



Conserving Britney: the Law, the Facts about Conservatorships, and the Future

Thursday, July 29, 2021

Program - 12:00 - 2:00 p.m.

Zoom Webinar

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Conserving Britney: the Law, the Facts about Conservatorships, and the Future

July 29, 2021 12:00—2:00 PM

Presented by: LACBA Trusts & Estates Section, Beverly Hills Bar Association, Orange County Bar Association & South Bay Bar Association

AN OVERVIEW OF CONSERVATORSHIP PROCEEDINGS – PART 1

MODERATORS: Deborah Keesey  Gavin Wasserman

SPEAKERS

Justice Maria E. Stratton  Honorable Mary Thornton House (Ret.)

Honorable Kim Hubbard  Honorable Clifford Klein (Ret.)

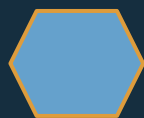
Dr. Christina Hui  Matthew Kanin  Jeffrey Marvan

John Rogers  William Sias



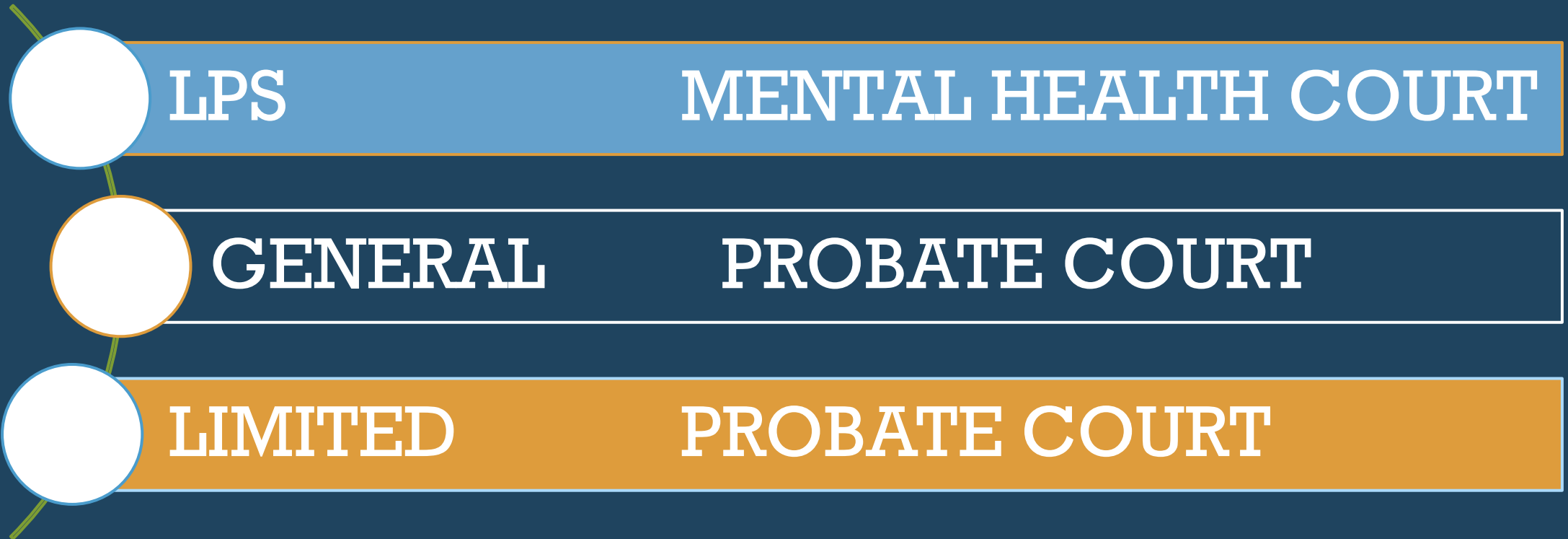
ALERT: **CANON 3B(9) OF THE CALIFORNIA CODE OF JUDICIAL ETHICS**


“A judge **SHALL NOT** make any **public** comment about a pending or impending proceeding in any court and **SHALL NOT** make any **nonpublic** comment that might substantially interfere with a fair trial or hearing.”



This rule applies to assigned judges, temporary judges, court-appointed referees, and court appointed arbitrators.


WHAT IS A CONSERVATORSHIP?





COMMONALITIES: SEE PROBATE CODES §§1801/1827/1829

For the Person: Is this person unable to provide properly for his/her/their personal needs for physical health, goods, clothing or shelter?




For the Estate: Is this person substantially unable to manage his/her/their own financial resources or resist fraud or undue influence?


Substantial inability ≠ isolated incidents of negligence or improvidence

Standard of Proof: CLEAR AND CONVINCING EVIDENCE

► **CONSERVATEE CAN DEMAND A JURY TRIAL**



Objectors can include: proposed conservatee, spouse/registered partner, a relative, any interested person or friend of the proposed conservatee



PROBATE CODE §1800.3

- If all of the requirements of the Probate Code are satisfied and the need for a conservatorship is established “to the satisfaction of the court,” then a court may appoint:
 - A conservator of the person or estate of an adult, or both
 - A conservator of the person of a minor who is married or whose marriage has been dissolved.
- No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the **least restrictive alternative** for the **protection** of the conservatee.





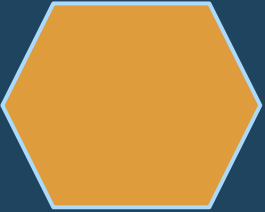

TYPICAL POWERS OF A CONSERVATOR



Conservator of the Person (COP)

- Fix the residence of the conservatee
- Make medical decisions for the conservatee
- Control the sexual and social contacts of the conservatee
- Control the right to marry

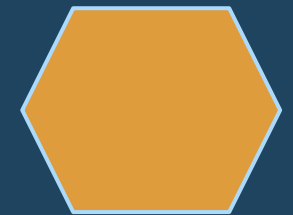
Conservator of the Estate (COE)

- Make financial decisions
 - Enter into contracts on behalf of the Conservatee
 - Sue for and/or defend Conservatee in lawsuits
 - Engage in investment of Conservatee's assets
- 
- 

WHO CAN BE APPOINTED CONSERVATOR?


A hierarchy exists for appointment:

- Wishes of the conservatee
- Spouse/domestic partner
- Adult child of proposed conservatee
- Parent of proposed conservatee, sibling, or their nomination of someone
- Private Professional/Public Fiduciary





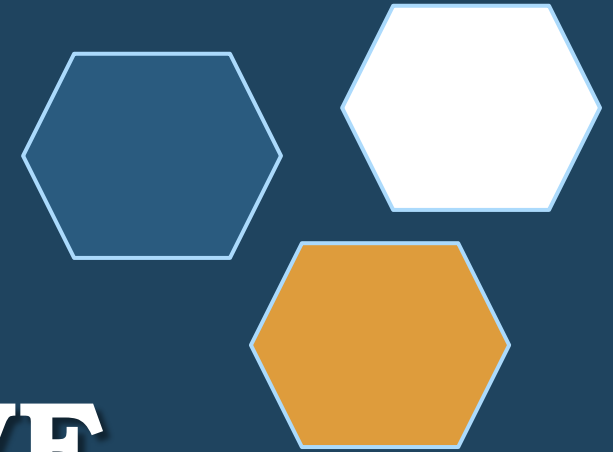
THE COURT'S PRIMARY DUTY

- A court always must act in the proposed conservatee's best interests in selecting a conservator. (Probate Code §1812(a))
 - Substantial evidence is evidence of “ponderable legal significance.” (*Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390,401)
 - Probate Courts are **Courts of Equity** with the express purpose for the protection of vulnerable persons.
- 

LEAST RESTRICTIVE ALTERNATIVES

Judge Clifford Klein (Ret.)

William Sias

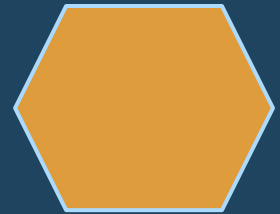




FOR WHOM IS A CONSERVATORSHIP ESTABLISHED?

Judge Mary Thornton House (Ret.)

Jeffery Marvan





FOCUS TODAY: GENERAL AND LIMITED CONSERVATORSHIPS

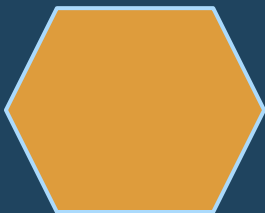
- **LIMITED CONSERVATORSHIPS:**

Designed for the Developmentally Disabled Adult

Powers Granted to Conservator Tailored to Permit Developmentally Disabled Person to Care/Manage their Affairs Commensurate with their ability to do so

- **GENERAL CONSERVATORSHIPS:**

All are Unique, But Common Scenarios are persons who are suffering from various levels of cognitive impairment through dementia, mental infirmities, comatose, stroke victims, or in a vegetative state



WHAT ARE THE RIGHTS RETAINED BY A CONSERVATEE?

GAL

SEALED
RECORDS

Judge Maria Stratton

CI

CAC



B. INITIATING CONSERVATORSHIPS AND ALTERNATIVES

Judge Kim Hubbard

Judge Clifford Klein (Ret.)



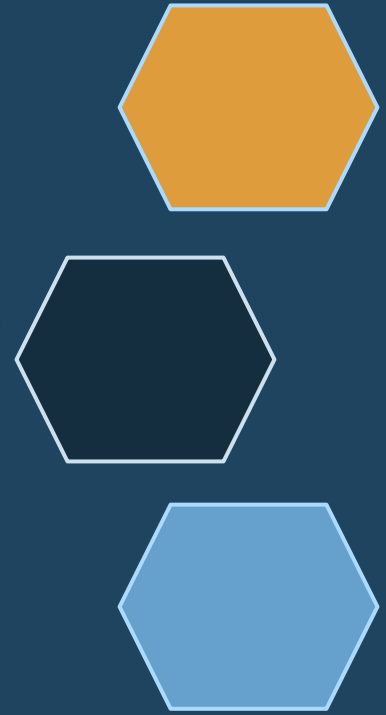
C. THE ROLE OF COURT APPOINTED COUNSEL & COURT INVESTIGATOR

Justice Maria Stratton

Judge Kim Hubbard

Matthew Kanin

Jeffrey Marvan

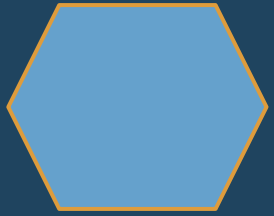


TOPICS INCLUDE:

- Ethical Standards of Court Appointed Counsel (CAC)
- Training
- Qualifications
- Issues with Private Counsel and the Court's Role
- What Do Other Counties Do?



THE ROLE OF THE MEDICAL CONSULTANT



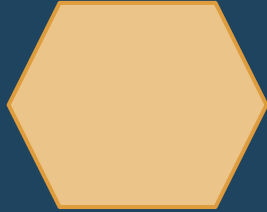
Dr. Christina Hui



Justice Maria Stratton

Judge Clifford Klein (Ret.)

Judge Kim Hubbard



- Diagnosis and Presentation

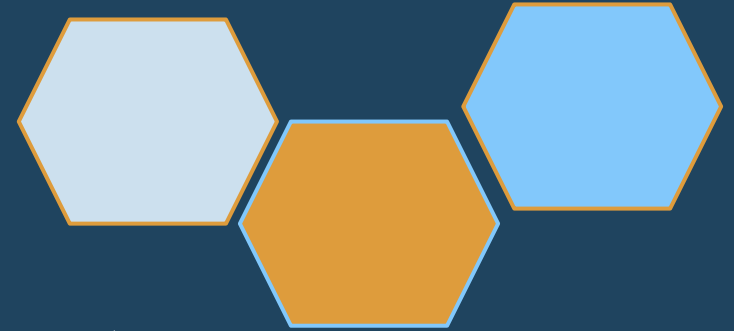


- What does the Court do with it?
- How do other Counties treat it?

DIAGNOSIS AND PRESENTATION



- Common scenarios



- Evaluation of the proposed conservatee

- Capacity Declaration: informed by elements Probate Code 810-813
 - GC-335 is the form required by California courts
- Additional powers may be granted re: placement and medication for individuals with dementia



CAPACITY DECLARATION

Judicial Council Form(s)

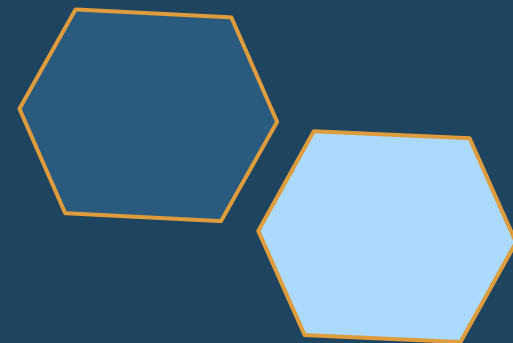
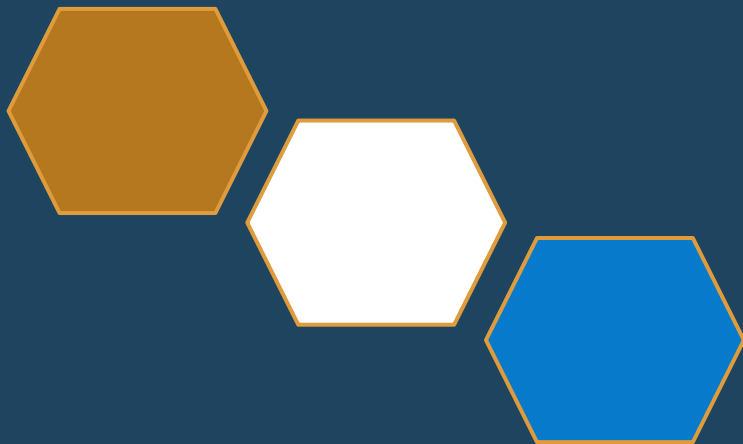
GC-335

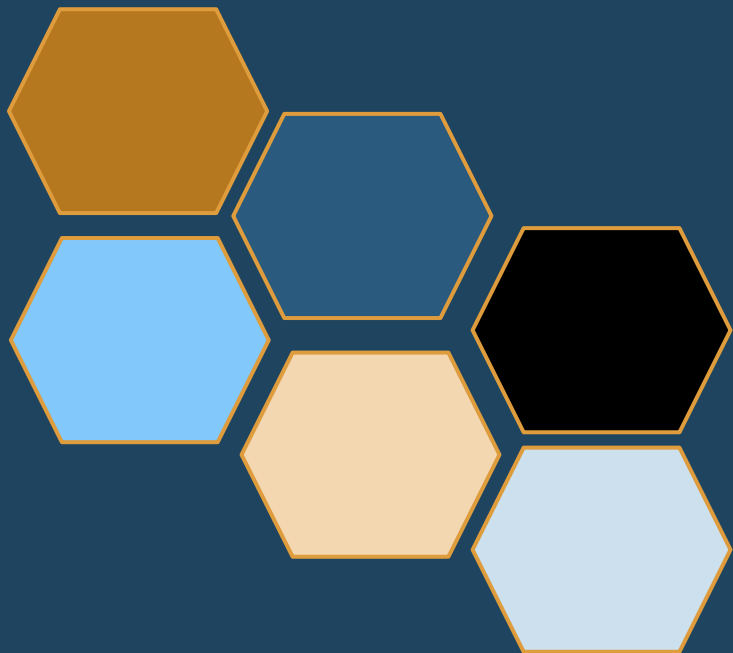
GC-335(a)



TERMINATION OF A CONSERVATORSHIP

- Dr. Christina Hui
- Judge Kim Hubbard
- Justice Maria Stratton
- Grounds for Termination
- Medical Evidence
- Procedures for Termination





QUESTIONS?



**THANK YOU FOR
YOUR
PARTICIPATION!**

Conservatorship of the Person and Estate of MARIA B. DENISE B.

as Conservator, etc., Petitioner and Respondent

v.

MARIA B.

Objector and Appellant

218 Cal.App.4th 514

160 Cal.Rptr.3d 269

[No. G047889.

Fourth Dist., Div. Three.

July 31, 2013.]

Citing Cases 27

(Superior Court of Orange County, No. A235201, Mary Fingal Schulte, Judge.)

(Opinion by Aronson, J., with O'Leary, P.J., and Ikola, J., concurring.)

Frank Ospino, Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Mark S. Brown, Assistant Public Defender, and Kira Rubin, Deputy Public Defender, for Objector and Appellant.

Joseph M. Geis and Andrea Gee for Petitioner and Respondent.

OPINION

ARONSON, J.-

As appellant Maria B.'s mother and limited conservator, Denise B. petitioned the trial court for an order authorizing her to consent to a hysterectomy and oophorectomy on Maria's behalf. ¹ Maria is a developmentally disabled adult who suffers from numerous health problems, including an abnormally long and heavy menses and debilitating migraine headaches that usually coincide with the onset of her menses. After numerous other treatments for Maria's severe menstrual bleeding and migraines failed, her doctors recommended a hysterectomy and oophorectomy to treat Maria's condition.

The trial court found **Probate Code section 2357** and its provisions regulating court-ordered medical treatment governed Denise's petition, rather than **Probate Code section**

1950 et seq., and its provisions regulating sterilization of developmentally disabled adults.

² As explained below, we agree **section 2357** governs because the objective of the proposed surgery is to treat ***519** Maria's medical conditions, not to prevent her from bearing children. Although the proposed surgery would result in Maria's sterilization, that is the incidental effect of the medically necessary treatment.

In deciding the merits of Denise's petition, the trial court found the preponderance of the evidence standard of proof applied instead of the more stringent clear and convincing evidence standard. We conclude the trial court erred in doing so because the proposed surgery would have a substantial and irreversible impact on Maria's fundamental right to procreative choice. Accordingly, the heightened standard of proof is required to protect that fundamental right and ensure the proposed surgery is truly a medical necessity.

We affirm the trial court's order granting Denise's petition, however, because Maria's counsel failed to show it is reasonably probable the trial court would have reached a different conclusion if it had applied the proper standard, and therefore failed to show the error was prejudicial.

I

FACTS AND PROCEDURAL HISTORY

Maria is a 25-year-old developmentally disabled adult who suffers from cerebral palsy, mild mental retardation, and hydrocephalus, which is an accumulation of excessive fluid in the brain. She functions academically and socially at approximately a first- or second-grade level and uses sign language to communicate because she is congenitally deaf. Denise is Maria's mother. In 2006, the trial court appointed Denise as the limited conservator of Maria's person and estate with the power to give and withhold medical consent on Maria's behalf.

To treat her hydrocephalus Maria has surgically implanted shunts that drain excess fluid from her brain to her abdominal cavity and thereby relieve some of the pressure in her head. The shunts, however, are susceptible to failure or infection and periodically have required surgical adjustment or relocation, although her current shunts can be moved without surgery using a special magnet.

Maria began her menses at age 11 and has experienced increasingly irregular menstrual cycles with excessive bleeding that lasts for an abnormally long period each cycle. Denise estimated Maria often would bleed 26 days per month, and frequently could not stand up without bleeding through her sanitary protection and clothing. Maria's condition caused her to experience low iron, chronic fatigue, bloating, and abdominal cramping. ***520**

In approximately 2008, Maria began having severe and debilitating migraine headaches. On a daily basis, Maria experienced headaches she rated a three on a scale from zero to 10,

but more than 10 times per year she suffered severe migraines she rated a seven or eight on the same scale. The onset of these migraines caused Maria to become weak and often collapse in pain, requiring numerous emergency room visits and six or seven hospitalizations. The migraines sometimes occurred when Maria's shunts failed or required relocation, but most of the time they coincided with the start of her period. Doctors at the hospital treated Maria with powerful pain medication, performed CAT scans to ensure her shunts were working properly, and then sent her home where she would sleep for a day or two. Maria worked with a pain management team at St. Joseph's Hospital and a specialist with the Department of Mental Health in an unsuccessful attempt to control the intense pain.

In 2009, Maria began seeing Dr. John W. Chen, a neurologist. To prevent her debilitating headaches, Chen prescribed Maria narcotic and prophylactic medications, and also referred Maria to neurosurgeons who performed multiple procedures to manipulate and adjust her shunts. Unfortunately, none of these treatments provided Maria any significant relief from her migraines. Because Maria's migraines usually coincided with her severe and lengthy menses, and because the change in hormone levels associated with a woman's menses can cause migraines, Chen recommended Maria see a doctor specializing in obstetrics and gynecology.

In 2010, Dr. Robert Borrowdale, an obstetrician and gynecologist, began treating Maria. Between February and July 2010, Borrowdale placed Maria on birth control pills to regulate her hormone levels and control her menses, but that treatment proved unsuccessful. In July 2010, Borrowdale performed a dilation and curettage on Maria to remove the lining of her uterus to reduce her bleeding. The procedure temporarily worked, but her bleeding soon resumed. Following the dilation and curettage procedure, Borrowdale prescribed a modified birth control pill regimen, but that too failed to curb Maria's excessive menstrual bleeding and severe migraines. In April 2011, Borrowdale stopped giving Maria birth control pills and prescribed Depo Provera, which is another form of birth control administered by an injection every 90 days.

The Depo Provera shots controlled Maria's menstrual bleeding and severe migraines for nine or 10 weeks, but her heavy bleeding and severe migraines would resume at that point. Maria would then have to endure the pain because she could not receive another shot until the end of the 90-day period. Consequently, she often had to visit the emergency room to obtain pain medication for the two or three weeks before she could receive her next shot. ***521** Moreover, Depo Provera may be taken only for approximately two years because it decreases the patient's bone density.

Having exhausted the less intrusive treatments described above, Borrowdale recommended Maria undergo a total hysterectomy. After consulting with Chen, Borrowdale revised his recommendation to also include an oophorectomy because the two doctors believed Maria's menstrual migraines were caused not only by her heavy bleeding but also the fluctuation in hormone levels caused by her ovaries.

Chen agreed a hysterectomy and oophorectomy offered Maria a viable treatment option because several of his other patients obtained migraine relief after undergoing those procedures. Without the hysterectomy and oophorectomy, Chen testified he would continue to treat Maria in the same manner -- using various medications and dosages to treat Maria's pain and prevent her migraines. This treatment also would require adjusting or relocating her shunts as needed. That course of action, however, concerned Chen. He explained prolonged use of these medications could cause liver or kidney failure, the repeated CAT scans required to examine the shunts would expose Maria's brain to increased radiation levels, and the repeated shunt adjustments would increase the risks of bleeding in her head.

Both Borrowdale and Chen discussed the proposed surgery with Maria, explaining the hysterectomy and oophorectomy could potentially help with her headaches, but would permanently prevent her from having children. Maria told both doctors she wanted the surgery performed.

In July 2012, Denise petitioned the trial court for an order authorizing her, as Maria's conservator, to consent to a hysterectomy and oophorectomy on Maria's behalf. Denise brought the petition under **section 2357**, which governs court ordered medical treatment. After several continuances, the court conducted a two-day trial on the petition in December 2012. Denise, Chen, and Borrowdale testified to the foregoing facts in support of the petition.

Acting as Maria's appointed counsel, the public defender opposed the petition on the grounds that (1) **section 1950 et seq.**, regarding sterilization of developmentally disabled persons, provided the controlling statutory procedures for the petition; (2) Maria lacked the capacity to provide informed consent for the proposed surgery; and (3) Denise failed to show by clear and convincing evidence that the proposed surgery was medically necessary. The only witness the public defender called was Dr. Thomas J. Grayden, a forensic psychiatrist who interviewed Maria shortly before trial. Grayden opined Maria met the criteria for schizophrenia and lacked the capacity to ***522** consent to the hysterectomy and oophorectomy. He also submitted a report describing Maria as suicidal and lacking mental stability. During closing argument, Maria asked to speak and asserted, "I want the surgery, I want the -- I want it removed. I have headaches, no periods."

The trial court took the matter under submission and later issued a detailed ruling granting the petition. The court found **section 2357** provided the controlling authority because Denise sought to obtain medical treatment for Maria's condition and sterilization was only an incidental effect of the treatment. The court further found the preponderance of the evidence standard was the controlling burden of proof and Denise presented sufficient evidence under that standard to show (1) Maria's medical condition "requires the recommended course of treatment"; (2) "there is a probability that the continuance of this condition will result in a serious threat to the mental health of Maria";

and (3) "Maria lacks the capacity to give an informed consent to this particular recommended course of treatment."

The trial court clerk forwarded the trial court's ruling to this court as an automatic appeal under **section 1962, subdivision (b)**, and California Rules of Court, rule 8.482. Later, the trial court requested that we dismiss this appeal because it erred in treating the matter as an automatic appeal. We invited the parties to brief the issue. After considering the briefs, we elected to review the matter as an automatic appeal on an expedited schedule.

