheduling order (TSO) in the present case is consistent with statutes governing adoption of local court rules – will be mooted by the pending adoption of the TSO's provisions (with some improvements) within new Local Rule 12.8, which is expected to become effective on July 1, 2006.[10/] (*Ante*, p. 5, ¶ 9.) Once that process is completed, those provisions will be part of the local rules of the Superior Court of Contra Costa County and it will no longer matter that they were not previously so.

Also, Jeffrey lacks standing to assert this issue. The trial court relieved him of the two requirements of the TSO with which he failed to comply – explanation of exhibits in his declaration and timely filing and exchange of binders. (See *ante*, pp. 11-12.) Thus, he is not aggrieved on this point. (Code Civ. Proc., §§ 902 [appeal may be taken only by a "party aggrieved"], 1110 [statutes governing appeals also apply to writ proceedings].)

10/ New Local Rule 12.8 is available online at http://www.cc-courts.org/comment.

CONCLUSION

Local Rule 12.5(b)(3) is consistent with California's statutory and case law, with constitutional principles, with traditional equity practice, and with sound public policy. For all of those reasons, this court should hold that the rule is valid.

Dated: March 29, 2006

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, rule 28.1(d)(1)]

The text of this brief consists of 9,036 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: March 29, 2006

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Jon B. Eisenberg