II DISCUSSION

A. Legal Background

[1] We must first decide whether Denise's petition falls under the provisions of **section 2357** or **section 1950 et seq. Section 2357** is part of the Probate Code chapter concerning the powers and duties of a guardian or conservator of the person. The statute allows a guardian or conservator to petition for a court order authorizing medically necessary treatment for a ward or conservatee when (1) the ward or conservatee is unable to give informed consent for the treatment, and (2) the guardian or conservator lacks authority to consent on the ward or conservatee's behalf without a court order.³ (**§ 2357, subd. (b).**) Under **section 2357** the court must appoint the *523 public defender or a private attorney "to consult with and represent the ward or conservatee at the hearing on the petition." (**§ 2357, subd. (d).**) The court may grant the petition "if the court determines from the evidence all of the following: [¶] (1) The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment. [¶] (2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the ward or conservatee. [¶] (3) The ward or conservatee is unable to give an informed consent to the recommended course of treatment." (**§ 2357, subd. (h).**)

[2] **Section 1950 et seq.** is a separate Probate Code chapter that only addresses requests to sterilize a developmentally disabled adult. The comprehensive statutory scheme recognizes the fundamental nature of every person's "right to exercise choice over matters of procreation," including the right to choose sterilization, and establishes detailed procedures to ensure "no individual [is] sterilized solely by reason of a developmental disability and that no individual who knowingly opposes sterilization [is] sterilized involuntarily." (**§ 1950.**)

Under this statutory scheme, the conservator of an adult, or any person allowed to petition for appointment of a conservator, may file a petition for "appointment of a

limited conservator authorized to consent to the sterilization of an adult with a developmental disability." (**§ 1952.**) If the person named in the petition has not retained legal counsel and does not plan to do so, the court must immediately appoint the public defender or a private attorney to represent the person and "undertake the representation with the presumption that the individual opposes the petition." (**§ 1954.**) The court also must appoint a facilitator for the person named in the petition to help the person understand the nature of the proceedings so the person may participate as fully as possible. (**§ 1954.5.**) Two physicians and a psychologist or clinical social worker must conduct "comprehensive medical, psychological, and sociosexual evaluations of the individual" and prepare a written report for the court and all parties. (**§ 1955.**)

[3] After receiving the report and the evidence, the court may grant the petition "only if the court finds that the petitioner has established all of the following beyond a reasonable doubt:" (1) the person named in the petition lacks the capacity to consent to the sterilization and that lack of capacity is likely permanent; (2) the person is fertile and capable of procreation; (3) the person is capable of engaging in sexual activity under circumstances likely to result in pregnancy; (4) either (a) the person's disability renders him or her ***524** permanently incapable of caring for a child even with training and assistance, or (b) pregnancy or childbirth would pose a substantially elevated risk to the person's life so that sterilization would be deemed medically necessary for a nondisabled person under similar circumstances; (5) all less invasive contraceptive methods are unworkable; (6) the sterilization method proposed entails the least intrusion of the person's body; (7) current scientific and medical knowledge does not suggest that either (a) a reversible sterilization procedure or less drastic contraceptive method will be available shortly, or (b) "science is on the threshold of an advance in the treatment of the individual's disability"; and (8) the person has not made a knowing objection to the sterilization. (**§ 1958.**) A court must issue a statement of decision for any order granting a petition and "an appeal is automatically taken by the person proposed to be sterilized without any action by that person, or by his or her counsel." (**§ 1962.**)

B. Section 2357 Provides the Controlling Standards and Procedures

[4] Maria's counsel contends **section 1950 et seq.** governs Denise's petition because the proposed hysterectomy and oophorectomy will result in Maria's sterilization. She argues the purpose of the proposed surgery is irrelevant if sterilization is a probable consequence of the procedure. We disagree. By its express terms, the application of **section 1950 et seq.** depends on whether the purpose of the proposed medical procedure is sterilization or a medically necessary treatment of a separate ailment. A court therefore must examine the purpose of the procedure, not its incidental effects.

[5] "In reviewing a statute, "[w]e first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.]

The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." [Citation.] If the statutory language is unambiguous, "we presume the Legislature meant what it said, and the plain meaning of the statute governs." [Citation.] [Citation.]" (**Wolski v. Fremont Investment & Loan (2005) 127 Cal.App.4th 347, 351.**) "'Issues of statutory interpretation are questions of law subject to our independent or de novo review. [Citations.]' [Citations.]" (**Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (2010) 187 Cal.App.4th 808, 820.**)

Section 1968 states, "This chapter does not prohibit medical treatment or surgery required for other medical reasons and in which sterilization is an unavoidable or medically probable consequence, but is not the object of the treatment or surgery." Moreover, **section 1961** provides, "A sterilization procedure authorized under this chapter shall not include hysterectomy or *525 castration. However, if the report prepared under **Section 1955** indicates that hysterectomy or castration is a medically necessary treatment, regardless of the need for sterilization, the court shall proceed pursuant to **Section 2357.**"

[6] When these two sections are read together, their language unambiguously establishes the proposed medical procedure's purpose dictates whether a petition for court approval must proceed under **section 1950 et seq.** or **section 2357.** The petition must proceed under **section 1950 et seq.** if the procedure's objective is to sterilize the individual. (Cf. **Conservatorship of Angela D. (1999) 70 Cal.App.4th 1410, 1419 (Angela D.)** [applying **section 1950 et seq.** to application for court order authorizing sterilization of a developmentally disabled woman because a pregnancy "would be devastating and perhaps fatal" to the woman and the fetus].) The petition must proceed under **section 2357.** however, if the procedure's objective is to treat a medical condition and sterilization is merely a secondary effect. (Cf. **Maxon v. Superior Court (1982) 135 Cal.App.3d 626, 628, fn. 2 (Maxon)** [applying **section 2357** to an application for a court order authorizing a hysterectomy to treat cervical cancer].)

Maria's counsel provides no authority or interpretation of **sections 1961** and **1968** to support the contention **section 1950 et seq.** applies to all medical procedures that could result in sterilization. Instead, Maria's counsel focuses on the numerous procedures and protections **section 1950 et seq.** provides without explaining why they apply in this case. Counsel's only argument regarding **section 1968** is that the section does not prevent **section 1950 et seq.** from applying in this case because the proposed medical procedures are merely recommendations rather than medical requirements. This argument misses the mark. Whether the proposed procedures are medically necessary speaks to the petition's merits, not to which of the two statutory schemes applies to the petition.

There is no dispute the purpose for the proposed hysterectomy and oophorectomy is to treat Maria's severe menstrual migraines and bleeding; sterilization is a secondary effect of a necessary medical procedure designed only to alleviate Maria's suffering. Indeed, Maria's counsel does not argue or offer any evidence to show Denise sought court

approval for the surgery for any reason other than treating Maria's migraines and bleeding. Accordingly, we conclude **section 2357** governs Denise's petition and we therefore review the trial court's ruling based on that section.

C. The Trial Court Erred In Applying the Preponderance of the Evidence Standard of Proof

In deciding the petition, Maria's counsel asked the trial court to apply the clear and convincing evidence standard of proof. Unfortunately, Maria's *526 counsel failed to cite any authority or otherwise explain why that standard applied. The trial court rejected the request and applied the preponderance of the evidence standard of proof because the court found nothing in **section 2357** suggested the clear and convincing evidence standard applied. We conclude the trial court erred because the impact the proposed hysterectomy and oophorectomy would have on Maria's fundamental procreative rights requires the heightened standard of proof to ensure the surgery is medically necessary under **section 2357**.

[7] "The function of a standard of proof is to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision. [Citation.] Thus, 'the standard of proof may depend upon the "gravity of the consequences that would result from an erroneous determination of the issue involved.'" [Citation.]" (**Conservatorship of Wendland (2001) 26 Cal.4th 519, 546 (Wendland)**.) "The required minimum standard reflects a 'societal judgment about how the risk of error should be distributed between the litigants.' [Citation.]" (**People v. Jason K. (2010) 188 Cal.App.4th 1545, 1556 (Jason K.)**.) Choosing the applicable standard of proof is a question of law we review de novo. (**In re Marriage of Ettefagh (2007) 150 Cal.App.4th 1578, 1584.**)

[8] Under the preponderance of the evidence standard, the parties share the risk of an erroneous factual determination "'in roughly equal fashion.'" (**Jason K., supra, 188 Cal.App.4th at p. 1556.**) [9] "The beyond a reasonable doubt standard is 'designed to exclude as nearly as possible the likelihood of an erroneous judgment' and 'imposes almost the entire risk of error upon [the party bearing the burden of proof].' [Citation.]" (**Ibid.**) [10] The clear and convincing evidence standard represents an "intermediate standard" that increases the burden on the party seeking relief and thereby reduces the risk of error to the opposing party. (**Ibid.**) Specifically, "[t]he 'clear and convincing evidence' test requires a finding of high probability, based on evidence "'so clear as to leave no substantial doubt' [and] 'sufficiently strong to command the unhesitating assent of every reasonable mind.'" [Citations.]" (**Wendland, supra, 26 Cal.4th at p. 552.**)

[11] **Section 2357** is silent on which standard of proof applies to a petition authorizing the conservator to consent to medical treatment on a conservatee's behalf. ⁴ "The default standard of proof in civil cases is the *527 preponderance of the evidence." (**Wendland, supra, 26 Cal.4th at p. 546**; see **Evid. Code, § 115** ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Courts nonetheless apply the heightened clear and convincing evidence standard in a variety of civil cases when certain important or fundamental rights are at stake. (**Wendland, at pp. 546, 555**; see also **Jason K., supra, 188 Cal.App.4th at pp. 1556-1557**.)

For example, the clear and convincing evidence standard applies in actions to (1) sterilize a developmentally disabled adult conservatee; (2) withhold artificial nutrition and hydration from an incompetent adult conservatee; (3) appoint a conservator based on a person's inability to provide for his or her personal needs; (4) permit involuntary electroconvulsive therapy; (5) civilly commit a person to a mental hospital; (6) terminate parental rights; (7) deport a person; and (8) discipline a judge. (**Wendland, supra, 26 Cal.4th at pp. 546-547**; **Jason K., supra, 188 Cal.App.4th at pp. 1556-1557**; see also 1 Witkin, Cal. Evidence (5th ed. 2012) Burden of Proof and Presumptions, § 40, pp. 212-214.)

In **Conservatorship of Valerie N. (1985) 40 Cal.3d 143 (Valerie N.)**, the California Supreme Court held a person's right to procreative choice is a fundamental right that requires courts to apply the clear and convincing evidence standard in actions seeking authorization to sterilize a developmentally disabled conservatee. (**Id. at pp. 161-164**.) **Valerie N.** considered the constitutionality of former section 2356, subdivision (d), which effectively denied incompetent conservatees the right to choose sterilization as a method of contraception by prohibiting their conservators from consenting to sterilization on their behalf. ⁵ The Supreme Court found the statute constitutionally overbroad because "[t]rue protection of procreative choice can be accomplished only if the state permits the court-supervised substituted judgment of the conservator to be exercised on behalf of a conservatee who is unable to personally exercise this right." (**Valerie N., at p. 168**.)

The **Valerie N.** court urged the Legislature to pass legislation allowing a conservator to consent to sterilization on his or her incompetent conservatee's behalf, but also providing criteria and procedures to ensure the conservatee is sterilized for an appropriate reason, not merely because he or she is incompetent or developmentally disabled. ⁶ In the interim, the Supreme Court explained **section 2357**'s procedures for approving intrusive medical treatments *528 should be adapted and applied to requests for authorization to sterilize an incompetent conservatee. One of the adaptations the **Valerie N.** court identified as necessary to protect the conservatee's fundamental right to procreative choice required the conservator to present clear and convincing evidence of the need for sterilization. (**Valerie N., supra, 40 Cal.3d at p. 168**.)

In **Maxon**, the court held a conservatee's fundamental right to procreative choice required the conservator to present clear and convincing evidence of the need for a medical procedure that would treat a potentially life-threatening condition, but also would result

in the conservatee's sterilization. Specifically, the conservator petitioned for authorization to consent to a hysterectomy for her conservatee because the conservatee had been diagnosed with cervical cancer and three doctors recommended the surgery to prevent the cancer from becoming malignant. (Maxon, supra, 135 Cal.App.3d at p. 628.) The trial court found clear and convincing evidence the surgery was medically necessary, but the court denied the petition because it found former section 2356, subdivision (d)'s prohibition against sterilizing incompetent conservatees prevented the court from granting the petition. (Maxon, at pp. 631, 634.)

The Court of Appeal reversed, finding section 2356, subdivision (d), did not apply because "the purpose of the proposed surgery [was] to protect the life of the incompetent rather than to prevent her from bearing children." (Maxon, supra, 135 Cal.App.3d at p. 633.) As for the standard of proof, the Maxon court found the petition "must be supported by clear and convincing evidence of the medical necessity for the operation . . . [b]ecause we view a hysterectomy as a serious and intrusive invasion of [the conservatee's] right of privacy." (Id. at pp. 633-634.) The court further explained, "[a]n elevated standard of proof in a proceeding to determine whether or not such an operation is of 'medical necessity' will lessen the possible risk that a factfinder might decide to sterilize an individual on unsubstantiated testimony or discredited eugenic theories." (Id. at p. 634.) The Maxon court concluded the trial court should have granted the petition because clear and convincing evidence supported the court's finding the surgery was medically necessary to treat the conservatee's cervical cancer. (Ibid.)

[12] Here, we conclude the clear and convincing evidence standard is required to protect Maria's fundamental right to procreative choice. Although the objective of the proposed hysterectomy and oophorectomy is to treat Maria's severe menstrual migraines and bleeding, the surgery would have a substantial and irreversible impact on her right to procreative choice by denying her the opportunity to bear children. Denise therefore must present clear and convincing evidence to show the surgery is medically necessary under section 2357. We do not suggest the clear and convincing evidence standard is required on all section 2357 petitions. As the trial court stated, *529 nothing in the statute suggests that result. Rather, we merely require the clear and convincing evidence standard in this case because the proposed medical treatment significantly impacts a fundamental right. The appropriate standard in every case will depend on the specific medical procedure proposed and whether it impacts a fundamental right, but the clear and convincing standard will be the exception rather than the norm.

We emphasize the purpose of requiring a heightened burden of proof in this case is not to prevent Denise from obtaining medical treatment for Maria that could potentially provide Maria some relief from her severe menstrual migraines and bleeding. Rather, the purpose is to (1) emphasize the importance of the decision that would substantially affect Maria's fundamental right to procreative choice, and (2) place the risk of any error in making that decision on an outcome that would not impact the fundamental right at issue and could later be changed. (See Wendland, supra, 26 Cal.4th at pp. 546-547

[purpose of heightened standard of proof includes emphasizing importance of underlying decision and adjusting the risk of error to protect the fundamental right at stake].)

For example, if the trial court erred in finding the proposed surgery was not medically necessary and erroneously denied the petition, Maria would retain the ability to bear children and Denise could file a new petition after obtaining further medical evidence to support the need for the surgery. But if the trial court mistakenly concluded the proposed surgery was medically necessary, Maria would lose the ability to bear children and that outcome could not be altered. (See **Wendland, supra, 26 Cal.4th at p. 547** [involving petition for authorization to remove life-sustaining treatment].) We acknowledge Maria would continue to suffer from her severe menstrual migraines and bleeding in the first scenario, but Denise could rectify this result by making a more comprehensive showing regarding the medical need for the surgery. Moreover, if the surgery is truly a medical necessity, Denise should be able to present sufficient evidence to establish that fact by clear and convincing evidence. We emphasize the clear and convincing evidence standard is higher than the preponderance of the evidence standard, but lower than the beyond a reasonable doubt standard the Legislature requires when the medical procedure's objective is to sterilize the conservatee. (**Jason K., supra, 188 Cal.App.4th at p. 1556; § 1958.**)

[13] Denise contends neither **Valerie N.** nor **Maxon** required the trial court to apply the clear and convincing evidence standard. According to Denise, **Valerie N.** is distinguishable because there the objective of the proposed medical procedure was to sterilize the conservatee, but the objective of the proposed medical procedure here is to treat Maria's severe menstrual migraines and bleeding. The analysis regarding the appropriate standard of *530 proof, however, examines the nature of the right that would be affected, not the objective of the proceedings that would affect the right. ⁷ (**Jason K., supra, 188 Cal.App.4th at pp. 1556-1557** ["To determine whether a proof standard meets this constitutional minimum, the courts evaluate . . . the private interest affected by the proceeding"]; see also **Wendland, supra, 26 Cal.4th at pp. 546-547.**) For instance, the **Maxon** court applied the clear and convincing evidence standard based on the significant impact the proposed medical procedure would have on the conservatee's fundamental right to procreation even though the procedure's objective was to treat a potentially life-threatening medical condition. (**Maxon, supra, 135 Cal.App.3d at pp. 633-634.**)

In Denise's view, the **Maxon** court's discussion regarding the clear and convincing evidence standard of proof is dicta because the issue in **Maxon** was whether former section 2356, subdivision (d), prevented the trial court from granting the petition for authorization to consent on the conservatee's behalf. Denise is mistaken. After determining former section 2356, subdivision (d), did not apply, the **Maxon** court necessarily discussed the governing standard of proof to determine whether the trial court applied the correct standard in finding the proposed surgery was medically necessary and whether the evidence supported that finding. (**Maxon, supra, 135 Cal.App.3d at p. 634** ["Our review of the record before us indicates that the trial judge

applied the appropriate standard and that his findings are overwhelmingly supported by clear and convincing evidence"].) The Maxon court could not have reached its decision directing the trial court to grant the petition without addressing the appropriate standard of proof.

Denise also contends the Supreme Court's Wendland decision requires us to apply the preponderance of the evidence standard, but she misconstrues the significance of that decision. Wendland involved a conservatee's fundamental right to refuse medical treatment, including life-sustaining artificial nutrition and hydration, and a conservator's exclusive authority under section 2355 to make healthcare decisions for an incompetent conservatee. (Wendland, supra, 26 Cal.4th at pp. 530-533, 538-541.) Section 2355 requires the conservator to make all healthcare decisions for a conservatee consistent with any formal healthcare instructions or informal wishes the conservatee expressed while still competent. If a conservatee left no indication regarding his or her wishes, section 2355 requires the conservator to make decisions based on the conservatee's best interest. (§ 2355, subd. (a).) *531

In Wendland, the conservator petitioned the court for authorization to withdraw artificial nutrition and hydration from an incompetent conservatee who suffered a brain injury, but was conscious and not terminally ill. (Wendland, supra, 26 Cal.4th at pp. 523-524.) The Supreme Court concluded the conservator must present clear and convincing evidence showing the withdrawal of life sustaining treatment was consistent with the conservatee's wishes or best interests, but concluded the conservator had failed to make the requisite showing. (Id. at pp. 546-548, 554.) In reaching that decision, the court acknowledged the Law Revision Commission comment to section 2355 stated the default preponderance of the evidence standard should apply to section 2355 petitions because the statute does not specify any special evidentiary standard. Nonetheless, the Wendland court found the clear and convincing evidence standard applied because it involved the conservatee's fundamental right to refuse life-sustaining treatment. (Wendland, at pp. 542-543, 555.) The Supreme Court, however, limited its holding to the specific facts of the case, explaining, "we see no constitutional reason to apply the higher evidentiary standard to the majority of health care decisions made by conservators not contemplating a conscious conservatee's death." (Id. at pp. 543, 555.)

Denise relies on this statement to support her contention we must apply the preponderance of the evidence standard because Denise's petition did not request authorization to withdraw life-sustaining treatment. Wendland, however, construed section 2355, not section 2357, and nonetheless supports our conclusion the clear and convincing evidence standard applies to Denise's petition. Indeed, despite its conclusion "the vast majority of health care decisions made by conservators under section 2355" are governed by the preponderance of the evidence standard, the Wendland court applied the clear and convincing evidence standard because the petition at issue affected the conservatee's fundamental right to refuse medical treatment. (Wendland, supra, 26 Cal.4th at pp. 543, 555.) As explained above, a conservatee's right to procreative choice

also is a fundamental right that requires application of the clear and convincing evidence standard. Accordingly, even though the two cases involve different fundamental rights, **Wendland** supports our conclusion the clear and convincing evidence standard applies.

Finally, Denise argues we should apply the preponderance of the evidence standard because it allows us to balance the competing interests in this case, namely, Maria's right to procreative choice and her right to receive medical treatment. Denise's reliance on **Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1**, is inapposite, however. **Hill** involved a cause of action for violation of the California Constitution's right to privacy based on the National Collegiate Athletic Association's requirement that collegiate athletes submit to random drug tests. (**Id. at pp. 8-9**.) **Hill** did not address the appropriate standard of proof in a ***532** proceeding seeking court approval for a medical treatment or other action that would affect a person's fundamental rights. Moreover, the statement Denise cites regarding the preponderance of the evidence standard is from a dissenting opinion. (**Id. at pp. 85-86 (dis. opn. of Mosk, J.)**.)

D. Maria's Counsel Failed to Show the Trial Court's Error Was Prejudicial

Although the trial court erred, we may not reverse the trial court's order granting Denise's petition unless Maria's counsel shows it is reasonably probable the trial court would have denied the petition had it applied the correct standard of proof. We affirm the trial court's order granting the petition because Maria's counsel failed to make this required showing.

California's Constitution provides, "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (**Cal. Const., art. VI, § 13**; see also **Code Civ. Proc., § 475**.)

"The effect of this [constitutional] provision is to eliminate any presumption of injury from error, and to require that the appellate court examine the evidence to determine whether the error did in fact prejudice the [appellant]. Thus, reversible error is a relative concept, and whether a slight or gross error is ground for reversal depends on the circumstances in each case.' [Citation.] [¶] The phrase 'miscarriage of justice' has a settled meaning in our law, having been explained in the seminal case of **People v. Watson (1956) 46 Cal.2d 818, 299 P.2d 243 (Watson)**. Thus, 'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] 'We have made clear that a "probability" in this context does not mean more likely than not, but

merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (**Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 800**, original italics (**Cassim**).)

The **Watson** standard applies in both criminal and civil cases, and requires appellate courts to "examine 'each individual case to determine whether prejudice actually occurred in light of the entire record.'" (**Cassim, supra, 33 Cal.4th at pp. 801-802.**) Under this standard, the appellant bears the burden to make an "affirmative showing" the trial court committed error *533 that resulted in a miscarriage of justice. (**Century Surety Co. v. Polisso (2006) 139 Cal.App.4th 922, 963**; see **Citizens for Open Government v. City of Lodi (2012) 205 Cal.App.4th 296, 308.**)

Here, Maria's counsel failed to explain how the result would have been any different if the trial court applied the clear and convincing evidence standard of proof instead of the preponderance of the evidence standard. At trial, Denise bore the burden to present evidence establishing (1) Maria's medical condition "requires the recommended course of medical treatment"; (2) if Maria's condition remains untreated, "there is a probability that the condition will become life-endangering or result in a serious threat to [Maria's] physical or mental health"; and (3) Maria "is unable to give an informed consent to the recommended course of treatment." (**§ 2357, subd. (h).**)

To meet this burden Denise presented her own testimony and testimony from Chen and Borrowdale describing Maria's severe menstrual migraines and bleeding, the numerous unsuccessful treatments the two doctors attempted, the proposed hysterectomy and oophorectomy as the next step in Maria's treatment, the risks associated with continuing the current course of treatment without the surgery, and Maria's desire to have the surgery performed. The only witness Maria's counsel called was Grayden, who opined that Maria lacked the capacity to consent to the proposed hysterectomy and oophorectomy. Maria's counsel called no witnesses to rebut the evidence regarding Maria's severe menstrual bleeding and migraines or the threat her condition posed to her health. Although Maria's counsel criticized Denise for failing to try other less intrusive treatments before seeking court approval for the proposed hysterectomy and oophorectomy, Maria's counsel failed to present any evidence to show other less intrusive treatments had not been tried.

Maria's counsel now argues the proposed hysterectomy and oophorectomy was merely a "recommendation, not a requirement," but counsel misconstrues the required showing under **section 2357**. **Section 2357** requires the party seeking court approval to present evidence establishing the medical condition "requires the recommended course of medical treatment." (**§ 2357, subd. (h)(1).**) That is precisely the finding the trial court made based on Denise's evidence and Maria's counsel did not present any evidence to rebut that finding.

[14] Accordingly, we affirm the trial court's ruling granting Denise's petition despite the court's application of the incorrect standard of proof. Maria's counsel failed to satisfy Maria's burden to show the trial court's error *534 caused Maria actual prejudice. Based

on our review of the record, we conclude Denise's un rebutted evidence regarding Maria's medical condition, the need for the proposed hysterectomy and oophorectomy, and the consequences for Maria if she did not have the surgery amount to clear and convincing evidence supporting the trial court's decision to grant Denise's petition. The trial court's lengthy and detailed decision demonstrates the court carefully considered all of the evidence in making the required findings under **section 2357, subdivision (h)**. Without some evidence to rebut Denise's evidence, Maria's counsel cannot establish a reasonable probability the trial court would have denied the petition under the heightened clear and convincing evidence standard.

Although not raised by Maria's counsel, we note the trial court's application of the incorrect standard of proof does not amount to structural error requiring automatic reversal. As explained above, an appellant generally is not entitled to a reversal unless he or she shows not only that the trial court erred, but also that the trial court's error actually prejudiced the appellant and resulted in a miscarriage of justice. That standard, however, does not apply when the trial court's error violates the United States Constitution and involves a defect in the trial mechanism that affects the framework within which the trial proceeds rather than simply an error in the trial process. (**Cassim, supra, 33 Cal.4th at p. 801, fn. 6; In re Angela C. (2002) 99 Cal.App.4th 389, 394.**) When a trial court's error amounts to structural error, reversal is required without regard to the strength of the evidence or other circumstances. (**In re Enrique G. (2006) 140 Cal.App.4th 676, 685.**)

In the civil context, structural error typically occurs when the trial court violates a party's right to due process by denying the party a fair hearing. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 8:309, p. 8-190 (rev. # 1, 2011) (Eisenberg et al., Civil Appeals and Writs).) Structural errors requiring automatic reversal include denying a party's request for a jury trial (**Martin v. County of Los Angeles (1996) 51 Cal.App.4th 688, 697-698**) and violating a party's right to present testimony and evidence (**Marriage of Carlsson (2008) 163 Cal.App.4th 281, 290-291**). (See **Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 579** ["In our view, if a civil litigant was permitted to introduce evidence, cross-examine witnesses, and present argument before a fairly selected jury that rendered its honest verdict on the trial record, there has been no 'structural [defect] in the constitution of the trial mechanism' that might call for automatic reversal of a civil judgment without consideration of actual prejudice"].) *535

Previous cases involving the erroneous application of the preponderance of the evidence standard rather than the clear and convincing evidence standard have not found structural error requiring automatic reversal. Instead, the reported cases have analyzed the error under the **Watson** standard and required a showing it was reasonably probable the appellant would have achieved a more favorable result under the proper standard of proof. (See, e.g., **People v. Englebrecht (2001) 88 Cal.App.4th 1236, 1257, fn. 7; In re Marriage of Weaver (1990) 224 Cal.App.3d 478, 488; Conservatorship of Sanderson (1980) 106 Cal.App.3d 611, 620-621.**)

III

DISPOSITION

The order is affirmed. Based on the parties' stipulation at oral argument, this opinion shall be final as to this court 10 days after it is filed. The clerk of this court is directed to immediately issue the remittitur upon finality. (Cal. Rules of Court, rule 8.272(c)(1); Eisenberg et al., Civil Appeals and Writs, *supra*, ¶¶ 11:192-11:193, p. 11-81; ¶ 14:24, pp. 14-5 to 14-6 (rev. # 1, 2012).) In the interest of justice, the parties shall bear their own costs on appeal.

O'Leary, P.J., and Ikola, J., concurred.

¹ A hysterectomy is a surgical procedure to remove a woman's uterus and an oophorectomy removes her ovaries.

² All statutory references are to the Probate Code unless otherwise stated.

³ **Section 2357, subdivision (b)**, states as follows: "If the ward or conservatee requires medical treatment for an existing or continuing medical condition which is not authorized to be performed upon the ward or conservatee under **Section 2252, 2353, 2354**, or **2355**, and the ward or conservatee is unable to give an informed consent to this medical treatment, the guardian or conservator may petition the court under this section for an order authorizing the medical treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to the medical treatment."

⁴ In contrast, **section 1958** requires a trial court to apply the beyond a reasonable doubt standard of proof when deciding a petition under **section 1950 et seq.** for a court order to sterilize a developmentally disabled adult.

⁵ Former section 2356, subdivision (d), provided, "No ward or conservatee may be sterilized under the provisions of this division." (Former § 2356, subd. (d).)

⁶ In response to **Valerie N.**, the Legislature enacted **section 1950 et seq.** (**Angela D.**, *supra*, **70 Cal.App.4th at pp. 1416-1417.**)

⁷ Whether **section 2357** or **section 1950 et seq.** governed Denise's petition relies on Denise's objective in bringing the petition, but our conclusion turned on statutory interpretation principles, not standard of proof principles.

(NAME):

CASE NUMBER:

**ATTACHMENT TO FORM GC-335,
CAPACITY DECLARATION – CONSERVATORSHIP
ADDITIONAL DETAILED INFORMATION**

TO PHYSICIAN, PSYCHOLOGIST, OR PSYCHIATRIST

The purpose of this attachment is to provide additional, more detailed information than is included in the Capacity Declaration - Conservatorship, to enable the court to determine whether the (proposed) conservatee has:

- A. The capacity to give informed consent to medical treatment and has the capacity to handle his/her financial affairs;
- B. Dementia and if so, (1) whether he or she needs to be placed in a secured-perimeter residential care facility for the elderly, and (2) whether he or she can remain in his/her home with full-time caregivers if resources are available, and (3) whether he/she would benefit from dementia medications;
- C. An acquired brain injury (brain tumor, stroke, seizure disorder, traumatic brain injury);
- D. An intellectual disability; and/or
- E. A psychiatric disability.

This attachment is to be completed only by a physician, psychologist, or psychiatrist. It should be filled out completely, signed and dated on the last page, and filed as an attachment to Judicial Council Form GC-355 (Capacity Declaration - Conservatorship) if ordered by the court or if the petitioner chooses.

GENERAL INFORMATION

- 1. (Name):
- 2. (Office address/phone number):
- 3. I am a California Licensed Physician Psychologist Psychiatrist acting within the scope of my licensure with at least 2 years' experience diagnosing dementia, acquired brain injury, intellectual disability or psychiatric disability.
- 4. (Proposed) conservatee (Name):
 - a. I last saw the (proposed) conservatee on (date):
 - b. The (proposed) conservatee is is NOT a patient under my continued treatment.

5. EVALUATION OF (PROPOSED) CONSERVATEE'S COGNITIVE FUNCTIONS

(Proposed) Conservatee's Level of Education:

Language spoken

Note to practitioner: This form is **not** a rating scale. It is intended to assist you in recording your impressions of the (proposed) conservatee's cognitive abilities. Where appropriate, you may refer to scores on standardized rating instruments.

(Instructions for items 5A and 5B): Check the appropriate designation as follows:

a = No Impairment **b** = Impairment Present **c** = So Impaired as to be incapable of being assessed

A. Alertness and Attention/Concentration:

(1) Levels of arousal (alert, lethargic, responds only to constant stimulation, stupor)

a b c

(2) Orientation (types of orientation impaired)

a	b	c	Person
a	b	c	Time (day, date, month, year, season)
a	b	c	Place (address, city, state)
a	b	c	Situation (Why, What, How?)

(3) Ability to attend and concentrate (type of attention/concentration impaired)

a	b	c	Focused (1-2 minutes)
a	b	c	Sustained (5 minutes)
a	b	c	Sustained (10-15 minutes)
a	b	c	Sustained (15-30 minutes)
a	b	c	Sustained (30 or more minutes)
a	b	c	Easily Distractible
a	b	c	Alternating/Divided (can multitask; cook, drive)

B. Information Processing: Ability to:

(1) Remember (ability to remember a question before answering, recall names, relatives, past presidents, events of the past 24 hours)

I	Immediate recall	a	b	c
II	Short-term memory	a	b	c
III	Long-term memory	a	b	c

(2) Understand and communicate either verbally or otherwise (deficits reflected by inability to comprehend questions, 3-step command, use words correctly, name objects)

a b c

(3) Recognize familiar objects and persons (deficits reflected by inability to recognize familiar faces, objects, family members)

a b c

(4) Understand and appreciate quantities (deficits reflected by inability to perform simple calculations)

a b c

(5) Understand and appreciate current life circumstances (deficits reflected by inability to acknowledge being dependent on others for life sustaining activities of daily living)

a b c

(6) Reason using abstract concepts (deficits reflected by inability to grasp abstract aspects of his/her situation or to interpret idiomatic expressions or proverbs)

a b c

(7) Plan, organize and carry out actions (or direct others to if physically unable) in one's own rational self-interest (deficits reflected by inability to break complex tasks down into simple steps and carry them out)

a b c

(8) Reason logically by weighing the pros and cons of a given situation to problem-solve or make a decision that is in the best interest of his/her person (deficits reflected by not coming to conclusions that include all information provided in writing, or in an auditory/visual format)

a b c

6. EVALUATION OF (PROPOSED) CONSERVATEE'S PSYCHIATRIC/PSYCHOLOGICAL FUNCTIONS

Note to practitioner: This form is **not** a rating scale. It is intended to assist you in recording your impressions of the (proposed) conservatee's psychiatric/psychological abilities. Where appropriate, you may refer to scores on standardized rating instruments.

(Instructions for items 6A and 6B): Check the appropriate designation as follows:

a = No Impairment **b** = Impairment Present **c** = So Impaired as to be incapable of being assessed

A. Thought Disorders

(1) Severely disorganized thinking (rambling thoughts, nonsensical, incoherent or nonlinear thinking)

a b c

(2) Hallucinations (auditory, visual, olfactory)

a b c

(3) Delusions (demonstrated by false beliefs maintained without or against reason or evidence)

a b c

(4) Uncontrollable or intrusive thoughts (unwanted compulsive thoughts, compulsive behaviors)

a b c

B. Ability to handle family environment (deficits reflected by inability to identify and/or deal with family dysfunction that is NOT in his/her best interest and/or unduly influences him/her to act in a self-destructive way)

a b c

C. **Ability to modulate mood and affect:** The (proposed) conservatee has does NOT have a pervasive and persistent or recurrent emotional state that appears inappropriate in degree to his/her circumstances. If so, complete 6C.

Instructions for item 6C & 6D Check the degree of impairment of each appropriate mood state (if any) as follows: **a** = mildly inappropriate **b** = moderately inappropriate **c** = severely inappropriate)

Anger	a	b	c	Euphoria	a	b	c
Anxiety	a	b	c	Depression	a	b	c
Fear	a	b	c	Hopelessness	a	b	c
Panic	a	b	c	Despair	a	b	c
Apathy	a	b	c	Helplessness	a	b	c
Irritability	a	b	c	Indifference	a	b	c

D. Personality Disorder/Character Disorder: The (proposed) conservatee has does NOT have a characterological personality disorder that interferes with his/her ability to make appropriate decisions that are in his/her best interests. If so, complete 6D.

Narcissistic Personality Disorder	a	b	c
Borderline Personality Disorder	a	b	c
Dependent Personality Disorder	a	b	c
Avoidant Personality Disorder	a	b	c
Schizoid Personality Disorder	a	b	c
Schizoaffective Personality Disorder	a	b	c
Paranoid Personality Disorder	a	b	c

E. The (proposed) conservatee's periods of impairment from the deficits indicated in items 6C & 6D.

- (1) do NOT vary substantially in frequency, severity or duration.
- (2) do vary substantially in frequency, severity, or duration (please explain; continue with an attachment if necessary):

F. (Optional) Any other information regarding this evaluation of the (proposed) conservatee's cognitive or psychiatric/psychological function is stated below stated in Attachment.

7. EVALUATION OF (PROPOSED) CONSERVATEE'S EVERYDAY FUNCTIONAL ABILITY

Note to practitioner: This form is **not** a rating scale. It is intended to assist you in recording your impressions of the (proposed) conservatee's daily functional abilities. Where appropriate, you may refer to scores on standardized rating instruments.

(Instructions for items 7A and 7C): Check the appropriate designation as follows:

a = No Impairment **b** = Impairment Present **c** = So Impaired as to be incapable of being assessed

A. Activities of Daily Living (ADLS)

Bathing: either sponge, shower or tub

a b c

(1) Dressing: includes choosing and obtaining clothing

a b c

(2) Toileting: going to toilet, cleaning self, and changing clothes

a b c

(3) Transfer: can get in and out of bed / can get on and off chair

a b c

(4) Continence: both urine and bowel function completely by self

a b c

(5) Feeding:

a b c

The (proposed) conservatee is **Independent** in **ALL** ADL functions _____

The (proposed) conservatee is **Dependent** in **ALL** ADL functions _____

B. (Optional) Any other information regarding this evaluation of the (proposed) conservatee's Activities of Daily Living function is stated below stated in Attachment.

C. Instrumental Activities of Daily Living (IADLS)

(1) Ability to use Telephone/Cellular Phone

a b c

(2) Shopping

a b c

(3) Food Preparation

a b c

(4) Housekeeping

a b c

(5) Laundry

a b c

(6) Mode of Transportation

a b c

(7) Responsible for Medications

a b c

(8) Ability to Handle Finances

a b c

The (proposed) conservatee is **Competent** in **ALL** IADL functions

The (proposed) conservatee is **Moderately Competent/Able to manage** in IADL functions

The (proposed) conservatee is **Not able to maintain self, even with help** in IADL functions

- D. (Optional) Any other information regarding this evaluation of the (proposed) conservatee's Instrumental Activities of Daily Living function is stated below stated in Attachment.

8. CAPACITY FOR (PROPOSED) CONSERVATEE TO MAKE PLACEMENT AND MEDICATION DECISIONS

A. Placement of (proposed) conservatee

- (1) The (proposed) conservatee would benefit from or needs placement in a restricted and secure facility.
- (2) The (proposed) conservatee would benefit from or needs 24-hour caregiver support in their home if resources are provided to the (proposed) conservatee.
- (3) The (proposed) conservatee HAS capacity to give informed consent to this placement.
- (4) The (proposed) conservatee does NOT have capacity to give informed consent to this placement.
- (5) A locked or secured-perimeter facility is is NOT the least restrictive environment appropriate to the needs of the (proposed) conservatee.

B. Administration of Medications to (proposed) conservatee

- (1) The (proposed) conservatee needs or would benefit from the following psychotropic medications appropriate to the care of his/her respective medical/psychiatric disorder:
- (2) The (proposed) conservatee HAS capacity to give informed consent to the administration of psychotropic medications appropriate to the care of his/her respective disorder.
- (3) The (proposed) conservatee does NOT have the capacity to give informed consent to the administration of psychotropic medications appropriate to the care of his/her respective disorder.

(4) The (proposed) conservatee needs or would benefit from the following psychotropic medications appropriate to the care of his/her respective medical/psychiatric disorder listed in B1 because (state reasons below, continue on Attachment if necessary):

(5) Number of pages attached _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date

Type or Print Name

Signature of Declarant

Court Appointed Counsel in Conservatorships

A. The Law Regarding Appointments

1. Discretionary Appointments

a. Probate Code §1470

(a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

(b) If a person is furnished legal counsel under this section, the court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel. The sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the date of the order appointing counsel.

(c) The court shall order the sum fixed under subdivision (b) to be paid:

(1) If the person for whom legal counsel is appointed is an adult, from the estate of that person.

(2) If the person for whom legal counsel is appointed is a minor, by a parent or the parents of the minor or from the minor's estate, or any combination thereof, in any proportions the court deems just.

(3) If a ward or proposed ward is furnished legal counsel for a guardianship proceeding, upon its own motion or that of a party, the court shall determine whether a parent or parents of the ward or proposed ward or the estate of the ward or proposed ward is financially unable to pay all or a portion of the cost of counsel appointed pursuant to this section. Any portion of the cost of that counsel that the court finds the parent or parents or the estate of the ward or proposed ward is unable to pay shall be paid by the county. The Judicial Council shall adopt guidelines to assist in determining financial eligibility for county payment of counsel appointed by the court pursuant to this chapter.

(d) The court may make an order under subdivision (c) requiring payment by a parent or parents of the minor only after the parent or parents, as the case may be, have been given notice and the opportunity to be heard on whether the order would be just under the circumstances of the particular case.

2. Mandatory Appointments

a. Probate Code §1471

a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interest of that person in the following proceedings under this division:

(1) A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator.

(2) A proceeding to terminate the conservatorship.

(3) A proceeding to remove the conservator.

(4) A proceeding for a court order affecting the legal capacity of the conservatee.

- (5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.
- (b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of that person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.
- (c) In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost for that legal service if he or she is able. This subdivision applies irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825 .

3. Los Angeles County's Always Appoints Counsel for the Proposed Conservatee

B. State and Local Rules Re Qualifications

1. State Rules

a. C.R.C. 7.1101 Scope, definitions, and general qualifications

(a) Scope (Prob. Code, §§ 1456, 1470-1471)

The rules in this chapter establish minimum qualifications, annual education requirements, and certification requirements that an attorney must meet as conditions of court appointment as counsel under Probate Code section 1470 or 1471 in a proceeding under division 4 of that code.

(1) The rules in this chapter apply to an appointed attorney regardless of whether the attorney is a sole practitioner or works for a private law firm, a legal services organization, or a public defender's office.

(2) The rules in this chapter do not apply to:

(A) Retained counsel;

(B) Counsel appointed under the authority of any law other than Probate Code section 1470 or 1471.

(b) Definitions

For purposes of this chapter, the following terms are used as defined below:

(1) "Appointed counsel" or "appointed attorney" means an attorney appointed by the court under Probate Code section 1470 or 1471 who assumes direct personal responsibility for representing a ward or proposed ward, a conservatee or proposed conservatee, or a person alleged to lack legal capacity in a proceeding under division 4 of the Probate Code.

(2) "Probate guardianship" means any proceeding related to a general or temporary guardianship under division 4 of the Probate Code.

- (3) “Probate conservatorship” means any proceeding related to a conservatorship or limited conservatorship, general or temporary, under division 4 of the Probate Code.
- (4) “LPS Act” refers to the Lanterman-Petris-Short Act (Welf. & Inst. Code, §§ 5000-5556), which provides for involuntary mental health treatment and conservatorship for persons who are gravely disabled as the result of a mental health disorder.
- (5) A “contested matter” is a matter that requires a noticed hearing and in which an objection is filed in writing or made orally in open court by any person entitled to appear at the hearing and support or oppose the petition.
- (6) “Trial” means the determination of one or more disputed issues of fact by means of an evidentiary hearing.

(c) General qualifications

To qualify for any appointment under Probate Code section 1470 or 1471, an attorney must:

- (1) Be an active member in good standing of the State Bar of California or a registered legal aid attorney qualified to practice law in California under rule 9.45;**
- (2) Have had no professional discipline imposed in the 12 months immediately preceding the date of submitting any initial or annual certification of compliance; and**
- (3) Have demonstrated to the court that the attorney or the attorney's firm or employer:**
- (A) Is covered by professional liability insurance with coverage limits no less than \$100,000 per claim and \$300,000 per year; or**
- (B) Is covered for professional liability at an equivalent level through a self-insurance program;**
- (4) Have met the applicable qualifications and annual education requirements in this chapter and have a current certification on file with the appointing court;**
- and
- (5) Have satisfied any additional requirements established by local rule.

(d) Local rules

The rules in this chapter establish minimum qualifications and requirements. Nothing in this chapter prohibits a court from establishing, by local rule adopted under rule 10.613, additional or more rigorous qualifications or requirements.

(e) Retroactivity

The amendments to this chapter adopted effective January 1, 2020, are not retroactive. They do not require an attorney who submitted an initial certification of qualifications under this chapter as it read on or before December 31, 2019, to submit a new initial certification.

2. Los Angeles Rules re Qualifications

a. L.A.S.C. Local Rule 4.123 Court-Appointed Counsel Panel General Eligibility Requirements and Procedure for Appointment to the Panel

All Court-Appointed Counsel Panel attorneys must meet the following general requirements:

- (a) Active Status with the State Bar. The attorney must have maintained active status with the State Bar of California for each of the preceding three years and**

have no disciplinary proceedings pending or filed against him or her during the preceding twelve months.

(b) Submit Application and Compliance Statement. The attorney must complete and submit the following:

(1) An Application for Appointment to the Court-Appointed Counsel Panel;

(2) A Compliance Statement with the Application, and annually thereafter;

These forms may be obtained on-line at www.lacourt.org, see "Probate," from the Probate Division, Stanley Mosk Courthouse, or by calling telephone number (213) 830-0850; and

(3) If seeking appointment in Conservatorship and/or Guardianship proceedings, Judicial Council form GC-010, Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorship/Guardianships. Annually thereafter, the attorney must submit Judicial Council form GC-011, Annual Certification of Court Appointed Attorney. These forms may be obtained on-line at www.courts.ca.gov/forms.

(c) Educational and MCLE Requirements.

(1) The attorney must complete at least twelve hours of MCLE during his/her State Bar reporting period in the subjects of decedent estates, conservatorships/guardianships, or trust administration;

(2) The attorney must complete the mandatory Court-Appointed Counsel Panel training course(s) within one year from submission of his or her application; and

(3) To qualify for appointment in conservatorship or guardianship proceedings, the attorney must satisfy the qualifications and continuing education requirements in California Rules of Court, rule 7.1101.

(d) Professional Liability Insurance. The attorney must carry professional liability insurance with policy limits consistent with the value of the matters handled, and at a minimum an amount of \$100,000 per claim and \$300,000 per year.

b. Rule 4.124. Court-Appointed Counsel Panel--Requirements for Specific Areas of Interest

(a) General Requirements for Specific Areas of Interest. Court-Appointed Counsel Panel attorneys must meet the following general requirements for specific area(s) of interest:

(1) *Decedent Estate and Trust Administration.* Prior to filing the application and within the past three years, the attorney must have represented parties in at least six different probate or trust administration court proceedings, including three decedent estate or trust proceedings from inception through final account and/or order for distribution.

The attorney must have experience and/or training in tax-related issues sufficient to enable him or her to identify tax issues from the facts of the case and to competently represent the client's interests concerning the potential tax consequences of the particular matter.

(2) *Conservatorships.* Attorneys representing conservatees in Conservatorship proceedings must satisfy the requirements of California Rules of Court Title Seven, rule 7.1101(b)(2).

(3) *Guardianships*. Attorneys representing conservatees in Guardianship proceedings must satisfy the requirements of California Rules of Court Title Seven, rule 7.1101(b)(1).

(4) *Conservatorships of the Person*. Prior to filing the application and within the past five years, the attorney must have represented parties in at least four conservatorship of the person matters (including at least two proceedings from their inception) which involve securing the appointment and qualification of the conservator of the person.

(5) *Limited Conservatorships*. Attorneys representing limited conservatees in Conservatorship proceedings must satisfy the requirements of California Rules of Court Title Seven, rule 7.1101(b)(2). In addition, the attorney must understand the legal and medical issues arising out of developmental disabilities and the role of the Regional Center.

(6) *Estate Planning and Taxation*. Prior to filing the application and within the past three years, the attorney must have extensive experience in matters regarding estate planning, estate, gift, or income tax or related tax matters pertaining to trusts and decedent estates. The attorney must have represented parties in at least three substituted judgment (Prob. Code, § 2580 et seq.) or particular transactions matters. (Prob. Code, § 3100 et seq.)

(7) *Medi-Cal Planning*. Prior to filing the application and within the past three years, the attorney must have represented parties in at least three Probate Code section 3100 petitions, including at least two in which there was a request to increase either the Community/Spouse Resource Allowance and/or increase the Minimum Monthly Maintenance Need Allowance. The attorney must be familiar with the laws and regulations for Medi-Cal eligibility, and shall be knowledgeable on the rules regarding the increase of the CSRA/MMMNA, exempt assets, gifting rules, and tax ramifications related to Medi-Cal planning.

(8) *Compromises/Judgments and Special Needs Trusts for Minors/Persons with Disabilities*. Prior to filing the application and within the past three years, the attorney must have represented parties in at least three petitions for approval of compromise under Probate Code section 3500 or Code of Civil Procedure section 372, three of which involved creation of special needs trusts. The attorney must be familiar with the advantages and disadvantages of the various funding alternatives available under Probate Code section 3600 et seq., and the application of MICRA to medical malpractice settlements.

(9) *Fiduciary Appointments/Guardians ad Litem*. The attorney must have at least ten years in practice, with recent experience serving as a fiduciary or guardian ad litem.

An attorney who acts as a guardian ad litem or fiduciary may not be covered by his or her professional liability insurance. Although insurance coverage is not a requirement, the attorney may wish to consult his or her professional liability insurance carrier prior to accepting such appointment.

(10) *Evidence Code Section 730 Experts/Referees/Special Masters*. The attorney must have at least ten years in practice, with experience serving as an Evidence Code section 730 expert, Code of Civil Procedure section 638 referee, or special master.

The attorney also must have substantial expertise in the substantive area of law involved in the matter.

(11) *Health Care Decisions for Adults Without Conservators and Tuberculosis Detention Proceedings/Capacity Determinations*. Prior to filing the application and within the past three years, the attorney must have extensive experience in matters relating to medical treatment and bio-ethical issues. The attorney must be familiar with Probate Code section 3200 or Health and Safety Code section 121365 proceedings. These cases often involve complex treatment issues and may require immediate attorney response to medical emergencies. Consequently, the attorney must become familiar with the medical parameters underlying these issues in order to adequately represent the client's interests.

(b) MCLE Requirements for Specific Areas of Interest. Court-Appointed Counsel Panel attorneys must meet the following MCLE requirements for specific area(s) of interest:

(1) *Conservators*. The attorney must satisfy the educational requirements found in California Rules of Court Title Seven, rule 7.1101(f)(1).

(2) *Guardians of the Estate*. The attorney must satisfy the educational requirements found in California Rules of Court Title Seven, rule 7.1101(f)(1).

(3) *Guardians of the Person*. The attorney must satisfy the educational requirements found in California Rules of Court Title Seven, rule 7.1101(f)(2).

(4) *Estate Planning and Taxation*. The attorney must have at least ten hours of MCLE in the areas of estate planning and taxation during the attorney's State Bar reporting period.

(5) *Limited Conservatorships/Conservatorships for Developmentally Disabled Adults*. The attorney must have at least three hours of MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period, and have attended the Limited Conservatorships Court-Appointed Counsel Panel Training Program.

(6) *Medi-Cal Planning*. The attorney must have at least three hours of MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period.

(7) *Compromises/Judgments and Special Needs Trust for Minors/Incompetent Adults*. The attorney must have at least three hours of MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period.

(8) *Health Care Decisions for Adults Without Conservators and Tuberculosis Detention Proceedings/Capacity Determinations*. The attorney must have at least three hours of MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period.

C. Court Appointed Counsel Panel in Los Angeles

1. Panel of Attorneys Who Are Qualified

2. Random Appointment

3. Appointments Are Personal

- a. L.A.S.C. Local Rule 4.126 Court-Appointed Counsel Panel Attorney Appointments are Personal.

Court-Appointed Counsel Panel attorney appointments are personal and cannot be delegated to other attorneys. Only the attorney appointed by the court may render legal services to the client and appear at hearings.

4. Private Pay v. County Pay

D. Ethical Duties of Court Appointed Counsel

1. Local Rules

L.A.S.C. Local Rule 4.125 – Ethical Guidelines

Court-Appointed Counsel Panel attorney's primary duty is to represent the interests of his or her client in accordance with applicable laws and ethical standards. The Court-Appointed Counsel Panel attorney's secondary duty is to assist the court in the resolution of the matter to be decided. The Court-Appointed Counsel Panel attorney must, if practical, ensure that the client is afforded an opportunity to address the court directly.

2. Rules for Attorneys – Generally are Generally in Line With CAC Ethical Rules

- a. **Business and Professions Code §6068 – Duties of Attorney**

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state.
- (b) To maintain the respect due to the courts of justice and judicial officers.**
- (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.**
- (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.**
- (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.**
- (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
- (h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, “against the attorney” includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

b. CA Rules of Professional Conduct -Jeff

i. Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

ii. Rule 3.1. Meritorious Claims and Contentions

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;*

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

iii. Rule 3.3. Candor Toward The Tribunal

(a) A lawyer shall not:

(1) knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision

- (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.
- (b) A lawyer who represents a client in a proceeding before a tribunal* and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse to the position of the client.

c. Professional Duty of Care – Civil Liability

d. Court Oversight – Administration of Code

Code of Civil Procedure § 128. Powers of courts; contempt orders; execution of sentence; stay pending appeal; orders affecting county government

- (a) Every court shall have the power to do all of the following:
- (1) To preserve and enforce order in its immediate presence.
 - (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.
 - (3) To provide for the orderly conduct of proceedings before it, or its officers.**
 - (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein.
 - (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.**
 - (6) To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code.
 - (7) To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.
 - (8) To amend and control its process and orders so as to make them conform to law and justice. An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following:
 - (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal.
 - (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.
- (b) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting an attorney, his or her agent, investigator, or any person acting

under the attorney's direction, in the preparation and conduct of any action or proceeding, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, the violation of which is the basis of the contempt except for the conduct as may be proscribed by subdivision (b) of Section 6068 of the Business and Professions Code, relating to an attorney's duty to maintain respect due to the courts and judicial officers.

(c) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting a public safety employee acting within the scope of employment for reason of the employee's failure to comply with a duly issued subpoena or subpoena duces tecum, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt. As used in this subdivision, "public safety employee" includes any peace officer, firefighter, paramedic, or any other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes.

(d) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting the victim of a sexual assault, where the contempt consists of refusing to testify concerning that sexual assault, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt.

As used in this subdivision, "sexual assault" means any act made punishable by Section 261, 262, 264.1, 285, 286, 287, 288, or 289 of, or former Section 288a of, the Penal Code.

(e) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting the victim of domestic violence, where the contempt consists of refusing to testify concerning that domestic violence, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt.

As used in this subdivision, the term "domestic violence" means "domestic violence" as defined in Section 6211 of the Family Code.

(f) Notwithstanding Section 1211 or any other provision of law, no order of contempt shall be made affecting a county government or any member of its governing body acting pursuant to its constitutional or statutory authority unless the court finds, based on a review of evidence presented at a hearing conducted for this purpose, that either of the following conditions exist:

(1) That the county has the resources necessary to comply with the order of the court.

(2) That the county has the authority, without recourse to voter approval or without incurring additional indebtedness, to generate the additional resources necessary to comply with the order of the court, that compliance with the order of the court will not expose the county, any member of its governing body, or any other county officer to liability for failure to perform other constitutional or

statutory duties, and that compliance with the order of the court will not deprive the county of resources necessary for its reasonable support and maintenance.

Probate Code §1800 Purpose of chapter

It is the intent of the Legislature in enacting this chapter to do the following:

(a) Protect the rights of persons who are placed under conservatorship.
(b) Provide that an assessment of the needs of the person is performed in order to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible.

(c) Provide that the health and psychosocial needs of the proposed conservatee are met.

(d) Provide that community-based services are used to the greatest extent in order to allow the conservatee to remain as independent and in the least restrictive setting as possible.

(e) Provide that the periodic review of the conservatorship by the court investigator shall consider the best interests of the conservatee.

(f) Ensure that the conservatee's basic needs for physical health, food, clothing, and shelter are met.

(g) Provide for the proper management and protection of the conservatee's real and personal property.

3. Not a Guardian Ad Litem

4. Cannot Declare a Doubt line in Criminal Cases

5. Drabick Circumstances

“When the client is permanently unconscious, however, the attorney must be guided by his own understanding of the client's best interests. There is simply nothing else the attorney can do.” *Conservatorship of Drabick* (1988) 200 Cal. App. 3d 185, 212.

6. Every Person is Unique

E. Privately Retained Counsel in Relation to Court Appointed Counsel

1. Every Case is Unique

2. Possible Elder Abuse Backdrop

3. How the Court Handles These Issues

4. Capacity of Proposed Conservatee to Contract

a. Probate Code §810

The Legislature finds and declares the following:

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

e. Probate Code §811 – Deficits in mental functions

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) **Alertness and attention**, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) **Information processing**, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) **Thought processes.** Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) **Ability to modulate mood and affect.** Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

f. Probate Code §812 - Capacity to make decisions

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision.

F. How Does the Court Investigator Differ From Court Appointed Counsel?

G. How Orange County Handles Court Appointed Counsel

Media Handbook for California Court Professionals



JUDICIAL COUNCIL
OF CALIFORNIA

ADMINISTRATIVE OFFICE
OF THE COURTS

Media Handbook for California Court Professionals



JUDICIAL COUNCIL
OF CALIFORNIA

ADMINISTRATIVE OFFICE
OF THE COURTS

**Judicial Council of California
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Media Handbook for California Court Professionals

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Foreword

We are pleased to present the *Media Handbook for California Court Professionals*, a guide for those who are responsible for media relations in their courts.

The publication of the *Media Handbook* comes at the same time the branch and the individual courts are developing and implementing their strategic and operational goals for the next six years. Central to these goals is a greater emphasis on reinforcing public trust and confidence, which will affect every interaction the courts have with the public. Public education about the role and work of the courts, improved access to information about court processes and services, transparency, and, above all, responsiveness to our communities—all are a part of meeting our overriding responsibility of serving and being accountable to the public. Each court and each staff member has an important role to play in the public's trust and confidence in the judicial branch.

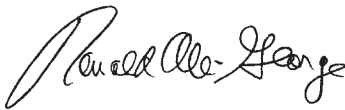
The handbook provides guidelines for communicating with the public through the media. It includes advice for establishing a media program in your court and educating the public about your court's duties, programs, and activities. It shows how to create media policies, develop media contacts, and handle high-profile cases and emergencies.

The *Media Handbook* was written by Leanne Kozak, a former television journalist and trial court public information officer who now produces the AOC's award-winning *California Courts News*, a monthly news broadcast for court staff throughout the

state. The book is a collaborative project of the AOC's Public Information Office and Office of Communications and includes valuable contributions from experienced public information officers and others in the California courts.

We wish you well as you strive to improve the public's understanding of the courts, and we hope this handbook will be a valuable resource in that journey.

Sincerely,



Ronald M. George
*Chief Justice of California and
Chair of the Judicial Council*



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Administrative Director of the Courts

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Introduction

As the world grows smaller and increasingly interconnected, people have come to expect more information than ever. The mass media respond to and feed that demand, which inevitably affects the justice system and the courts in myriad ways.

It is safe to say that virtually every superior court in California will, at one time or another, be contacted by the media. Usually the subject is routine; sometimes it's the stuff of screaming headlines. Usually the coverage is positive or neutral; sometimes it's negative and counterproductive.

In any case, it is in the court's best interest to be prepared for encounters with the media so that they may accurately and truthfully represent the court to its stakeholders and proactively educate and inform the public about the court's work.

The information in this handbook, which is specific to California, is geared toward the court professional designated as the media contact. The handbook is intended to provide that person with some basic knowledge of what to expect from the media (usually the news division) and what the media generally expect from the court. It provides suggestions on how best to handle media inquiries and presents some selected strategies for generating positive coverage. It also includes advice from experienced court information officers who have valuable insights to share. The *Media Reference Kit*, a companion binder, includes court forms, rules, samples, and other helpful materials.

We hope that you will read through this manual for a general orientation and then keep it handy for future reference. We welcome your comments and suggestions on ways we can improve this publication in future editions.

1

The Media

You probably have already formed some opinions of the media based on general impressions or personal encounters. According to most research, your opinions are probably negative. But if you hope to establish a mutually beneficial relationship with the media, you'll have to set aside those opinions. Instead, recognize that most journalists are just trying to do a good job and get the story right. And it is the court's job to help them get it right.

Remember, too, that most journalists assigned to cover the courts are generalists. They have little experience or background in the justice system, so they are depending on you to fill in the gaps with information, assistance, and guidance. This informational void is an opportunity for the court to proactively educate the journalist and the public.

It should be noted that the court views journalists as members of the public, with no fewer rights. Journalists are entitled to enter the public areas of the courthouse and are entitled to be in the courtrooms, just like anyone else. They do not need to seek special permission to be present and to quietly take handwritten notes. It is not only their right but also their duty to witness and monitor the court's activities.

Relationships With the Media

For you to have successful encounters with the media, it is essential that you establish relationships of mutual respect and understanding. While everyone may not always agree on the objectives and you may not always be happy with the outcomes, such a cordial relationship is absolutely necessary to maintain pleasant professionalism with the media. You do not need to be best friends—in fact you shouldn't be, so that you can serve the court's interests appropriately. But mutual cordiality will usually advance everyone's agenda.

Deadlines

Acknowledging inflexible deadlines is central to understanding how the media work. Most of the time media representatives who call the court will be producers, reporters, and photographers from local newspapers, TV, and radio news departments. Regardless of the medium, they are all in a huge hurry and under intense deadline pressure, so they hope for/expect instant satisfaction. Try not to hold that against them. That's just the nature of the profession. Just like you, they're being asked to do more and to do it more quickly.

In general, print journalists have more time to work on each story; they usually publish just once a day so they have a single deadline. Electronic journalists, on the other hand, have a 24-hour news cycle to feed. They may have a half-dozen deadlines in a day and often must cover more than one story a day. So they have less preparation time to devote to each story.

Respecting the reality of rigid deadlines will help you have successful encounters with the media. When you get a media call, *always ask about the person's deadline*. Since deadlines are critical, they deserve your attention. Furthermore, you don't want to spend hours rounding up information only to discover that you provided it too late to make tomorrow's paper.

What Is News?

You get a phone call from a reporter. You scratch your head, wondering why in the world the media would be interested in what they're asking about. And then you wonder why they failed to show up for your last really great court event, which they *should* have been interested in!

Here's the conundrum: There is no scientific, universally accepted definition of *news*. The truth is that news is what they *say* it is, on any given day. And it may not be what you think is important.

Usually the people who decide what is newsworthy are an assemblage of news managers sitting around a conference table in the morning, scanning stacks of fresh newspapers, riffling through story files and news releases, trading ideas on what will be of interest to their customers. If it's something that *everybody's* talking about, then every news agency is going to put it on its story list. Activities of important people (the President is in town) and unplanned breaking events (big fires, earthquakes, etc.) are also in the "must-cover" category. But after such obvious choices are made, the process becomes very subjective, which is both a curse and an opportunity for the court.

At this stage of the selection process, news managers are identifying what stories—among all the rest of what's happening everywhere in the world and in the local area during that news cycle—deserve the most attention. Every potential story is weighed against every other potential story. For example, if a passenger jet goes down at the local airport, you can be sure that an ongoing murder trial in your court won't attract a reporter that day.

Karen Dalton, public information officer of the Superior Court of San Diego County, called a news conference in December 2005 when her court dispatched a truck full of surplus office goods to Mississippi courts that were destroyed in Hurricane Katrina. Only two reporters showed up because, at the same time, a couple of pipe bombs were found at a local elementary school. Absent that event, she probably would have had a full house.

If it's a "slow news day" (no breaking news events, government is quiet, no fresh scandals, etc.) reporters will be eagerly looking for stories, desperate to fill their pages or airtime.

Practical considerations also dictate which stories will be covered. For instance, decision makers weigh geographic proximity, expenses, the hour of the event, availability of reporters and photographers, story complexity, and other factors. And stories may be selected because an editor or a reporter feels passionate about the subject matter and lobbies for the coverage.

Each medium has its unique considerations, too. Radio may pass on a story if producers are unable to line up a dynamic interview for a quote. TV is guided mightily by the presence or absence of exciting visual elements.

In other words, decisions by the media can be perplexing to outsiders. But if you recognize the imprecision of the process, you will better understand what motivates the media on any given occasion, and that will be highly useful in your role as media contact.

Controversy

Another reality of news is that it is unavoidably attracted to controversy, in an attempt to appeal to consumers' human curiosity. For example, if the court is negotiating new labor contracts and everyone comes to quick agreement, it probably won't make the news. But if workers are chanting slogans and waving banners on a picket line, you should expect a media call. If attorneys are handling a trial in a calm, routine fashion, they'll inspire very little attention. But if they shout at each other in the hallway every day, reporters will be attracted to the fireworks.

Convenience

There is generally greater interest in certain court proceedings than others, for some very practical reasons. Criminal arraignments in trial courts inspire by far the most requests to use cameras in the courtroom. That's because in many cases the arraignment is the first time the media have a chance to get pictures of the accused and because they have a higher chance of getting approval from the arraignment judge than during subsequent proceedings. So arraignments are a convenient opportunity to get visuals that can carry future stories indefinitely, even if further access is denied.

Typically the next most popular event is the sentencing hearing because of the inherent drama of victim statements and because there are seldom objections to the presence of cameras after a verdict.

News Organizations

Usually the journalists who will get in touch with you are the reporters who will ultimately be writing the story. Or, if it's TV, you may be contacted by someone on the "assignment desk." Folks who work "the desk" coordinate and arrange the practical details of field production.

Keep in mind that usually the people who contact you are the foot soldiers in the operation, not the ultimate decision makers. Editors, producers, and other news managers will have the final say about what gets covered and how it's presented.

Different Agendas

Not all reporters and not all news organizations are created equal. They operate under dramatically different editorial philosophies, and they generate different kinds of products. For instance, if your presiding judge agreed to sit down with a *60 Minutes* reporter for a philosophical discussion about sentencing guidelines, you could expect a grueling grilling because *60 Minutes* has a reputation for intense analytical interviews. On the other hand, if the interview were for the *Oprah Winfrey Show*, the tone of questioning would be quite different.

Even local TV newscasts have noteworthy differences. Some go for the longer stories that include background and context; others are more interested in getting rapid-fire, snappy sound bites.

The type of program also signals significant orientations. TV's *California Channel*, broadcast from the capital on cable, creates an entirely different product than the local network affiliate's breezy morning show.

There are also different brands of reporters. Some revel in their reputation for asking tough, confrontational questions. Other reporters nurture a reputation of fairness and objectivity.

It's helpful to get to know who does what brand of journalism in your local market so that you're prepared for encounters with the media.

Professional Courtesy

Realize that the media and individual reporters are often in competition with one another and the stakes are high. So do not tell one reporter what another reporter is working on (and they will ask). Be discreet. Leave it to them to do the sharing, if they're so inclined.

Tell the Truth

Do not lie to the media. Sometimes it's appropriate and/or necessary to withhold information, particularly in regard to court matters, but you should never lie. At the very least, you will sacrifice your credibility as a media contact, which will be very damaging to your professional reputation and to the court.

If you cannot be truthful, be quiet. (Strategies for handling difficult questions are discussed in chapters 6 and 7.)

2

Getting Started

If you don't already have one, your court should write a local media policy that articulates protocol for contacts with the media. Your guidelines should then be distributed widely to everyone who might possibly be affected. Here are two examples:



Superior Court of Fresno County

Media Guidelines for Courtroom Judicial Assistants

Non-High-Profile Cases

There are many cases that the media has an interest in, and sometimes you may not know whether or not the case is considered a high-profile case. When in doubt, ask the judicial officer if the caller should be referred to the Media Coordinator.

- Information, other than basic calendar information, should not be given on the first phone call. It is entirely appropriate to identify what information is being requested and to tell the caller that his or her call will be returned as soon as possible.
- Talk to the hearing judge and relay the requested information.
- Ask the hearing judge if the call should be referred to the Media Coordinator, and if not, ask how the questions should be answered.
- It may be helpful to note down the information and paraphrase it back to the hearing judge.

Tip for Dealing With the Media

If the press contact involves a pending case (cases are pending until all appeals are exhausted), provide only procedural information, such as the date of the next court proceeding, the names of attorneys, copies of minute orders and case filings, etc. Don't explain what the moving papers mean or describe what happened in court. That's doing the reporters' jobs for them, and interpreting can cause problems [for you and the hearing judge].

—Jerrienne Hayslett, Director of Public Information (Ret.),
Superior Court of Los Angeles County



Superior Court of San Joaquin County

Media Policy

Media Relations for Administrative Staff

These are suggested procedures for court supervisors, managers, and administrators to follow when the media call or arrive unannounced.

If it's a fairly straightforward request (such as factual information like "Is Jane Doe scheduled to be in court this afternoon?"), give the reporter the information if you have it, but document who called, his or her media affiliation and phone number, and what information was sought. Pass that information on to the court's Public Information Officer.

If you think that these calls may need further attention or will result in a larger news story, please contact the PIO by e-mail, phone (209) 468-8120 or pager (209) 982-8528.

If the subject matter is controversial or potentially sensitive, notify your Executive Officer/Director, the Public Information Officer, or your supervising or other appropriate judge.

If you need time to respond to a reporter's request, let him or her know an estimated time when someone from the court will be able to respond.

If you don't know the answer to the question, tell the reporter that.

Don't refuse to comment or use the expression "no comment."

Some reporters ask the same questions of or try to confirm the information with multiple sources. *The court should speak with one voice and be consistent in its message. If the reporter has already discussed the issue with another judge or court employee, contact that individual before responding to the reporter to make sure that you are providing a consistent response and correct information, or you may refer the reporter back to the original source. You are encouraged to contact the PIO in this event.*

If the press contact involves a pending case (cases are pending until all appeals are exhausted), provide only procedural information, such as the date of the next court proceeding, the names of the attorneys, copies of minute orders and case filings, etc. Don't explain what the moving papers mean. Don't describe what happened in court; that would be doing the reporters' job for them, which is inappropriate and dangerous.

Coordinate communications with the Sheriff/Marshal and the Community/Media Relations office regarding bomb threats and evacuations, in-custody defendant escape attempts, courthouse shootings, and other security or law enforcement matters. 3/21/02

The Court's Media Contact

As suggested in these media policies, it is highly advantageous for the court to speak with one voice in order to avoid confusion and to present a unified, coherent message to the media and the public. As media inquiries multiply, the process of centralizing responses will also foster efficiency and control and help the court keep track of media contacts.

For a court to achieve those goals, it is generally best to direct all media calls to one or more specific people. The court then has the best chance of controlling and monitoring the nature, breadth, and accuracy of the public information it disseminates, thereby minimizing the likelihood of public disagreements based on misunderstandings. Having a designated media contact person also relieves everyone else on staff of the responsibility of interacting with the media; they can individually decline to respond to media inquiries and can instead direct all calls to the media contact person.

For courts with several locations, one designated person per location works well. Designating a second contact person as a backup will also be useful. Contact numbers for those people should be widely distributed throughout the court and the media. They should be posted prominently on the court's Web site and printed on business cards, news releases, and other appropriate court documents. Even if you have designated contacts, reporters can and do call whomever they choose, so it is wise to educate everyone about the court's policy on media calls.

If at all possible, the primary media contact person should be available by phone 24 hours a day, every day, either by cell phone or pager or both. Modern media are on a 24-hour cycle, and it is in the court's best interests to provide information whenever it's

needed. For example, if a reporter is working on a rewrite for an 11 p.m. newscast and she's unsure of what a judge can and cannot do, wouldn't you want to provide a correct answer and put the information in perspective, rather than have the reporter guess? Or if a reporter had gotten some incorrect information about the court late in the day, wouldn't you want the opportunity to set the record straight? Or if a camera crew decides on Sunday to appear on your doorstep first thing Monday morning, wouldn't you want to be warned so you could marshal the accurate information and informed spokespeople? If the media come to know that you're comfortable taking calls at any time, they will take advantage of the availability, which is to your advantage in the long run. And you'll be fully informed of media interest and able to facilitate appropriate and timely responses to queries.

When the Media Contact Is the CEO

While this option isn't practical in larger courts, some courts may decide that "speaking with one voice" is best handled by the court executive officer (CEO) and no one else. Such an arrangement obviously affords the most control over the message that is publicly available, but it may be cumbersome and may seriously restrict media access. The CEO is not always available when there's a need, so alternative options should be articulated.

Courtroom Contact

One of the primary issues to consider is who should handle requests for photographing, recording, and broadcasting in the courtroom. Because the California Rules of Court dictate that it's a decision for each individual judge on each individual matter,

some judges want the media to bring their requests directly to them. In other courts, the media contact person will receive and process all such requests and the judge makes the decisions. Regardless of how it's done, it's helpful to have the process clearly articulated in a local media policy.

Other Court Contacts

Some courts encourage journalists to make direct contact with anyone in the court who can potentially help them get information.

For obvious practical reasons, many procedural inquiries are best channeled directly to the courtroom clerk, such as case scheduling information (date and time when a matter is to be heard).

If direct contact with appropriate individuals works for your court, make sure to distribute that list of court contacts (names and phone numbers) to all the media and post it on your Web site in the press or media section.

The Media List

The media list is one of the most important tools the media contact has. Perhaps you can acquire an existing, up-to-date media list from one of your community partners. If so, before you use it, verify that all the information is correct and current. If you must create your own list from scratch, here's what's needed:

- Make a detailed list of all the newspapers, TV stations, radio stations, local magazines, Web sites, and any other media that are available in your county or your "media market." In other words, your list should include whatever newspapers people in your county read, whatever TV they watch, radio they listen to, and so on. Placer County, for example, has no

TV stations located within its boundaries. It's considered to be in the Sacramento viewing area, so Sacramento TV stations should be on Placer's media list.

- Don't overlook trade publications, professional newsletters (like the local bar association's newsletter), community newspapers, ethnic and cultural newsletters, church bulletins, school newspapers, or media coming from the Administrative Office of the Courts, such as *Court News Update (CNU)* and AOC-TV's *California Courts News (CCN)*. Be all-inclusive on your master list; you can narrow it down later as needed.
- Insert a brief description for each entry, plus full contact information (which will require frequent updates because media people move around a lot). If you can't get all the information from their Web sites, fill in the gaps by phoning their main reception number during the slow morning hours.

Examples

The Gazette

(Publishes weekly. Free at newsstands. Locally owned.)

555 West Fifth Street, Anytown, CA 55555

Main: 555-555-2222

City Desk: 555-6666

Fax: 555-1111

Editor: David Forester, 555-4444, dforester@gazette.net

Crime reporter: Edward Ng, 555-3333 (cell: 555-2222),
eng@gazette.net

Court beat reporter: Irene Hamilton, 555-7878 (cell),
ihamilton@gazette.net

News copy deadline: Tuesdays, 4 p.m.

KIOD-TV Channel 55
(WNET Network, local half-hour news at 6 p.m.
and 11 p.m.)
5454 55th Street, Anytown, CA 55555
Main: 555-555-5555
Newsroom: 555-4545
Fax: 555-3232
Assignment Desk: 555-5454
News director: Marita Maldonado, 555-6767
Reporter: Victor Craig, 555-1212 (cell)

From this master list create a sublist of those media to which you will routinely fax your general news releases. Have that list ready to use at a moment's notice. Then create an electronic list-serve of your sublist so that you can simultaneously e-mail news releases to all those addresses with a single stroke.

Don't forget to include your own Webmaster on your distribution list. You want to be certain to keep your court's Web site current with fresh news releases.

Keep a copy of your media lists at home and in your car, just in case something really exciting happens when you're not in your office.

Letter of Introduction

As soon as the court's primary contact with the media is named, send a very brief letter of introduction to everyone on the media list, noting the contact's 24-hour availability. E-mail or fax will do. Sending it both ways is better so the information can be easily shared within the media organization.

Your letter of introduction could look something like this:



*Superior Court of California,
County of San Joaquin*

PLEASE NOTE NEW PHONE NUMBER

From: Leanne Kozak

Date: September 28, 2001

Allow me to introduce myself to you. I am the new public information officer for the Superior Court of California, County of San Joaquin (a newly created position).

Feel free to call on me whenever you wish to cover news relating to people or business of the Superior Court of San Joaquin County, or if you need to get or verify information. I am available 24/7.

Office: 209-468-8120
 Pager: 209-982-8528
 Cell: 209-601-1192
 Fax: 209-468-8373

I will also be your contact for obtaining permission to photograph, record, or broadcast in our courtrooms. Please continue to use the customary form, faxing it to the number listed above. I will then facilitate the request.

With your permission, I will also pitch story ideas to you and your reporters as suitable subjects present themselves.

I look forward to working with you.

Return Those Calls!

Returning phone calls and e-mail from the media must always be a very high priority for the person designated as the media contact. Remember that journalists are always working on tight deadlines. If you respect their deadlines, you will be well on the road to a good relationship.

Even if you don't have the answer to a question or if your answer is no, do return their calls ASAP. If you need to do some research before you answer, say so. At least they'll be reassured that you're working on it, and they won't suspect that they're being ignored. Such prompt and frequent communication will be appreciated.

Your Media Journal

Keep a permanent, daily journal of all calls from the media. A tabbed, spiral notebook works well. Make note of who called or stopped by, from what organization, call-back numbers, the nature of the inquiry, and the information you conveyed. Jot down the case number, too. You may get other calls on that same case; if the number is handy, the case will be easy to look up again. You will find your media journal to be an invaluable reference.

Paperwork

Reporters and photographers often show up without paperwork to request permission for electronics in the courtroom, so have a stack of printed request forms (form MC-500, *Media Request to Photograph, Record, or Broadcast*, and form MC-510, *Order on Media Request to Permit Coverage*) at your desk and at each reception desk so reporters and photographers can pick them up. If your court's media policy allows individual court locations or judges to handle these requests directly, provide a stack of blank forms at every location.

Post the request forms on the media section of your court's Web site so you can direct journalists to the page where they can access the forms from their own computers.

3

Photographing, Recording, and Broadcasting in the Courtroom

Cameras, recording devices, and broadcasting have been permitted in California courtrooms since 1984, when the Judicial Council of California adopted rule 980 of the California Rules of Court. In 2006, the Judicial Council approved a reorganization of the rules of court effective January 1, 2007, and rule 980 was renumbered 1.150.

Under the rule judges have discretion. Amendments adopted in 1997 include 19 factors that judges consider in reviewing requests to bring cameras and other electronic devices into court. These factors include the importance of maintaining public access to the courtroom, preserving the privacy rights of the participants in the proceedings, and the effect of camera coverage on counsel's ability to select an unbiased jury.

The tenor of the times is also a consideration. After a Los Angeles judge permitted live cameras in the O. J. Simpson trial in 1995 with arguably unsatisfactory results, many judges said they were loathe to risk a repeat. In fact, in Los Angeles it wasn't until more than 10 years later that live camera coverage was again permitted—in record producer Phil Spector's murder trial. Judge Larry Paul Fidler made a compelling argument for camera coverage in his order from the bench. Here is the essence of his remarks, as related by Allan Parachini, public information officer of the Superior Court of Los Angeles County:

- Judges and court leaders often decry the inaccuracies and misconceptions created by fictional television justice shows like *Law and Order*. Those programs surely do create and feed misimpressions about the courts, so the most powerful weapon courts may have is to let the public see how the real thing actually works.

- Camera coverage may not be appropriate in all cases, but public trust and confidence in the courts hinge on whether the public can observe the courts doing their routine business. In our experience, when this occurs the impression created is almost always positive. The real justice system is a fascinating place and real judges generally get it right. Real judges go to elaborate lengths to protect the rights of all litigants, and they do so while maintaining a sense of humor and remembering that they, too, are human beings sensitive to the issues being litigated.
- This is a television era. The world of TV has changed fundamentally since the Simpson matter was litigated. The Internet has added a dimension to public scrutiny of the courts that was beyond conception in 1995. The amount of television coverage alone that is now focused on high-profile cases is difficult to grasp until one actually sees 40 video cameras and 75 still cameras turned out for a celebrity's sentencing hearing in a probation violation case. We had just such a case in May 2007.
- Courts have no choice but to recognize the new era in communications. Forward-thinking judges know that decisions about whether to permit camera coverage have become more complex than they were a decade ago, or even five years ago.

In permitting cameras in the Spector trial, Judge Fidler noted on the record that the cameras themselves would be contained in housings that rendered them virtually invisible. After opening arguments, it was clear that few

people, if any, in the courtroom were preoccupied by the camera presence.

Judge Fidler emphasized that television coverage of actual court proceedings can neutralize some of the effects of misleading or simply wrong speculative analysis that may fill the airwaves during a high-profile trial. It accomplishes that goal by, at the very least, making it possible for the public to compare the actual proceeding with the descriptions of media commentators.

Judges may still decide against permitting cameras, and in California they are entitled to do so. Court staff who handle media relations should recognize that once the judge has made this decision, the court's responsibility is to comply with the judge's wishes and address other strategies to tell the true story of the justice system.

The factors judges consider in determining whether to allow cameras and additional information about the rule are posted on the California Courts Web site at www.courtinfo.ca.gov/presscenter/camerasincourt.htm.

Forms for Requests to Photograph, Record, or Broadcast Court Proceedings

The rule requires that formal requests be made to photograph, record, or broadcast in the courtroom regardless of the electronics employed. The two completed, signed forms become a part of the permanent court record. (Examples are included in the *Media Reference Kit*.)

- Form MC-500, *Media Request to Photograph, Record, or Broadcast*: This form is to be filled out by the person or organization asking to record images or voices.
- Form MC-510, *Order on Media Request to Permit Coverage* (2 pages): This form is submitted with MC-500, filled out by the court, and signed by the judge.
- Both forms are available in the Press Center of the California Courts Web site as well as at www.courtinfo.ca.gov/forms/documents/mc500.pdf and www.courtinfo.ca.gov/forms/documents/mc510.pdf.

Five-Day Rule

The rule requires that the written request be submitted at least five court days prior to the target event. The object of this advance notice is to allow sufficient time for all stakeholders to be notified and weigh in on whether the judge should permit access. But sometimes court events move quicker than that. Arraignments, for example, often occur without five days' notice, so this rule is frequently waived in arraignment court.

The judge may also waive the five-day rule for good cause. Most often, though, when the media miss the five-day deadline, it's because they decided at the last moment to cover the proceeding. (That's not necessarily because it was overlooked; rather, it's because news media like to stay fluid with their plans so they may nimbly respond to breaking stories.) While some judges don't consider this "good cause," they may nevertheless grant the waiver if asked. Other judges grant waivers only if legitimate excuses are articulated in a written request.

Local Rules

Some courts have created local rules that address media access. In the Superior Court of Sacramento County, for example, there are standing orders that apply only to its juvenile and family law facilities. The Orange court lists very specific, designated areas where cameras and other electronic recording devices may operate. The Los Angeles court also restricts photography to specific areas. In San Joaquin, some courtroom doors open directly into hallways, so a local rule requires journalists to respect a five-foot media-free buffer near courtroom doorways. The Santa Clara court does not permit photography of people coming through security at entrances and has restrictions on what can be recorded in other areas. Many local rules prohibit photographers from shooting through the windows of courtrooms if camera access has been denied. Examples of local rules are included in the *Media Reference Kit*.

All local rules that affect the media should be posted on the court's Web site in the press section so that media representatives have every opportunity to familiarize themselves with your local rules.

Special Orders

Sometimes special circumstances call for situational arrangements. Presiding or supervising judges are allowed to impose restrictions on media presence in areas outside of courtrooms, such as building entrances and exits and hallways. For example, if there is a high-interest trial in a courtroom that is very near an elevator or an entrance, even if it is in a mixed-use building,

there's a potential for safety and crowd problems in the hallway when the media converge. Consequently, some courts find it necessary to restrict media presence to only certain areas in the building while that particular trial is in progress.

Examples of special orders are included in the *Media Reference Kit*.

Denials

If a judge denies the request for media coverage, sometimes the court's media contact person can facilitate a mutually acceptable compromise between the judge and the media, such as limiting access to certain times and places or using a pool arrangement.

There is no right to a hearing if a judge denies a request, although the judge may grant a hearing. The Superior Court of Santa Barbara County has a local rule, 603, that addresses the recommended process for reconsideration:

Any party aggrieved by an order made pursuant to this Rule may apply to the court to modify the order, or to be exempted from it, by making a request in writing to the judge who issued the order, or to the Presiding, Acting Presiding or Assistant Presiding Judge of the Court, if the judge who issued the order is not available. Such written request shall be made under penalty of perjury, and shall state the specific impact of the order on the party requesting exemption or modification, as well as the specific relief requested.

Laptops

Sometimes journalists will ask permission to bring their laptop computers into the courtroom so they can take notes. Of course, journalists and other members of the public are always free to take notes, but they're not allowed to cause a disturbance, and clicking keys can be distracting during court. It's usually up to each individual judge whether to allow laptops, although the court's media contact person can facilitate the request.

Be aware that if the courtroom is in a Wi-Fi hotspot (where computers can connect to the Web without wires), the laptop is capable of transmitting information live to the airwaves or the Internet.

Cell-Phone Cameras

Cell phones and all other devices capable of taking pictures are subject to the restrictions of rule 1.150, under an amendment adopted by the Judicial Council effective January 1, 2006. Since it's virtually impossible to distinguish between phones that take pictures and phones that do not, some courts have local rules prohibiting any kind of cell phone in courtrooms.

4

What's Public?

The California Constitution guarantees the public and the press the right to attend all stages of court proceedings in both criminal and civil matters. But there are exceptions. Likewise, there is a general presumption that records filed in civil and criminal matters are open to the public and press, unless those records are specifically made confidential by statute, public policy, or court order.*

Below is a partial list illustrating the types of proceedings and records that are generally open and those that are generally closed. Please note that this list is not exhaustive. Exceptions are possible, or a judicial officer may have entered an order limiting access to a record or proceeding in a particular case. If you have any questions about whether a specific proceeding or record is open to the public and press, you should check with your court executive officer and/or presiding judge.

Should members of the press dispute or take issue with a court's decision on openness, it would be inappropriate for you to offer legal advice about how to challenge the decision. But you may want to suggest that they talk with an attorney about available options.

*See rules 8.160, 2.550, 2.551, 2.580, and 2.585 of the California Rules of Court.

CIVIL MATTERS

Proceedings

OPEN	Jury selection process (voir dire) Pretrial motions Small claims court Trials
USUALLY CLOSED	Access to jurors (until trial concludes) Hearings in chambers (transcripts may be available)
CLOSED	Grand jury proceedings (grand jury may make some transcripts available with approval of presiding judge) Procedures to address complaints about the conduct of court-program mediators Sidebars or in-chamber conferences (transcripts may be available)

Records

OPEN (unless sealed by a judge)	Complaints Docket entries and minutes Evidence introduced in open court Jury instructions Jury questionnaires (may be delayed) Motions Petitions Pleadings
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	<ul style="list-style-type: none">Subpoenaed records (after introduced into evidence)Trial noticesTranscriptsVerdictsWritten rulings and orders
USUALLY CLOSED	<ul style="list-style-type: none">Records concerning communications, negotiations, or settlement discussions in the course of a mediationRecords concerning the receipt, investigation, and resolution of complaints about court-program mediators
CLOSED	<ul style="list-style-type: none">Applications for fee waivers (in forma pauperis)Confidential social service, medical, psychiatric, and educational records; child abuse reports; guardianship and conservatorship investigators' reportsGrand jury evidentiary materials (grand jury may make some available with approval of presiding judge)Jury identification information ordered sealedSealed records and documents

CRIMINAL MATTERS, INCLUDING INFRACTIONS

	Proceedings
OPEN	<ul style="list-style-type: none"> Arraignments Bail hearings Change-of-plea hearings Jury selection process (voir dire) Pretrial motions Sentencing Traffic proceedings (except informal and juvenile traffic court proceedings) Trials
USUALLY OPEN	<ul style="list-style-type: none"> Preliminary hearings
USUALLY CLOSED (with exceptions: judge's permission/ restrictions)	<ul style="list-style-type: none"> Access to jurors (until trial concludes) Hearings in chambers (transcripts may be available) Pretrial suppression hearings
CLOSED	<ul style="list-style-type: none"> Grand jury proceedings (transcripts may be available if there has been an indictment) Sidebars or in-chambers conferences (transcripts may or may not be available)

OPEN (unless
sealed by a judge)

Records

: Arrest warrants filed
: Bail bonds
: Bench warrants filed
: Complaints
: Correspondence from court to
: attorneys or defendants
: Declarations for arrest warrant
: Docket entries and minutes
: Evidence introduced in open court
: Grand jury transcripts after indictment
: (10 days after delivery to defendant
: unless court orders part or all of tran-
: script sealed)
: Jury instructions
: Jury questionnaires (may be delayed)
: Motions
: Petitions
: Pleadings
: Promises to appear (signed)
: Search warrants/affidavits (after return
: of service is filed or 10 days after iss-
: uance)
: Subpoenaed records (after introduced
: into evidence)
: Transcripts
: Trial notices
: Verdicts
: Waivers
: Written ruling and orders

CLOSED

- : Arrest records sealed upon finding of
- : factual innocence
- : Confidential social service, medical,
- : psychiatric, and educational records;
- : child abuse reports
- : Grand jury records before indictment
- : Indigent-defendant applications
- : Jury identification information ordered
- : sealed
- : Presentencing mental evaluation
- : records
- : Probation reports (with exceptions)
- : Sealed records and documents
- : Search warrants and affidavits until
- : the return of service is filed or 10 days
- : after issuance, whichever occurs first
- : Summaries of criminal history infor-
- : mation (Dept. of Justice and Dept. of
- : Motor Vehicles rap sheets)

Juvenile and Family Court Actions

It is difficult to make general statements about the openness of broad categories of proceedings and records in juvenile and family court actions. For example, in juvenile actions, there is a general presumption that all proceedings are closed and records are sealed. In certain juvenile delinquency actions, however, certain records are made public at the conclusion of the action. There are many other examples of exceptions because the laws and rules governing confidentiality in juvenile court are complex and nuanced. You are encouraged to consult with your executive officer or presiding judge before responding conclusively to any media requests in this area.

In family court, there is a general presumption that hearings and records are open. However, adoptions and certain paternity proceedings and records are confidential, as are certain marriage records. In addition, conciliation court proceedings and child custody mediation sessions and records are confidential. Child custody evaluation reports are also confidential. You should talk with your executive officer or presiding judge if the media ask for records pertaining to confidential marriages, adoptions, paternity proceedings, child custody, or visitation matters.

Legal Opinion From the Administrative Office of the Courts

Because there are so many exceptions and complexities, if the executive officer and/or presiding judge are in doubt on the question of openness, help is available. They may request a legal opinion from the AOC's Office of the General Counsel. Guidance on how to request a legal opinion is on the Serranus Web site at <http://serranus.courtinfo.ca.gov/programs/ogc/documents/requestingalegalopinion.pdf>.

5

How to Handle Media Calls

Calls from the media can run the gamut—from the routine procedural question that takes you eight seconds to answer to the proposal for multicamera extended access that takes you weeks to work out. The following is a representative sampling of the most common media requests that trial courts are called on to answer.

Information-Only Questions

Rarely will a civil action in superior court generate media interest. Most calls from the media come from journalists asking basic information about criminal cases. Reporters want to know when and where the murder suspect arrested during the weekend is going to be arraigned and whether the judge will allow cameras. Or they're checking on the progress of a particular case and hoping that you can get the info for them from the judge or clerk. Or they want to know how long the judge is going to delay the reading of the verdict. Or they want to interview a judge about the new traffic laws, and could you please set it up? They're all fairly routine requests.

But you should provide an on-the-spot answer only to questions that you are certain are simple, routine, and noncontroversial. Anything more complex than that requires some reflection or verification. Because your answers will be relied on and may be quoted, you want to be certain that you are correct. So do your homework before you go on the record.

If it's not the type of inquiry for a quick answer, tell the reporter that you will call back shortly. Jot down the reporter's desk phone and cell-phone numbers in your media journal. Ask about the deadline. If you think you can accommodate that time

frame, promise to call back by a designated time. And then do it—even if you have to say you don’t have an answer yet. Journalists literally hang by the phone waiting for answers.

If you establish a reputation as a source of reliable information, you will also get calls from journalists unfamiliar with the justice system asking very basic questions about procedures (like “What happens next?”). Consider this an opportunity to educate and explain the process. It will be an investment in accuracy that will pay off. You can also recommend that they get a copy of *The Courts and the News Media*, a publication of the California Judges Association. (See the References section in chapter 12.)

You may get calls for information that are properly directed to the AOC. For example, if someone wants to know about statewide judicial branch initiatives or the varied work of the Judicial Council’s many advisory committees, the inquiries should be forwarded to the AOC’s Public Information Office. Calls about judicial discipline should be forwarded to the Commission on Judicial Performance in San Francisco.

Remember to write down an entry in your media journal for each media call you handle.

When the Judge Can’t Talk

A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge’s direction and control.

—California Code of Judicial Ethics, canon 3B(9)

Judicial ethics prevent California judges from talking publicly about cases in many instances, but that doesn't stop reporters from asking. Either they don't know or understand the canon, or they're hoping that the judge will violate the prohibition and provide them with a colorful quote. Reporters often want to talk to the judge after a verdict, thinking that it's then fair game. But the prohibition remains until all appeals are exhausted.

Even though you cannot facilitate an inappropriate interview, it's counterproductive to simply ignore the media's request or reply with a terse "No comment" or its equivalent.

The better tactic is to consider the inquiry an opportunity for education. Have copies of canon 3B(9) handy to give to reporters (see the *Media Reference Kit*) and explain why the judge can't talk about the case. According to the *California Judicial Conduct Handbook*, "[t]he reporter will then know the limits of the discussion and not view the judge as uncooperative."*

Remember, too, that reporters are often desperate for an authoritative quote. Here's one way to accommodate that need and educate the public as well: When the judge can't comment, give them a quote or a sound bite explaining why. For example, when Judge William J. Murray, Jr., was asked about a defendant who had been in his San Joaquin court previously and was now involved in another matter, the judge couldn't comment. But he did provide the following sound bite so that the reporter had a voice of authority from the court: "If somebody summons or subpoenas me . . . I can do that. But the rule is that judges are not supposed to use their position to advance the interests of other people."

*David M. Rothman, *California Judicial Conduct Handbook*, 2d ed. (Cal. Judges Assn. 1999), § 5.36.

Public Education

This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity.

—California Code of Judicial Ethics, canon 3B(9)

Sometimes judges are willing to provide background and context for reporters. That’s allowed under canon 3B, and it can be extremely useful for conscientious journalists. Supplying this information also advances the court’s interest in disseminating accurate information about the justice system. Here’s the advice provided to judges in the *California Judicial Conduct Handbook*:

Providing Public Information Concerning Court Procedures and Status of Litigation

Judges may also explain, for public information, “the procedures of the court.” This provision permits a judge to publicly provide such information even in cases pending in the judge’s court. For example, a judge could, in response to media questions, describe the procedures concerning jury selection or the steps in the trial or litigation process. Judges, however, almost never make such comments out of the concern that procedural matters could be seen as involving substance and/or that a comment might be reported inaccurately. The judge is there to provide a clear and accurate picture of the courts and the proceedings that are of interest.*

**Id.* at § 5.34.

When Cameras and Recording Equipment Appear Without Permission

Unless there are specific orders or local rules in place, cameras, recording, and broadcasting are allowed in the public areas of the courthouse. The exception is in the courtroom, where they must have the judge's permission. Jurors and potential jurors are also off-limits, according to the rules of court.

That means that journalists may interview people on camera outside the courtroom and in the hallways, elevators, or anywhere else without asking or getting permission from the court.

You may certainly ask your media organizations to notify you when they want to shoot in your facility, just as a courtesy. And if you create a mutually helpful relationship with the media, they will be happy to let you know when they are coming, and for what, because they know you will help them get the story and get it accurately. It's also to your advantage to know when the media are in your facility and what they are seeking. Knowing about media inquiries can be very useful information for court operations and for documenting your own work.

Routine Media Coverage Requests

Many MC-500 forms are filled out by the media incorrectly or incompletely, which can evolve into a problem later on. Every section on the form must be filled in, although rarely does item 5, "Increased Costs," come into play.

If the request is late by the five-day standard in the rules of court, you may want to encourage the media agency to attach a

statement of “good cause” for being tardy so that the judge can take that into consideration when deciding on a waiver.

If you are handling the requests, you’ll want to get a decision and the judge’s signature on form MC-510. Be sure to then convey the decision as soon as possible to the media so they can make plans and pooling arrangements, if needed.

Don’t forget to fill out the “conditions” in item 4b. Usually the judge wants the right (item 4.b(5)) to position the cameras in the room (if there’s no jury, the jury box can be the perfect place for cameras and journalists—they’re out of the way, and they can grab good shots). And usually the judge wants the media access to be authorized for that one event only (item 4.b(7)).

The completed forms are then included in the court file as part of the official record.

Media Options in Court

Some judges hold to a general policy of allowing no media equipment in their courtrooms. Reporters can come in and take notes, but that’s it. At the other extreme, some judges are perfectly comfortable with allowing a half-dozen cameras and tripods plus journalists in their courtrooms. They grant all requests, they take all comers.

There are also other options. Judges may allow a live broadcast feed. Or they may allow videotaping only for later broadcast. The judge may allow a still camera only and no video. (It should be noted that even still cameras can make loud, distracting clicking sounds.) Some judges allow a sketch artist only and will sometimes designate a strategic reserved position so the artist will have a good view of the proceedings. Some judges don’t mind if

cameras shoot from outside the courtroom through windows in the hallway doors; others prohibit it.

Regardless of the judge's decision, it should be communicated to all media uniformly, and the media contact should make sure that all media representatives understand and follow the rules lest future media accessibility be jeopardized.

Pooling

Some judges prefer to limit the crowd, with perhaps only one videographer and one still photographer. Those two media representatives will then share their images with all other media outlets that request them. This is called a “pool,” an arrangement that's common and accepted in the media.

Some TV stations prefer to be the designated pool camera to maintain control of the product. Some prefer that others do the shooting, so they can send their cameras elsewhere—a strategy to stretch their resources.

According to the rules of court, the media are charged with forming their own pool arrangements, deciding who among them will do the shooting and sharing, and then formally notifying the court. But, in actual practice, it's much more casual than that in routine cases. Usually the first camera to arrive ends up as the pool camera, and the court is seldom privy to the details, since it's almost always irrelevant to the court.

Routine Media Visits

News photographers and reporters are notoriously nomadic. Not only do they move around from city to city, station to station, and court to court, but they also have little time to master each individual location's house rules. And there are wide variations in how much latitude journalists are afforded. So it's useful to frequently remind journalists about which rules of court will be enforced in your location. You should have a supply of those rules printed and handy, just in case a new reporter who's unfamiliar with your customs shows up.

Some elements of the rule of court on photographing, recording, and broadcasting engender continuing confusion, so it doesn't hurt to remind journalists of the following:

- In the courthouse, they must not photograph jurors or prospective jurors. Point out the fact that jurors' badges aren't always visible, so journalists can't rely on that to identify jurors. Remind them to take special care with people in the background. When they're in doubt about whether the person in their shot is a juror, they cannot use the shot.
- They are not allowed to photograph spectators in the courtroom. Even if spectators were witnesses at one time or will be witnesses in the case in the future, they cannot be photographed while they are spectators. However, some judges may determine that if spectators insert themselves into the proceedings as active participants, such as jumping up and shouting at the judge in the middle of the trial, they can be photographed.
- They must not record audio of conferences between attorneys, conversations at the bench (sidebars), or conferences between an attorney and a client/witness/aide.

- Every journalist covering the court is responsible for knowing and following the rules of court and any specific local court orders regulating coverage. Ignorance is not an excuse.
- If journalists violate rules of court, the judge may pull their plug, cite them for contempt of court, impose monetary sanctions, or worse. At the least, deliberate violations of the rules will sour the mutually helpful working relationship between journalists and the court.

Nonroutine Media Requests

Besides local news, there is a huge, hungry media industry interested in gaining access to court records and proceedings. You may hear from TV shows like those on Court TV or CBS's *48 Hours Mystery*. There are also many "true crime" magazine and book writers who may ask for special accommodations.

Writers for print publications are the easiest to accommodate because all they may need is someone to help them get to records or exhibits.

On the other end of the spectrum, you may be asked to facilitate a gavel-to-gavel multicamera video production that takes months to complete. While such productions can add to the court's workload, they can also be tremendous opportunities to accurately educate the public about the work of the court.

If the production is something other than a segment for a local newscast, ask the producer in charge to submit a complete, detailed narrative, in the form of a letter, describing what they propose. This should include what court personnel will be involved, where they want equipment and personnel to be stationed, what specific accommodations are being requested, what extra expenses

are anticipated and who will pay/when, the length of project, what programming will result, and other pertinent details.

If you are unfamiliar with the program proposed, ask for tapes to review. This will help you determine whether they do the kind of programming compatible with your court's public image. You can also check with members of the Conference of Court Public Information Officers. Many of them have had encounters with national media organizations and can tell you about their experiences. Their Web site has contact information: www.courtpio.org.

Based on this information, confer with your presiding judge, the trial judge, and the court executive officer to assess the impact on the court in specific language (court security, foot traffic flow problems, staff time, and so forth). Your court can then weigh the educational benefits versus the inconvenience (not to mention the possible effects on the official proceedings).

If the court decides to allow the production, it will be incumbent on the court's media contact person to be actively involved in shepherding the activities, in order to ensure accuracy and a positive outcome for both the court and the media.

6

The Interview

The current trend in journalism could be called *humanistic*: reporters are eager to build their stories around people—people doing things, saying things, reacting, disagreeing. Journalists are now required to be not only reporters but also storytellers, so they try to include more in their pieces than just a recitation of the facts. Direct quotes are always sought, and the court is frequently asked to comment on news of the day, either to clarify or to add perspective. Consider this reality yet another opportunity to educate.

The Inquiry

If you are the designated media contact person, requests for interviews should come to you. Ideally you have a protocol articulated in your media policy that covers such requests. Your direct involvement with media inquiries gives you the chance to make sure that the court's public information is coordinated and accurate and that the court is speaking with a single voice.

When the initial inquiry is made, try to get as much information about the proposed interview as possible. Ask the following questions:

- Deadline—how soon must the interview occur? (You may be told that someone will be on your doorstep in moments. Don't feel pressured to accommodate. If you cannot be adequately prepared for the interview without more notice, simply decline. It's better that the court have no participation in a story if the alternative is inaccuracy or poor preparation.)
- What's the subject, specifically?

- What's the focus of the story? What point of view or approach will the story have?
- Will the interview be printed or broadcast, or is it for background information only?
- Will the interview be live or taped?
- When will the story be printed or aired?
- If it's print, will photos be taken? Of what? When? Where?
- If it's TV, will they want to shoot anything other than interviews? Action shots (sometimes referred to as B-roll), for example?
- Does the reporter want someone in particular to interview, or will any appropriate authority be acceptable?
- Who else besides the court will be interviewed for this story? (This will give you revealing clues about the general thrust and tone of the story.)
- What questions will be asked? It's unlikely that you'll get a list of questions, but you can explain that if the interviewee knows the general nature of the questions in advance, he or she can be adequately prepared to provide thorough, accurate responses. If you are not provided with a list of questions, don't fret. Presumably the interviewee is an expert in the area of inquiry and so is unlikely to be stumped by any question, but if research is required to answer a question, be certain that someone quickly gets back to the reporter.

Conclude the conversation by telling the caller what day and time you will call with a decision on how to proceed. Then keep your promise.

Who Does the Talking?

In some courts, the media contact person or public information officer is designated as the voice of the court in the press. But usually, if given a choice, reporters prefer interviews directly with policymakers or those directly affected rather than with a spokesperson.

Identify your best candidates in advance of requests from the media, so you can put your best spokesperson forward. Some executive officers are comfortable doing media interviews and lend the voice of authority to the dialogue. When judges are available to the media, it's an opportunity to humanize the judiciary in the eyes of the public.

Interviews on the Fly

Sometimes reporters ask for spontaneous, right-now interviews out of convenience. But when electronic journalists purposely employ the element of surprise, they presume that their interview target would be unlikely to cooperate if asked in advance. Or the TV station may relish a “gotcha” style of journalism. So a crew may arrive unannounced and thrust a microphone in someone's face, hoping that he'll be caught with his defenses down. Sometimes newsmakers become sufficiently flustered by the surprise that they blurt out some ill-advised remark. Or they figure, “What the heck, they're here now; I might as well give the interview.”

Most media experts agree that no matter how comfortable newsmakers may feel with the media, it is ill advised to grant interviews on the fly (when approached without warning in the hallway, for example). Except for the simplest of inquiries, extemporaneous answers seldom make anyone proud.

Judges and court staff should be encouraged to deflect such encounters. The reporter should be told to call the media contact person to get the information. Or you can offer to schedule a sit-down interview in the future—even if it’s 30 minutes later. This will give all involved a chance to collect their thoughts and their facts and for the interviewee to provide a measured answer worthy of a quote in the media. Don’t get rushed into anything for which you’re unprepared.

Preparing for the Interview

It is in the court’s and the public’s best interests that thorough preparation precede media interviews—so that needed information is handy, correct, and presented in the most accurate light. Regardless of who does the interview, either you as the court’s media contact person or someone else, the following advice should be helpful.

- Consult with colleagues for their input and perspectives, as appropriate.
- Write out a list of questions that will likely be asked. Be specific, including the tough, critical, difficult questions so you’re ready for the worst.
- Formulate honest, responsive answers, and express them in a positive, constructive way.
- Identify and list your talking points—key concepts that you want to be sure to mention and reinforce with repetition—whether or not those points are asked.
- Consider limiting the scope of the interview. Specifically identify areas or subjects that cannot or should not be discussed. If those areas are broached, prepare an explanation for why they’re off-limits.

- Write out and arrange your notes so you can easily refer to them during the course of your interview.

Rules for Successful Interviews

To gain mastery of the interview process and to ensure the very best outcome, keep these concepts in mind:

- Do your homework beforehand. Anticipate realistic questions and fully prepare your answers.
- Know that *you* are in charge of the interview, not the reporter.
- Keep your answers simple, uncomplicated. Too much embroidery can get you in trouble.
- If appropriate, use analogies and examples to clarify and illustrate.
- Avoid legal jargon and acronyms. They're counterproductive to the goal of communicating, because most people won't know what you're talking about.
- You don't have to tell everything you know. In fact, you almost certainly shouldn't when you work for the court. Know what is off-limits.
- Remember the reason you're doing the interview: to present certain information to the public in a way that you think is best. So keep your talking points always in mind; remember to weave them into your remarks, or make a special point of them.
- Don't hesitate to refer to your notes or to pause for reflection or a check of your mental list. TV and radio editors will delete silent pauses, and, of course, pauses make no difference for print.

- Assume that the reporter is not an expert on the subject. Offer definitions and explanations.
- Don't be bashful about guiding the reporter. You can and should point out what's important and relevant and what isn't. Most reporters appreciate the help.
- Flag your key points with phrases like "Now here's the important part" or "Here's the main message." This increases the likelihood that that part of your interview will be used.
- Rephrase questions to your advantage. For instance, if the reporter asks whether you think it's reasonable to ask voters to approve a multibillion-dollar bond in tough times, say, "Perhaps you should be asking whether it's reasonable to ask people to enter unsafe court buildings, to put their lives in danger because of inadequate security, and to wait an inordinately long time for their day in court. And the answer is no."
- You can add whatever you think is relevant even if it isn't asked. Check your notes at the end of the interview to see if you hit every point you wanted to make. If you didn't get to everything, tell the reporter you want to add something.
- If you're asked a multipart question, choose the part you like the best and answer that one.
- Avoid casual conversation. You may say something that you'll wish you hadn't, and everything is always on the record.
- If there are periods of silence, resist the urge to fill in the silence. It is during those times when people blurt out some very foolish things.
- Do not ever display angry behavior. If appropriate, calmly let your measured words express your negative reactions.

- Do not lie to the media. You may have to be silent, but don't lie.

Declining to Answer

You do not have to answer every question that you're asked. Decide beforehand what questions or topics are appropriately off-limits. You may even want to alert the reporter in advance that you'll be unable to address certain subjects so that there's no disappointment or confusion.

When you must decline to provide certain information that you possess, explain why. Such explanations not only educate but also insulate you from looking secretive or uncooperative. For example, you may explain, "The rules of court prohibit us from revealing that information." Or let's say that you're asked for details on security changes after budget cuts. You can say that to answer would be irresponsible, because you would be sharing information that would compromise the safety of the public.

When They Change the Subject

You may be told that the reporter wants to interview you about subject A, but the questions soon veer off into another area. There may be no subterfuge intended; the reporter may just be following a conversational thread. Or it may have been a planned trap. Either way, you're always free to decline to go in that direction. Just say so, without sounding irritated.

Especially if the interview is on live TV or radio, you should choose your words carefully so you continue to sound gracious and professional. Briefly, firmly, and diplomatically state that you're unable to answer that question and state the reason. Then

be quiet. If you're asked again, repeat your answer. Remember that you are in control of the conversation and do not have to answer every question that's asked.

E-mail Interviews

More and more reporters are taking advantage of the convenience of interviewing via e-mail. E-mail is also a convenience for the interviewee and offers significant control. You don't have to carve out appointment time, the task can get done quickly and according to your schedule, you can collaborate with others on your responses, you can fine-tune your answers until you're satisfied, and you have a written record of what was said.

If these features appeal to you, don't hesitate to suggest this option to reporters. Just be sure that you take great care with your responses, just as you would with any written communication, and that you have someone proofread your answers before you tap the "send" key.

Telephone Interviews

Many print and radio reporters are happy with interviews over the phone—it saves them travel time. The law says the reporter should tell you if and when the interview is being recorded. But you never know if other people are listening in, so don't share confidences.

There are advantages to the relative anonymity of phone interviews. You can remove the visual distractions around you so you can remain totally focused on the questions and your answers. You can refer to your notes more easily when formulating and delivering your answers. And you can even have a colleague

unobtrusively nearby to coach you through difficult material, if needed.

TV Interviews

A telephone interview alone will seldom suffice for TV, since it needs the visual element. And if you agree to meet with a TV reporter in person, you should presume that you will be on camera. TV reporters and producers usually don't have the luxury of pre-interview conversations; they generally have only one shot at it, and then they are on to another story.

Most local TV news stories are taped with one- or two-person crews. If they use lights, that will take a few moments to set up. They may also rearrange furniture to get a pleasing scene. Ask how wide their shot is—you may not need to worry about your messy credenza. Even though the interview itself is probably going to be a tight shot of you, the photographer may get some cover shots that include background. Hide anything that you don't want seen on TV (your dying Boston fern, your used coffee cup, family vacation photos, and so forth).

While the crew is setting up, don't let your guard down. Your words may be recorded at any time, so while the crew is in the room, don't say anything that you wouldn't want broadcast.

When it's time to speak, set your gaze on the interviewer—don't look into the camera lens. If the photographer is alone, stationed behind the camera, you'll be told where to look while you talk. Express yourself as you always do—if you typically gesture with your hands, do so during the interview to achieve a natural, comfortable appearance.

Be aware that those cover shots, or cutaways, may be inserted randomly into the final story for visual interest. So be guarded in your facial expressions and watch your posture.

What to Wear for TV

If the setting is the courtroom, judges may wear their robes. If the interview is in chambers, a suit is appropriate. Court executives and other designated spokespeople should dress conservatively and simply, avoiding busy prints. No dangly earrings—they're distracting. Always have a suit jacket or blazer handy for last-minute interviews that you don't expect.

Don't Wiggle

If you're standing during the interview, firmly plant your feet; don't rock back and forth, and avoid the inclination to slowly back away from the reporter and camera. If you're seated, ask for a nonswivel chair. Moving excessively on camera is distracting and robs you of authority.

Sound Bites

Most TV and radio news stories are no longer than a minute and a half—often shorter—and they often squeeze in quotes from several sources. So each person's remarks are usually very brief in the final product.

That on-air snippet is called a "sound bite," or "bite"—a quote of manageable length that's supposed to capture the essence of the newsmaker's point of view. Sound bites are often no longer than about 15 seconds. If you give long-winded, complicated responses to questions, your remarks will almost certainly be edited down, and you leave it up to the reporter to select which part of your answer to use. That's relinquishing a tremendous amount of control over your message—which is obviously ill advised. It's better that you edit yourself as you speak so that *you're* the one who decides what's important and what isn't.

The best strategy is to silently pause a moment before answering, so you have time to formulate an intelligent, pithy response. Don't worry about the dead air—that will be edited out.

Mistakes

If you give an answer on tape that comes out wrong or if you stumble over an important point, stop. Tell the reporter that you want to restate that. Then go ahead and say it correctly. (Reporters would rather have a clean, succinct sound bite, too, so they'll be happy to have a "redo.")

If you realize later that you made a mistake at some point while taping, tell the reporter that you need to make a correction, and then say it again correctly. If the taping has already concluded, the reporter may simply make note of the error and the correct information and incorporate it into the final product later. If the reporter has already departed, call the reporter ASAP with the correct information. If the reporter is unavailable and your information is important, ask to speak to his or her supervisor about making the correction. Your efforts will be appreciated—conscientious journalists are just as eager to get it right as you are.

"Off the Record"

No matter how comfortable you feel or how confident you are in the reporter's discretion, you must presume that everything you say to a reporter—*everything*—is on the record. At all times. Even when you're in a social situation or in an educational setting or when you preface your remarks with "Off the record. . . ." This caution also applies when you're talking to photographers,

producers, and assignment-desk folks. It is your only safe course of action, except in the rarest of circumstances when you deliberately want to share confidential information. (Even then, you should not count on remaining anonymous, even if you have a reporter's promise. Journalists can't always keep their promises when outside pressures come to bear.)

What is overheard by journalists is also fair game, even while they're in the waiting room or public areas, setting up or breaking down the gear, so rein in the idle chatter.

“Don't Quote Me”

Avoid using the “don't quote me” dodge. You put the reporter in the dangerous and awkward predicament of not knowing for sure what information is usable. It is far more effective to make statements that can be attributed to an authoritative source such as the court.

But you can and should offer background information when appropriate, and that can be enormously helpful to reporters. It helps them understand the story and put it into proper context for their readers/viewers. When you speak to them “on background” it is generally understood to be off-limits for direct quotes. But be sure that you specifically state, *in advance*, that the information you're about to provide is “*only* for background, not for attribution.” And make sure that the reporter understands that and agrees to that. Otherwise you may find yourself quoted in some awkward or out-of-context ways.

You may ask that the camera or tape recorder be turned off during your background briefing, just to make sure.

If You Don't Know

If you're asked a question and don't know the answer, say so. You may want to direct the reporter to a better source. Or, if appropriate, agree to find out the answer and get right back to the reporter with the information. Then don't forget to do it.

Hypotheticals

Reporters frequently ask newsmakers to speculate because the answers are usually juicier and more colorful than straight facts. A good rule of thumb is to decline all hypothetical questions because they're fraught with danger. Say simply that to hypothesize or speculate would be inappropriate. Period. Then move on to the next question.

Final Jeopardy

Many reporters will conclude their interviews with a question like "Is there anything else I should have asked?" or "Would you like to add anything?" Be ready for that final, golden opportunity to highlight your primary message. Use it to rearticulate the main point that you want to convey, in summary.

Handouts/Take-Aways

Most reporters aren't experts on the justice system. And they're probably covering more than one story on any given day. So the best way to make sure that the court's story is told accurately, fairly, and completely is to make it easy. (This is not to suggest that reporters are simpletons; most are amazingly clever and quick. They have to be, to do the job they do.)

You can effectively uncomplicate their task by providing succinct printed information that they can take back to the shop with them for later reference. If there is a news release, have extra copies. Provide a fact sheet that includes relevant statistics and background information. (See the *Media Reference Kit* for examples.) Then the reporter won't have to take copious notes and can concentrate on what you're saying. And you're providing solid factual information that can enrich the story. For example, if the interview is about juror compliance, statistics like these may be helpful:

Example

Last Year in This Court

- Jury trials: 182
- Jury summonses mailed: 190,572
- Jurors legally excused without appearing: 50,080
- Jurors who appeared: 22,663
- Jurors and alternates seated: 2,066
- Jurors failing to appear: 7,460
- Warning letters mailed: 12,554

The Results

- Jurors who contacted court: 4,786
- Jurors who appeared for jury service: 202
- Jurors who were legally excused: 106
- Jurors who appeared at court hearing: 308

Getting an Advance Copy

Can you ask to see the story before it's published or aired so you can check for errors? Sure, you can ask. But almost never will such a request be granted. And even if you do get a sneak peek, you probably won't be able to change anything (unless there's a gross factual error). However, it never hurts to ask.

Getting Copies of Stories

Some TV stations sell video copies of stories that they've aired. Others will direct you to a service that records the shows for sale. Copies can cost anywhere from \$25 to \$250 and up. The most economical strategy is to ask the reporter when the story will air and then record a copy for yourself. Or the reporter with whom you worked may be able to provide you with a copy, which may not include the anchor's introduction and all the graphics. Your story may also be available for viewing on the TV station's Web site.

Corrections

If an important, substantive error about the court occurred in a radio or TV news story, call the news department immediately. For instance, if they say that \$2 trillion of the bond measure will go toward court improvements, and it should be \$2 billion, that calls for a correction, which may be made immediately on that newscast or on subsequent broadcasts—regardless of who made the mistake.

If the error was in the newspaper, you can ask for a correction. Most newspapers prominently post their correction policy.

But if the substance of the story was negative for the court and the error relatively inconsequential, better to let it go without a correction. You don't want to give the story renewed life with a second exposure just for the sake of correcting a minor mistake. Allow a negative story to fade quickly from public memory, as most do.

If there was no error of fact, but you felt that the focus or the tone of the story missed the mark or left out elements that you thought were important, you probably won't get immediate satisfaction. Instead, take it as a learning opportunity. Examine how you could have presented the information differently to achieve your own agenda of accurately educating the public about the justice system. Then incorporate those techniques into your next encounter.

And it certainly wouldn't hurt to discuss your disappointment with the reporter. Make sure that your tone isn't accusatory or confrontational. Merely point out what outcome you would have preferred. The reporter may offer some suggestions or observations that could be helpful in the future.

In some instances, you may wish to consider this option: If a story is unfairly negative or incorrect and this is a repeated problem with a particular reporter, the court may want to meet with the editor or even the editorial board to thoughtfully discuss the court's views and/or issues. This is an extreme step, but if you take it, bring along written documents as examples and rehearse key messages in advance.

Headlines

Headlines are a frequent source of anger and frustration among people in the news. Headlines sometimes give the wrong impression about your story or are outright incorrect or insulting. But don't blame the reporters—they seldom write the headlines. If the headline is sufficiently egregious, diplomatically register your disappointment with the editor; some type of apology or correction may be presented. Just make sure that you're comfortable having your story on public view a second time before you request another round in the spotlight.

Letters to the Editor

Sometimes a letter to the editor of the newspaper can be the proper vehicle for correcting misinformation or adjusting public misperceptions. Smaller community newspapers are more likely to print your letter because they receive fewer submissions. You will also enhance your publication chances if the letter comes from a judge—better still, the presiding judge.

But before you invest significant time in the composition, have a phone conversation with the editor to find out the paper's parameters and to gauge the likelihood of use. You may even be able to arrange for a guest editorial, or perhaps you'll inspire a follow-up news report.

Your regular bench-bar-media meetings are the perfect setting to float ideas and gauge interest in your topic. (See more on letters to the editor in chapter 9.)

Responding to the Negative

Reporters are supposed to be government watchdogs, so they are doing their job by looking for anything amiss or unusual in the justice system. It is therefore prudent for courts to anticipate and prepare for media attention before negative developments occur. Media inquiries on the subject may not ultimately materialize, but it is better to be prepared.

For example, if the court makes an obvious change, such as bolting one of the entrances to the main courthouse to save money, you can expect publicity as soon as reporters notice the long lines at the other entrances. But when a story unfolds in this way, discovered and initiated by the media, it may not get told the way you'd prefer. In this example, the reporter may choose to concentrate exclusively on the inconvenience to customers, which puts the court in a bad light.

Rather than leave the publicity to chance, be proactive. As with all potentially negative news, it is best to get out in front of it rather than to be in a reactive mode, which is never a position of strength. Reveal the potentially negative news yourself first, so that it's done on your terms, on your schedule. This strategy also signals that you have nothing to be ashamed of, nothing to apologize for.

When you are in control of the message, you are in a better position to emphasize the positive. For example, you can explain that bolting that entrance door is part of an integrated campaign to improve customer safety in courthouses during lean budget times, and you can then point out your other safety improvements. And, moreover, it's yet another effort to be frugal with taxpayer dollars.

Sometimes there is no positive side to emphasize. Nevertheless, being the first to come forward with potentially unflattering news or negative developments demonstrates that the court is committed to transparency.

More techniques for sharing information are discussed in chapter 9.

The Surprise Call

Sometimes, despite your best efforts to anticipate and prepare for media inquiries, you get caught off-guard. A reporter calls, and it sounds like trouble—a negative story brewing. Or, even worse, the reporter arrives on your doorstep with a photographer. The number 1 rule is to take a deep breath—and pause. Do not blurt out responses immediately, even if you think you know the answers.

Ask the reporter to tell you as much as she can about the situation, the people she has already talked to, and what she has already learned and confirmed. Ask her exactly what information she is seeking from your court. If you have established a mutually trusting and honest relationship with the media, the reporter should be forthcoming with this information.

At this point, you may be able to redirect the inquiry to someone else, since it may be inappropriate for the court to address it. For instance, if the reporter has learned that one of your judges is under investigation for possible wrongdoing, it is inappropriate for the court to comment. Refer the reporter to the State of California's Commission on Judicial Performance, the constitutional agency charged with the discipline of judges (455 Golden Gate Avenue, Suite 14400, San Francisco, CA 94102; ph: 415-557-1200), and its Web site, <http://cjp.ca.gov>.

If it's an issue to which you're fairly certain that you can or should respond, ask the reporter what her deadline is and when she hopes to print or broadcast. Then tell her that you will call her back—which you must absolutely do, even if it's just to say that you don't yet have an answer. Then proceed directly to the huddle.

The Huddle

Now it's time for a strategy huddle. In most courts that conversation will include the executive officer, the presiding judge or designee, and other stakeholders on the subject (chair of the court's media relations committee? head of security? financial officer? who else?).

Use the following points as a guide:

WATCH THE CLOCK.

You have promised a response by a certain time. And the less time reporters have to prepare their stories the higher the error rate because their time for reflection has evaporated.

GATHER THE FACTS.

Make sure that *everything* relevant is on the table. When bad news comes out in dribs and drabs, the situation becomes ugly and uncontrollable.

ESTABLISH PARAMETERS.

Discuss and identify what can and cannot be shared publicly, remembering that it is one of the Judicial Council's stated goals to improve trust and confidence in the judiciary by enhancing the public's understanding of the courts. Your role is not to circle the wagons.

DESIGNATE A SPOKESPERSON.

One person should be charged with handling all media contacts. That person should be available 24/7 until everything dies down.

DECIDE EXCLUSIVITY.

Decide whether the response will be given only to the reporter who asked or whether all the media should be informed.

DETERMINE THE MEDIUM.

What is the best information delivery method—faxed news release, statement, background, fact sheet, written quotes, sequential interviews, news conference, some other format, or a combination?

LIST THE QUESTIONS.

Anticipate what will likely be asked, especially by the toughest of reporters. Write out the answers.

WRITE TALKING POINTS.

Identify the main messages and positive information that you want presented. There are excellent examples from the Superior Court of Riverside County in the *Media Reference Kit*.

After the Huddle

- Return the reporter's phone call and contact all the other media, if needed.
- Arrange interviews or a news conference.
- Write a news release and/or fact sheet and background information, prepare a media kit, and distribute the materials.
- As appropriate, inform other court staff of the story before they find out about it from their morning paper or on the evening news.

Dodging

When an unpleasant story is knocking on your door, at some point you may be tempted to try a little avoidance. Ignoring phone calls. Ducking into hallways. Hoping the story will just magically go away without the court's having to deal with it.

Dodging is seldom successful. Like blood in the water to a shark, if a reporter believes that you're dodging, the story may become irresistibly tantalizing. The reporter will presume that you are obviously hiding something, and it's probably pretty juicy, well worth pursuing vigorously. Then you stir up more interest than the story may inherently deserve.

There's another danger to dodging. If you do manage to elude the media up to deadline time, there's a very good chance that they will say something like "We tried repeatedly to get a response from the court, but they refused to return our phone calls." That makes the court look deliberately uncooperative and unresponsive to public inquiries—which does not contribute to a positive image.

Furthermore, the story will be presented without your input, lacking the court's point of view and perspective. That can't be good. And you have relinquished an excellent opportunity to educate a mass audience.

As noted before, it will ultimately be better for the court if you get out in front of the bad news and reveal it yourself, on your terms and in your frame. Get it all out there at once, and the sooner the better. You're then free to move past the bad news, rather than endure death by a thousand cuts.

The Ambush

When camera crews arrive unannounced, shouting questions and demanding answers, maybe even chasing their prey down the driveway, that's an ambush.

If your court finds itself in such a hostile media environment, do not under any circumstances take the bait. Presume the ambush camera is always rolling and recording sound. Keep walking calmly. Completely ignore the crew's presence, without even the flicker of acknowledgment or response. Your goal is to provide nothing interesting. Don't talk, don't say "No comment" or "I have nothing to say." Under *no* circumstances should you display annoyance or anger, like muttering threats or placing your hand over the camera lens. Do not create dramatic video to lead the evening news.

You may say just one thing, if it suits the circumstances: politely suggest that the reporters call the court later to set up an appointment. The interview will then occur under controlled circumstances, where you choose and when you choose (which had better be soon). And you'll have the relevant information and spokespersons lined up for a reasoned response.

Handling Negativity

If you've had a negative encounter with an individual reporter or photographer, you may be inclined to punish that person by freezing him out of future contact. That's almost never in the court's best interests; the court is dependent on all media channels to inform and educate. Your goal should be to turn that negative into a positive.

If the reporter made a substantive factual error in a story, inquire about a correction—first with the reporter, and, if you're not satisfied, follow up with a supervisor. (See chapter 6.)

If the reporter or photographer was rude or broke the rules, tactfully discuss the problem with him directly. He may not have been aware of the transgression. If that fails to achieve mutual satisfaction, speak to his supervisor.

If behavior and facts were correct but you feel that your court was unfairly portrayed, you should have a conversation with the reporter to determine if it was intentional or done out of ignorance. If it was the latter, you can correct that by filling in the educational gaps. Consider it a teaching moment. If the unfair treatment was deliberate, you may ultimately decide to decline any future contact with that reporter or photographer, but that should be a last resort.

Praise

When reporters do a good, fair job covering court stories, be sure to compliment them. It's most effective if the praise is in writing, with a copy to their supervisors.

8

News Conferences, News Releases, and Media Kits

To achieve the best results and to maintain your court's credibility with the media, it is important to choose the appropriate vehicle for your message.

News Conferences

In actual practice, trial courts seldom have news conferences. They're a suitable strategy only if you have breaking-news information in which virtually all relevant media outlets will have an immediate, simultaneous interest. It would be appropriate, for example, if there were a fire in your courthouse overnight and you needed to get new calendar information to the public. Announcing that your court has secured a multimillion-dollar grant from a private foundation to fund community outreach programs would be another appropriate reason for a news conference. But if you call a news conference for a less-than-dramatic development, you will elicit little interest from the media and your news judgment will be seriously questioned, affecting your future credibility.

If you do determine that there is sufficient and pressing media interest in the information you have to share, the news conference is an efficient tool to share information quickly. Use the following suggestions as a guide.

News Conference Guidelines

- Schedule the news conference for early in the day, if possible, with as much advance notice to the media as you can provide.
- Pick an appropriate location—one that can accommodate the media outlets' needs. Outdoors is easily accessible, and no lights are needed during the day. If the conference will be held inside, be sure the room is big enough for everyone, with plenty of electrical outlets and no distracting noises like generators whirring in the next room.
- Fax and/or e-mail the announcement to everyone on your media list; include the Who, What, When, Where, and Why.
- After the fax, if there's time, make follow-up phone calls to key media to make sure your message has been received.
- Keep a list of everyone you contact—names, agencies, and phone numbers—in case you need to cancel or make changes.
- If needed, prepare news releases and media kits.
- Set the stage with a solid, no-window background, a court seal somewhere in the frame, a podium, and flags.
- Make sure the court's spokesperson is well rehearsed, as for an interview, and armed with agreed-upon talking points.
- Start on time and end on time. News conferences usually should take no longer than about 30 minutes.
- Leave time for questions. (Prepare answers for anticipated questions, even for the questions you hope aren't asked.)

News Releases

The most effective news release is direct and succinct. Media outlets receive a lot of news releases, so make sure that their “gatekeepers” can take a quick glance and learn the key information. Keep the release itself brief, attaching additional information for the reporter who will cover the story.

Single-Page News Releases

The most functional news release is on a single page. Keep it simple, clear, and to the point, and it will be well received.

At the top of the page, include the following:

- The contact person, including name, title, e-mail address, day and night phone, pager, and cell numbers (and make sure that that person really will be available to take calls—there is nothing more frustrating for reporters than to call the designated contact and not get an immediate response)
- The date of the news release
- An embargo notice if there is any hold on the information—for example, “Hold until 5:00 p.m. Friday” (otherwise include the line “For Immediate Release”)
- A centered headline that summarizes your story or what’s happening

The first paragraph of the body should be the attention grabber. State what’s most compelling about your story. Keep it short and direct. Then answer as many of the “Five Ws” of journalism that apply. Feature this information prominently, so editors don’t have to struggle to glean the pertinent info.

The 5 Ws

WHAT exactly is the essence of your story, in a nutshell?

WHO are the people central to your story? Who is affected? How many? How to contact them?

WHEN is this event? List the day, date, beginning and end times, and the specific times of any planned highlights (like what time the ribbon will be cut).

WHERE will your event occur? Be specific, with details, even if you think people should already know. Identify where people should park, which entrance to use, where equipment is to be placed, and so forth. Maps are always good.

WHY is your event happening? Why now? Specifically state why your story is important, and to whom. Why should anyone care?

If you are aware of or have made arrangements for visual opportunities (photo ops) for news cameras, point out what will be available and when. That could go a long way toward selling your story.

The rest of the news release should include background information that further explains your story or event. It is likely that whoever covers your story will know nothing more about it, or the court, than what you reveal in your news release. So make it clear, simple, thorough, and accurate so that it's virtually impossible for the media to make a mistake.

If you are quoting people or using names in your news release, mention who they are and what their connection is to your story, unless it's obvious (like if the Chief Justice will be the keynote speaker). Be sure to include their full and correct titles as you want them to be used on the air and in print, and be sure that names are spelled correctly.

Be enthusiastic but don't overinflate the importance of your story—you'll lose credibility.

If you want the media to publish a contact phone number or Web site for the public to use, make sure you state that specifically.

Examples of news releases are included in the *Media Reference Kit*.

Multipage News Releases

Sometimes the subject matter demands that more information be included in the news release than can fit on a single page. There are examples of those, too, in the *Media Reference Kit*.

Some multipage releases include a “fact sheet,” an extremely useful tool for reporters. It's an easy reference, a thumbnail guide to the important points.

A “background fact sheet” is very helpful for reporters who may want or need extra data to flesh out the story. It also attempts to anticipate questions that reporters are likely to have about the mechanics of the event.

Inclusion of a fact sheet or backgrounder can go a long way toward ensuring accuracy in the final story.

When to Deliver News Releases

The most efficient medium to distribute news releases is via fax—electronic or paper. When do you send out a release? That depends on the type of information you’re sharing. Fax it immediately if it falls into the breaking-news category (e.g., the first floor of your courthouse flooded overnight, and you need to inform the public about where to go). In such a case, you may also want to telephone the major news organizations with the information.

Notification for planned events or news conferences should be at least 48 hours in advance, if possible.

For feature stories or suggestions, two weeks in advance is appropriate.

Providing Photos

If you have digital photos, offer to share them with the media in advance of your event. For instance, the newspaper may prefer to have a posed portrait of your new judge rather than a candid shot caught on the fly. And if the paper knows the portrait is in hand, the reporter may not need to bring a photographer. The smaller newspapers may not have a photographer to send along on the story, so they may be happy to have the photos you supply.

Plan to take plenty of well-composed, high-resolution digitals to share later with media outlets that may have missed the event.

Exclusives

An “exclusive” means you give your story to only one newspaper or TV or radio station and to no one else. The media navigate in a very competitive environment, and they like to be able to crow about having an exclusive story, so you may be asked to grant that privilege.

It is seldom a good idea to grant exclusives. It implies that you play favorites, and it is definitely in your best interests to maintain the appearance of neutrality. Furthermore, if you have a positive story to tell, you want as many media as possible for the widest audience possible. And if the story is negative, you owe it to everyone to disseminate the information evenhandedly.

On the other hand, if a reporter approaches you with a story idea, it is generally understood that you won't invite other media to join in without first discussing it with the reporter.

Embargoes

Imposing an “embargo” on information means that you are providing the information to the recipients before they are authorized to publish or use it. For example, if you are honoring someone with a surprise award, you may send out a news release in advance of the event but ask that the media not reveal the winner's name until after the ceremony. In other words, they can use the information about the coming *event*, but the *name* is embargoed until the announcement.

It is unwise to presume that embargoes are always effective. Mistakes are made, and not everyone honors such requests. It is safer to release only information that is public—*when* it's public.

Media Kits

A media kit is appropriate for planned events, like specialty-court graduations, grand openings, and investitures. It is a packet of information that supports and supplements your news release. It provides reporters with all the facts in writing, which should enhance the likelihood that the story will be accurate. And it relieves

reporters of having to do their own research, which few have time to do.

Have plenty of hard copies of the kit on hand to distribute at your event. The kits will be especially appreciated by those news organizations that can send only a photographer, who will then hand off the project to a writer who wasn't present at the scene. If possible, post all kit materials in the press section of your Web site for easy access later.

The materials should be prepared under the assumption that reporters are not familiar with court operations or the judicial system. Most reporters are generalists who will welcome orientation and background materials that you provide.

All the items can be enclosed in a folder with inside pockets or in a large envelope—no need to waste money on a fancy container; the media will not be impressed. In fact, they may view an expensive presentation as an inappropriate waste of public funds. Below are some suggestions for what might be included, depending on the topic.

- The news release
- A fact sheet about your story or event
- Backgrounder or supplemental information
- Preproduced pamphlets on the general subject (some are available from other courts and the AOC)
- A brief tutorial, glossary, or brochure that explains the pertinent judicial process
- Copies of previously published newspaper, magazine, or journal articles about your topic or event
- Brief biographies of the court's spokespersons to establish their credibility and credentials

- Contact information for follow-up with spokespersons
- Photographs, CDs, DVDs, charts, graphs, videos
- Written texts of prepared statements
- A list of suggested questions that interviewers may want to ask (some reporters appreciate the suggestions; others will ignore them)
- Copies of guidelines, policies, or restrictions relating to media coverage that are already in place (like state and local rules of court)
- Pooling notification and arrangements
- Parking advisories and restrictions, including those affecting live trucks
- Suggested interview and reporter standup locations and any restrictions
- Information on the media center or a workspace where media may congregate

9

Strategies for Positive Publicity

Rather than waiting for positive stories to magically appear in the media, many courts are taking a proactive approach. Of course, because of the many variables involved, there are no guarantees that a court's efforts will yield satisfying results. But courts generally have been pleased with the outcomes of their efforts when they use the strategies outlined in this chapter.

Bench-Bar-Media Group

One of the best ways to enhance the likelihood of desirable, mutually productive outcomes with the media is to establish ongoing, positive relationships with them. An excellent means to achieving this goal is to establish a bench-bar-media group. If your court doesn't already have such a group, get one started and keep it active. Quarterly or twice-yearly meetings may be sufficient to maintain a healthy dialogue. It will provide a forum for participants to clear up misunderstandings, solve problems, educate one another, and find common ground. Furthermore, this working group can be enormously useful when high-profile cases occur. The group can help you manage the event in countless ways.

As a first step, host a get-acquainted luncheon to gauge the level of interest in the court's community. Your guest list should include interested bench officers and bar members and representatives from all the media outlets in your area. Make a special effort to recruit media decision makers (editors, assignment managers, general managers, news directors, and so forth) so that you establish "buy-in" from their organizations. During the meeting, circulate a sign-in sheet to collect individual contact information, including direct phone lines and e-mail addresses, and use it to generate a listserve for communication between

meetings. Also, discuss and agree on the elements of your meetings that will be confidential. Determine which topics are fair game and which are off-limits. Finally, draft a mission statement, which will guide and focus your meetings. Here's an example:



Superior Court of San Joaquin County

Bench-Bar-Media Group Mission Statement

- Serve as a forum for exchanging ideas and concerns and for maintaining lines of communication among the court, the bar, and the media.
- Serve as an advisory committee to the Superior Court of San Joaquin County to provide information and express opinions concerning policies and procedures for media access to the courts.
- Provide education and training concerning issues related to the justice system to media personnel and to provide information to judges, court personnel, and members of the bar concerning issues related to news reporting in San Joaquin County.

Think Like a Reporter

If you want to generate positive publicity for your court, you must offer stories that suit the media's tastes and patterns. You may not agree with their choices of what's important or how they present it, but you must cater to their style and interests if you hope to get airtime or column inches.

Here are some of the facts that you should keep in mind as you make your plans:

- All media people are in a big hurry, so check their availability and schedule your events accordingly.
- The media often want to build their coverage around real people, so factor in that element when you're planning.
- Small local newspapers and cable channels will cover stories about community members and events that larger papers and TV and radio stations won't consider, so emphasize the local angle when you approach them.
- Newspapers are more likely than TV or radio to cover issues and complex stories because they usually have more "telling" space and may not require visuals. Newspaper reporters are also likely to have more preparation time to devote to each story.
- TV news programs usually tell each story in just about a minute or two of airtime, which amounts to just a few paragraphs with a couple of quotes.
- TV depends on visuals, so provide some if possible.
- Most reporters will appreciate your help in arranging the elements of the story.

Here's an example of how you can put this information to work. Let's say you're planning Adoption Saturday activities and you want to get as much coverage as possible, because that's the goal of the event. Schedule it early in the day, start on time, and keep it short. Provide all media with a news release in advance and distribute a complete media packet at the event so the story is easy for reporters to tell accurately.

Make it more than just another event by making it a people story. Pore over your list of participating adoptive families and talk to social workers to identify superlatives, like the oldest or youngest child or the most children ever adopted into one family, and so forth. Look also for the unusual, like the single dad adopting for the fifth time or the couple who's adopting a special-needs child.

Think of fresh angles to present, which is imperative if this is not the first Adoption Saturday to be covered by your local media. In Kern County in 2005, the unique angle they successfully pitched was the family adopting four children from Russia.

Coordinate with the social workers to encourage families to participate in your publicity, making sure that the families understand and agree to being identified and photographed for newspapers and TV. You then specifically pitch their availability to the media. You tell them when and where the families will talk to reporters and that they're eager to do so. Reporters then have a new hook on which to hang their story, and you've made it easy for them to do, which enhances the likelihood of coverage.

To appeal to TV, you must plan for interesting visuals. Maybe they've covered your event several times already, same ol' balloons and cake every year, same routine. So you must dig for something new, like maybe an opportunity to visit the home of that special-needs child to get video of the child playing with her new siblings.

Remember the “ultralocal” angle, too. Look down the list of addresses of the families who have agreed to participate. See if any of the families live in areas served by neighborhood newspapers or community TV. Then customize the news release you send to those media to highlight their local residents, which will greatly improve your chances of getting coverage there.

To appeal to a newspaper reporter who could be inspired to write an in-depth piece, provide plenty of well-written and tightly organized background information along with your news release.

You might also suggest story topics that can be covered in advance of Adoption Saturday because some reporters would rather preview the event than chase it. For example, you could provide information on remarkable adoption trends in your community, backed up by reliable statistics—local, if possible. And line up families they can interview.

Hooks

Two elements typically pique the media’s interest in a potential news story. If your story includes those elements, specifically point them out to enhance the likelihood of coverage.

IS IT A FIRST?

The media love to be able to say “This is new.” So if your event or development is innovative, unique, the first in the state (or country, or ever), then by all means say so. But do your homework to make sure you can make a true, definitive statement about how novel your story is.

WHOM DOES IT AFFECT?

If you can truthfully claim that your news will have an impact on a considerable number of people, state an approximate

number. If it's impressive or a significant proportion of a population, that may be enough of a lure to get coverage. For instance, you may be able to inspire a story on your new self-help center if you can point out that 100,000 people in your community stand to directly benefit from it. Be specific in trumpeting the benefits.

Making Contact Count

Cover all the bases. But pumping out news releases to only the most obvious targets is not the best way to maximize your chances for coverage. Think creatively about where you might inspire interest.

Planned Events

To alert all the media to an event that has a scheduled time and date, fax your news release to your entire media list. Also fax it to specific individuals in the media whom you imagine would have a particular interest in the event. For example, in addition to sending the fax to the city desk at the major newspaper in your area, send it to the individual reporters who typically cover those kinds of stories.

If you're eager to get as much coverage as possible, follow up with a telephone call to key media contacts the day before the event. Make your phone calls early in the day, before everyone is under deadline pressure. Tell them that you have faxed the news release and are now checking to see if they are interested in covering the event. (Don't expect a firm commitment that they'll be there, since news organizations seldom know for certain what they'll be covering. But you can at least get some indication of their level of interest.)

Pitches

“Pitching” means making a story suggestion or proposal. If you have an idea for a story that you’d like to see covered, identify the reporter or news organization most likely to be receptive and make a “directed pitch”—a proposal directed to the reporter’s particular interests and reporting style. For example, there may be someone assigned to cover all the crime stories (the crime “beat”) who would be the perfect reporter for a feature story on your dandy new in-custody interview suite. Or the reporter with the business beat might be very interested in your new high-tech accounting system, especially because it saves taxpayers money. Or the arts reporter might do a feature on the new sculptures that local students have donated for your reception area.

If you do pitch your story to any one individual, be aware that the decision to cover it may not be his or hers alone. So send your story information to the chief assignment editor and planning editor, too. Cover all the bases—you won’t offend anyone by doing so.

E-mail

After you establish relationships with reporters and editors, e-mail becomes a primary communication tool. In the meantime, rely on e-mail only if you’re confident that the person you’re trying to reach actually checks his or her e-mail frequently.

On the e-mail’s subject line put “Story Idea” followed by a few words that give clues about where it’s coming from or what it’s about. For example: “Story Idea: Court revs up small claims clinics.”

For the text, use the news release guidelines in chapter 8.

If you’re going to include attachments, make sure they’re produced in commonly used programs so they can be readily opened.

(Avoid compressing files for the same reason.) If you can't, cut and paste your extra material into the body of the e-mail (which is the safest way to make sure your recipient actually sees it).

Also always mail a hard copy of your pitch, just in case.

Snail Mail

The most reliable method for communicating your message is to send a paper copy through the mail. It gives people something tangible they can refer to, hand to their photographers as they rush out the door, or put in their files for future coverage. Furthermore, its presentational elements can be controlled so that the materials properly represent the court.

Telephone Calls

The best calling system is to mail your news release or pitch first, stating that you'll be phoning with a follow-up. Allow a few days; then call, making direct reference to your mailing.

Before you make a telephone call to pitch a story, find out your contact's deadlines so you don't call at crunch time. Anytime you call, ask if this is a good time to talk—if it's not, when is better?

When you do have the opportunity to chat with your media contacts, ask if they can give you some feedback on the story you proposed. If they themselves are not interested in pursuing your story, perhaps they can refer you to someone who may be more favorably inclined.

National Media

Unless they initiate the contact, it is extremely difficult to get attention from national media. You can certainly try, however, using the same techniques that you employ for local media.

Typically it is more fruitful to provide your news release to the Associated Press (AP), a not-for-profit cooperative that shares news information with thousands of newspapers and TV and radio stations all over the world. Send an e-mail (no attachments) to info@ap.org. Stories with local interest should also be sent to your nearest AP bureau; they're in Los Angeles, Tustin (Orange County), San Diego, Berkeley, Fresno, Sacramento, San Francisco, and San Jose. Their addresses are in the *Media Reference Kit*.

If you think your story has national or international significance, mail it to AP's National Desk or International Desk, 450 West 33rd Street, New York, NY 10001.

More information is available on the AP Web site: www.ap.org.

The Ultralocal Angle

You may get more meaningful coverage when you think ultralocal. Community cable TV stations and neighborhood newspapers are typically understaffed, so they're very eager for news tips, suggestions, and stories. And the easier you make it for them, the better. In fact, they may even run your news release exactly as you wrote it, without any edits or trims.

Think local for story angles, too. If an attorney who lives in Teentytown is appointed commissioner, you're much more likely to get a feature story in the twice-weekly *Teentytown Gazette* than in the large *Metropolitan Daily*. Or maybe you can't get the *Metro Daily* interested in your Adoption Saturday again this year. But if you contact all the weeklies in the small towns where the adoptive families live, you'll probably have better luck.

Identifying Opportunities

Some courts take a proactive approach to getting positive publicity. That means always being on the lookout for events or developments in your court that may be suitable for favorable media attention. Look around. Talk to people. Listen. Generally, you'll be looking for the unusual or what's new or whatever has a new wrinkle to it.

Granted, if you're in a large, competitive media market, it's extremely difficult to get coverage for anything other than a scandal or a celebrity appearance. But don't set the qualifying bar so high that you convince yourself that nothing will fly. Don't assume that it has to be an earth-shattering event to get publicity. In every size market, some days are very slow news days with not much going on. Or another story the media planned to cover may fall through at the last minute, and reporters/editors are desperate for anything decent. Then your story idea may very well be the answer to someone's prayer. So if you identify a solid, positive story possibility, don't hesitate to pitch it.

Hip-Pocket Stories

After you successfully pitch several doable story ideas to the media, you will become known as a "go-to" person for those slow news days. It then becomes useful to have a folder full of story ideas in your "hip pocket" that you can propose and set up for the media at a moment's notice. Then, when a reporter who needs to fill some space or airtime says, "Anything going on? Got anything for me today?" you can offer a specific, immediately doable story suggestion.

Examples

Milestones

- The millionth person to use the facilitator's services
- A commissioner celebrating his 20th year on the bench
- A volunteer who just logged the umpteenth hour of service
- The first/last anything

New stuff

- System, equipment, way of doing things

Evergreens (features without an expiration date)

- How the court is coping with growth or specific changes
- A new or updated outreach program
- Issues (like raising juror pay, dealing with records storage)

People

- A judge who volunteers at the youth center
- A clerk who's adopted five children
- A court reporter who's won speed-typing records
- An interpreter who speaks five different languages

Superlatives

- The oldest, the youngest, the longest service
- The new presiding judge and why he or she is special
- A profile of the recipient of an important award

Process Stories

Don't wait for the final report or the ultimate announcement or the big finish to share the story. "Process" stories are also legitimately told. For instance, if your court has formed a committee to perform a yearlong study on self-represented litigants, consider an interim report—an update on how the study's going, problems and successes so far, and so forth.

Be Creative

A little creativity can result in positive media coverage. For example, news organizations often look for companion pieces to accompany their main news stories. If you learn that the newspaper is planning a story on stepped-up traffic enforcement during an upcoming holiday, for instance, you might pitch a story about how your traffic commissioner goes to middle schools to talk about drinking and driving.

Also think about "sidebars," stories that present additional dimensions to the main story. For example, when the Superior Court of Riverside County suspended most civil trials for a few weeks to catch up on its criminal calendar, the newspaper also ran a story about the trend toward arbitration and mediation.

Consider seasonal stories, too. If your court performs weddings, Valentine's Day would be a perfect time to pitch a feature on the service. Be prepared with statistics on how many you've done, how many you do annually, and so on. And offer to see if couples want to be interviewed. Or if you provide passports, pitch a story about avoiding the summer rush. New Year's Day can trigger a story on new local rules of court and their effects—or new judicial assignments and their relevance to the public.

Be Alert

Keep your eyes and ears open for positive stories—there are stories everywhere. For instance, if you learn that a profoundly deaf defendant will be going on trial, it might be an opportunity for a story on signing in court. Or if there is a multiple jury trial scheduled, that could be a good story to illustrate how inadequate your present building is for such needs. Or if one of your judges is summoned for jury service, it's a chance to show that even judges do their duty.

Overpitching

Yes, there is a danger in pitching too many stories too often. If you pitch anything and everything without critically assessing whether it has a reasonable chance of coverage, or without regard to appropriate timing, you're wasting everyone's time. And you undermine your credibility with the media. They will presume that you clearly do not understand what constitutes a legitimate news story, and they may discount your future efforts. So don't send a news release out on every little thing or pitch stories that you don't truly believe have a chance.

Letters to the Editor

It is difficult to get a letter published in a large city daily. There's just too much competition for space. Assess your media market to determine whether a careful composition is worth the effort. If you can whip out the letter quickly (but thoughtfully), you've risked only the price of a stamp—or nothing if it's e-mail. You do have a better chance with smaller newspapers, particularly when the letter comes from the bully pulpit that is the bench.

Below is a letter written by Justice Edward A. Panelli (Ret.) in response to a news article. Published in its entirety by the *San Jose Mercury News* on January 29, 2006,* it's a good example of a communication that educates readers about the branch.

APPELLATE REVIEW MUST FOLLOW RULES

As a former presiding justice of the 6th Appellate District and former justice on the California Supreme Court, I read your articles with more than passing interest. I am particularly concerned about your discussion dealing with appellate review.

First, regarding your criticism that not enough decisions are published. Decisions of the appellate courts are to be published only if they meet standards set out in the rules. The decisions must have some overriding legal significance.† If all opinions were published the only beneficiaries would be the law book publishers of opinions. Moreover, unpublished opinions are available online. In addition, in my experience, most criminal appeals involve factual rather than legal issues and hence don't have great legal significance and don't warrant publication. To suggest that opinions may be unpublished to "hide" the result is, I believe, unfair to the court.

I also take issue with your description of the appellate process. Not all error requires reversal of the trial. Lawyers are well aware of the "no harm, no fault" rule. The appellate process is a review of what happened in the trial court. Its review is based on what is in the trial record. If it's not in the record, it didn't happen. Therefore, the role of the appellate

*Reprinted with permission from *San Jose Mercury News*.

†On December 12, 2006, the California Supreme Court amended the rules on publication of Court of Appeal opinions. The change was designed to encourage the publication of all appellate opinions that may assist in the reasoned and orderly development of the law and to improve public confidence in the publication process. Judicial Council of Cal., News Release 91, "Supreme Court Amends Rules on Publication of Court of Appeal Opinions" (Dec. 12, 2006), www.courtinfo.ca.gov/presscenter/newsreleases/NR91-06.PDF.

court is limited. Under our state constitution, only prejudicial error requires reversal of the case, which gives rise to the harmless-error rule. If it is “not reasonably probable” (the constitutional standard) that the result would be different but for the error, then the appellate court must affirm the trial court. If the appellate court did otherwise it would improperly interfere with the role of the trial court. Clearly, what is found to be “harmless” depends on judgment calls by the appellate justices. That is why we are careful about those we select to act as judges. Judges discuss these matters and the result is their best judgment of whether error is or is not harmless. You suggest that “the court reviews errors from a judicial perspective, not a community one,” but isn’t that what judges are charged to do? Judges represent the community in a broad sense, but they owe an obligation to their constitutional responsibilities, one of which is to make such calls.

—Justice Edward A. Panelli, Retired, Saratoga

Newspaper Editorials/Op-eds

You should definitely cultivate a relationship with the editors of your local newspapers, which you can do in your bench-bar-media group. Then, when your court has something to say publicly, you may be able to arrange in advance to contribute an opinion piece. That’s the strategy Judge John Parker took right before San Joaquin County’s Adoption Saturday event. A single phone call secured a tentative go-ahead, which resulted in the following letter being printed prominently on the op-ed page of the local daily newspaper.* It was an opportunity to garner favorable press for the court’s good work.

*“A Life Changing Saturday on Tap,” *The Record* (Stockton) (Nov. 9, 2001), p. B-7. Reprinted with permission from *The Record*, a division of Ottawa Newspapers, Inc.

YOUR VOICE

A LIFE CHANGING SATURDAY ON TAP

An important, life changing event is about to occur in Department 35 of the Superior Court in Stockton. Ordinarily it takes 2-3 years for the adoption process of children who may have been abused or neglected.

But on Saturday, seven families will participate in San Joaquin County's annual Adoption Saturday. It's an occasion that's designed to help streamline red tape; kind of a catch-up day.

This year nine children, ranging in age from 10 months to 11 years, will be welcomed into their new families. Parents will make a commitment to the children and to the state of California that the children will be adopted and treated in all respects as the lawful children of the parents, and that they shall enjoy all the natural rights of the child, including the right of inheritance. The parents are also making a more meaningful promise to the children: their willingness to share their homes, their family tree and the reservoir of love and acceptance. What greater contribution to the well-being of these children could be made?

Frequently these adoptive parents are the grandparents, aunts and/or uncles of the children; often they are single or beyond child-bearing years. But whatever the relationship is to the child, whatever the age of the parents and children, and however long it takes to finalize the adoption, the end result is very positive for the child. Parents and children have chosen each other to meld into a new family unit of love.

Unfortunately, there are too few adults in our community who are willing to become adoptive parents. Right now, there are about 300 children, ranging from a few months old to 17, who are in temporary care, eagerly waiting for permanent homes. These children deserve the care, nurturing and protection that loving adoptive parents provide.

Won't you please open your heart and your home? To find out more about becoming an adoptive parent, contact the Human Services Agency at [telephone number].

—Judge John Parker, San Joaquin Superior Court

Op-ed pieces can also serve to balance what's considered to be unfair. In January 2006, the *San Jose Mercury News* published a five-part series on the criminal justice system in Santa Clara County, "Stolen Justice, Tainted Trials," that was critical of prosecuting attorneys, criminal defense attorneys, and judges. Presiding Judge Alden E. Danner of the Superior Court of Santa Clara County decided that he had to speak out. He describes the process that led to the publication of his response:

The articles were punctuated by sensationalist headlines, and the methodology used by the authors led to unfair conclusions. That is not say that in some cases there were not abuses and excesses. But overall the series painted a distorted picture.

I submitted the op-ed article because I believed that silence would be construed as the court's agreement with the conclusions of the series. As presiding judge, I saw it as my obligation to respond in behalf of the court. My opinion was not solicited by the newspaper, but the editors were very cooperative and cordial when I asked to submit an opinion piece.

The primary purpose of my article was not to attack the newspaper, but rather to take the opportunity to speak to the public about all the good things that the court is doing, and to bring some perspective to the newspaper's investigation by including statistics that demonstrated that the cases studied by the *Mercury* were minuscule compared with the number of cases handled by the court. I also sought to educate the public about the flaws in the methodology used by the investigators in reviewing only cases being appealed by defendants and speaking only with defense appellate attorneys.

Early on in drafting the opinion I decided to take the “high road” and not attempt a detailed criticism of cases discussed in the series. Space didn’t allow such an approach, and I was conscious that the newspaper always has the last word. Some of my colleagues might have been happier with a “sock it to ’em” response, but I was convinced that would be the wrong approach.

I wrote the article myself, but I had help. After several drafts I was fairly satisfied with the content. However, I then called upon five of my colleagues (none of whom were mentioned negatively in the series) to separately review the draft and give me comments and suggestions. Other judges (including some who had been criticized in the series) heard that I was preparing a response and also made comments and suggestions. I received several good comments and suggestions that I incorporated into the draft. Thereafter, I sought comments and suggestions from Carl Schulhof, as the court’s public information officer, particularly concerning readability, style, and grammar (being fairly satisfied with content at that point).

The *Mercury News* printed the op-ed in its entirety (even though it exceeded the newspaper’s stated word limit) on January 31, 2006:*

*Reprinted with permission from *San Jose Mercury News*.

OPINION: ANOTHER VIEW

**PRESIDING JUDGE OFFERS CONTEXT
FOR 'STOLEN JUSTICE' SERIES**

By Alden E. Danner

As the presiding judge of the Superior Court of California of Santa Clara, I appreciate the opportunity to comment on the series of articles ("Stolen Justice, Tainted Trials," Page 1A, Jan. 22-26) concerning the county's criminal justice system.

By way of background, the Superior Court in Santa Clara County is the fourth largest trial court in California. During the five years covered by the Mercury News study, the court accepted the filing of more than 1.8 million cases. Of those, 1.5 million involved criminal and traffic matters. During the period, the court processed 62,000 felony cases to conclusion, mostly by dismissal, settlement or trial. The felony cases range from simple theft cases to violent assaults and murder. Forty-seven judges (of the 79 judges assigned to the court) are devoted exclusively to criminal cases.

As presiding judge, I attend numerous meetings around the state each year and speak with many judges and court executives. Santa Clara County is regarded as having one of the best trial courts in California. We have developed some of the most innovative court programs in the state. Examples include juvenile and adult drug courts, domestic violence courts, and mental health courts, as well as a Unified Family Court, self-help centers for people who do not have an attorney, an outreach court for the homeless, and an award-winning public Internet site.

Even though the Superior Court in Santa Clara County already performs outstanding services, the court strives to improve the manner in which it accomplishes its mission of serving the public by providing equal justice for all in a fair, accessible, effective, efficient and courteous manner. The court seeks to resolve disputes by applying the law consistently, impartially and independently. There is no area of the court where that is more important than the criminal justice system.

The court thanks the Mercury News for acknowledging in its Jan. 22 article that its review of 727 cases “established that the system usually works,” that most of “the county’s more than 300 criminal jury trials annually are marked by judicial rulings that correctly interpret and administer the law,” and that “there is rarely reason to doubt the guilt of those convicted.”

Be assured that the court takes seriously its solemn obligation to treat all parties fairly and impartially. In criminal cases that obligation includes protecting the rights of the accused.

The law is constantly changing because of new legislation and decisions by the appellate courts. The judges in Santa Clara County participate in a vast array of continuing education programs provided by the California Center for Judicial Education and Research and by the California Judges Association, among others. Many of our judges volunteer to teach in those statewide educational programs and are experts in their subjects.

The series claims that the criminal justice system is biased in favor of prosecutors. However, when only the appeals of defendants are reviewed, it is bound to appear that way. No comprehensive review was made of court limitations that are placed upon prosecutors daily. Such a review would reveal that limitations placed upon prosecutors by trial judges often result in acquittals, reductions of charges, or dismissals of cases. Even when a defendant is convicted in spite of limitations placed upon prosecutors, the trial was a fairer trial from the point of view of the defendant. Furthermore, while the series includes numerous comments attributed to attorneys who represent defendants on appeals, it contains few if any comments by the attorney general, who represents the people of the state of California on appeals.

It is always easier to second-guess a decision than to make one. The conduct of a jury trial involves intense pressure upon all participants. Many decisions with respect to evidence must be made without the opportunity for detailed research. The appellate courts often have many months to review and consider trial decisions that sometimes must be made by judges with only a

few minutes—or less—to consider them. As the series observed, it took three years for the reporters themselves to examine the cases, consult experts and draw conclusions about the propriety of rulings.

The court takes seriously its obligation to seek justice and strengthen a criminal justice system where all participants are treated fairly. In a democratic society it is imperative that the public, as well as those directly involved in the criminal justice system, have trust and confidence in the honesty and fairness of the system. While perfection in any complex legal system is difficult if not impossible to achieve, the court pledges that it will continue to strive to improve the system in Santa Clara County.

TV Editorials

Some TV stations take public positions on critical or controversial issues in the community, occasionally inviting input from viewers. For example, ABC affiliate KERO 23 in Bakersfield regularly airs editorials and solicits responses from viewers. If you want to weigh in with your opinion, you can inquire about a rebuttal. You will be provided with guidelines on how to proceed.

You may also make suggestions about future topics for editorials. And you may volunteer to write and present the court's point of view.

Responding to Newspaper Columns

Be on the lookout for opportunities presented by newspaper columns. For instance, in October 2005 a reporter for the *Crestline Courier-News* wrote a column about being called to jury service only to be dismissed the first day. It was a fairly neutral tale, but he ended by writing that “court officials need to . . . at least pay

us something for our time.” That kind of statement is a perfect opportunity for the jury commissioner to contact the columnist to offer an update on the court’s continuing efforts to increase jurors’ pay.

Another approach is to write a brief, carefully crafted letter educating the columnist about the subject. That may inspire the journalist to write another column that includes the newly acquired information and perspective. But be aware that anything you write may be directly quoted in the paper, so choose your words and your tone carefully.

Tidbits

Make a point of reading and characterizing the “gossip” columns in your local newspapers. The writers might welcome tidbits of positive information about the court and its people—promotions, changes in assignments, speaking engagements, and so forth.

Your Own Column

Some newspapers, particularly smaller ones, are eager to get good free material from outside authoritative contributors. A judge or court administrator can fill that bill. Propose a regular column, like the one published in Stockton for *La Voz*, the Spanish-language local newspaper distributed in numerous communities. Judges answered readers’ questions in their areas of expertise, like jury duty, traffic tickets, and small claims. The column didn’t take long to write, provided an important service to a target community, and raised the public profile of the local court.

“Tip of the Day”

In Yolo County, Judge David Rosenberg writes a “Legal Tip of the Day” that appears seven days a week in Woodland’s *Daily Democrat*. And the weekly *West Sacramento Press* compiles several of his tips for a column in each edition. The tips cover a broad range of issues—everything from legal procedures to courthouse hours. Judge Rosenberg says the tips take very little time to write, but they serve the worthy purpose of demystifying the justice system. If you want details on how to start a “Legal Tip of the Day” feature in your community, contact Judge Rosenberg at drosenberg@yolocourts.com.

Ventura’s “Tip of the Day” is heard on a popular commercial Spanish radio station. A staffer from the court’s self-help center calls in—live, on the air—at 10:30 a.m. Monday through Friday. She does Q&A with the show’s host, and she also answers questions submitted by listeners. It’s about a five-minute spot. There’s no charge to the court for the airtime because the station considers it a valuable public service. You can get more information from Robert Sherman, the court’s assistant executive officer, at 805-654-2964 or robert.sherman@mail.co.ventura.ca.us.

Bragging

Be on the lookout for any good news that you can brag about. For instance, when your court’s executive officer is appointed to a new statewide judicial committee, it’s excellent fodder for his or her neighborhood newspaper. Promotions, retirements, and other milestones are also worth sharing with ultralocal media, and also with the Administrative Office of the Courts (AOC).

Calendars

Your upcoming public events are perfect candidates for newspaper and TV calendars. The *Daily Breeze* newspaper in Torrance, for example, has an “Out and About” section that accepts notices of events and happenings. KCRA 3 in Sacramento broadcasts a calendar and has a section called “In Your Community Calendar” on its Web site where you can post events. KSBY-TV in San Luis Obispo has a similar listing.

Check your local media Web sites for submission guidelines and contact information.

Providing Video

Many TV stations would never ever consider using handout video or VNRs (video news releases)—they refuse to use anything that they didn’t personally shoot. Then again, you might be surprised at how many do use handout video these days, particularly in small, understaffed newsrooms.

Your chances of getting your story covered will be enhanced in some instances if you can provide video. For instance, it’s difficult for TV journalists to report on jury issues if they can’t show jurors. And it may not be practical to send a camera at just the right time to get those “B-roll” shots for whatever story you’re pitching.

If you have a digital video camera and editing capability, consider putting together a modest library of stock footage that you can offer, like sanitized shots of juries (no identifiable faces), the self-help center in action, the children’s waiting room full of kids, a walking tour of your new facility, and small claims court in session.

And always videotape your own events, news style, just in case you’re later asked for footage. (CCN—*California Courts News* on AOC-TV—welcomes video from courts.)

If you don't yet have a digital video camera kit and wish to acquire it, the audiovisual professionals in the AOC's Education Division/Center for Judicial Education and Research can give you advice and help you make your selection (ph: 415-865-7745).

PSAs

PSAs (public service announcements) are traditionally defined as free advertising for nonprofit organizations and government agencies. Historically, TV and radio stations that used the public airwaves were required to provide free airtime for the public good. That's no longer true, so there's very little free time available. And what airtime is available is at times when audience numbers are very low. Also, there's seldom a way to track how many people were exposed to the PSA, making it difficult—if not impossible—to find out if the message even got through. Before deciding to use a PSA, you should carefully weigh any resources invested in producing a PSA against the inability to verify whether your target audience will actually see it.

Buying Commercial Time

If your budget allows, you have the option of purchasing airtime. When you actually pay for airtime, you are guaranteed that your message will be aired on the days and at the times that you contract for, with measurable exposure.

In fall 2005, the Superior Court of Los Angeles County launched a radio public education campaign promoting traffic ticket payment and other transactions on the Web. The 10-second spots were read in three languages over 13 weeks during traffic reports on 75 radio stations, reaching an estimated 7.5 million

adult listeners in Los Angeles, Ventura, Riverside, San Bernardino, and Orange Counties. The airtime cost \$125,000.

The program's purpose—to increase the use of online traffic court—appears to have been achieved. Preliminary analysis found perceptible increases in the number of traffic court transactions conducted online and a similar increase in the amount of money generated by the Web.

Public Transit Ads

Some public transit companies provide free space in and on their buses and railcars to post your ads or PSAs. While the space is provided without charge, you will probably have to pay to produce the “car cards,” banners, or wraps. They do have strict production specifications, and your ads will appear only on a space-available basis. But you may get significant exposure to your target audience. For instance, if you're eager to broaden the response to jury summonses, ads in buses and railcars may get the attention of people you otherwise wouldn't reach.

PEG Channels

Don't overlook your local PEG television channels. These are the channels that cable companies provide for *Public*, *Education*, and *Government* matters. In some communities it's one channel for all three categories. In others, one or more channels will be devoted to each category. Program providers are not charged for airtime.

The public access channel is available for anyone and everyone to get material on the air, no matter what the quality. The cable companies may even provide the use of equipment, studio

time, and production assistance without charge. In some communities the programs get a significant local following, so they may deliver an audience worth tapping into.

The local college or university may be in charge of the education channel. The channel is often used for distance education, but talk shows and other programs may be aired.

The government channel is where you'll see city council meetings, public hearings, and the like. Some cities' government channels have significant budgets and extensive production capabilities and schedules. San Diego, for instance, programs public service announcements, community forums, special-event coverage, documentaries, talk shows with in-depth discussions, press conferences, current affairs programming, and "other thought provoking programming dealing with local issues." For an example, see www.sandiego.gov/citytv.

In Stockton, the city channel presents, among other programs, a weekly, 30-minute, locally produced newscast. The Superior Court of San Joaquin County successfully partnered with the channel to present preproduced 3-minute features called "Ask the Judge," which focused on topics like "Why should I answer the jury summons?" and "What happens when you get a DUI?" The Stockton channel can be found at www.stocktongov.com/channel97/index.cfm.

Here again, it's impossible to know how many people actually watch PEG channels because audience measurement tools are prohibitively expensive. But anecdotal evidence suggests that in many communities, it's worth trying to tap into that audience.

If you want to learn about PEG channels and where they are, here's a place to start: www.mrsc.org/Subjects/Telecomm/PEG.aspx#About.

You can also get information from your local cable companies. They can tell you who is responsible for what airtime and how you can take advantage of those resources. There may be video production capabilities that you can use, partnerships you can forge, or classes to take so you can learn to do your own TV production work.

Local Cable Programming

Many cable companies now offer “local on-demand” programs in the communities they serve. Some have sophisticated production capabilities and experienced staff. And their audience is growing. Nationally, Comcast posted 1.86 billion on-demand views in 2006, up 33 percent from 2005.

If any of your local cable companies offer this feature, they should be included on your mailing list for news releases. And they may accept preproduced programming from the court, such as information about pro per services, Adoption Saturday festivities, and so forth.

Talk Shows

Except for public television stations, there are not many local talk shows on TV anymore, but there are plenty on radio. Either way, it's best to contact the producer, if there is one, or the host. Present your program idea or issue and articulate why you think it's an important topic for listeners.

Before you appear for the broadcast, review chapter 6. If someone else from your court will be interviewed, be sure that person reviews the chapter.

Morning TV Shows

Early-morning local TV news programs usually have lots of hours to fill, sometimes as many as five hours per day. So they're always looking for local programming and story ideas, and that's an opportunity for positive publicity about your court. In 2005, *Good Day Sacramento* on UPN-31 covered Adoption Saturday live. During the 8 a.m. hour one of the families and a representative from the local Department of Health and Human Services were interviewed about the adoption process and the need for more adoptive families. During the 9 a.m. hour the program covered the court's Adoption Saturday activities. Great, positive publicity!

AOC Media

Don't forget about publicity through AOC media, which cover the state courts. The AOC's media channels reach audiences who are eager to receive information about your court and its activities. The editors and producers will help you fashion your message to suit the medium. Contact the AOC Office of Communications: 800-900-5980 or pubinfo@jud.ca.gov.

Serranus, the court-only Web site, has links to all AOC media and direct contact information:

- *California Courts News (CCN)* is a TV newsmagazine geared toward the California courts' 8,000 court professionals at 200 downlink sites. It appears monthly and is also available on demand on the Web at www.courtinfo.ca.gov/ccn. CCN welcomes story ideas and news story contributions from the courts. TravelCam video kits can be borrowed to shoot your own story, citizen-journalist style. Contact CCN producer Leanne Kozak at leanne.kozak@jud.ca.gov. There's also a TravelCam kit stationed at each regional office, ready for loan.

- *Court News Update*, a weekly e-mail briefing for California court leaders, judicial officers, and court professionals, is published every Tuesday and then archived on Serranus. To subscribe, contact Blaine Corren at blaine.corren@jud.ca.gov.
- *California Courts Review* is a quarterly printed magazine distributed to court executive officers, judges, court professionals, and other justice partners throughout California and the nation. See www.courtinfo.ca.gov/reference/ccr.htm.

AOC Public Information Office

Remember to also send news of your court's events to the AOC Public Information Office. That office often publicizes statewide court celebrations, such as Juror Appreciation Week, Adoption and Permanency Month, Adoption Saturday, and Mediation Week. Your court's activities could also be included in news releases to statewide media and court leaders. Contact Lynn Holton, public information officer, at 415-865-7740 or 7746.

Be Persistent

Regardless of the medium or the story you're pitching, it pays to be persistent. If you don't succeed with one reporter, try another one. If one station ignores you, try another one. If the time isn't right, try again later. If your story isn't picked up immediately, don't read that as a referendum on the validity of your story or your pitch. It may just be that competing priorities overshadowed your story at that particular time. Don't be discouraged—keep pitching.

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10

High-Profile Cases

Virtually everyone understands why court appearances by celebrities draw the media. The reasons are less apparent when unknowns attract attention. When you're trying to figure out why the media are buzzing around, remember that who-done-it stories and crime-and-punishment tales are proven audience pleasers.

Then, too, the media have found that getting a story about a court case is relatively easy. No umbrellas are needed, it's climate controlled, and the parties of interest are right at hand. It's usually inexpensive—no overtime, no travel. And the media perceive trial stories as easy to tell—everyone knows who the bad guy is and the chain of events is predictable. Add to that the voracious appetite of the 24-hour news cycle that demands to be fed with new story angles at regular intervals. All those factors tell you that the media are going to keep knocking on your door, and with increasing frequency.

The phenomenon is not going to go away. And when it's your turn for a Scott Peterson or Michael Jackson type of case, you should know what to do.

For the judges involved, the National Center for State Courts has published *Managing Notorious Trials*. The book addresses pretrial planning, jury considerations, security, and media issues from a judge's perspective and includes sample guidelines and forms. (See the References section in chapter 12.) But there is so much more to managing a high-profile case—which is why it's critical to have a plan.

Thinking Ahead

You can bank on significant media interest if one of the parties involved is a prominent or famous person or the case has already attracted a high level of notoriety. Multiple frenzied calls from reporters or inquiries from TV networks are a pretty good tip-off that you're in for a circus.

As soon as you get the clue, it's wise to begin fleshing out the specifics of your media plan. Don't wait for the media to drive the process. The media are inherently unable to predict when and how they will want to cover the story—or with what vigor. They almost always make spur-of-the-moment decisions about coverage. But don't assume such hesitancy is a lack of interest. They hedge and vacillate because they just don't know themselves what they will want to do. And they change their minds, depending on the public's response to the case. For instance, no one predicted how much audience traction there would be with Scott Peterson, a fertilizer salesman from Modesto accused of killing his pregnant wife. But as the story unfolded, the media felt compelled to respond to the growing public interest by devoting more and more resources to the story.

So with informed forethought the court should anticipate and plan for the most extreme situation. It's far easier to scale back than to ramp up as events unfold.

The Voice of Experience

There is certainly no more active and demanding media market than Los Angeles. Allan Parachini has been the public information officer in the Superior Court of Los Angeles County since 2002. He offers this advice on dealing with attention-getting events:

People often ask why Los Angeles has so many high-profile cases—especially involving celebrities. My joking response is, “We’re L.A.—look who lives here!” Celebrities do everything other folks do, from shoplifting and driving drunk to abusing spouses and violating contracts. And a small number of them—as in the population at large—are accused of committing murder.

Our location ensures that our court *always* has several criminal and civil matters that fall in the high-profile category. But any court system anywhere can find itself with an extremely high-visibility case—even one involving an internationally known celebrity—with literally no notice. Even small cities and smaller towns can find themselves trying to cope with dozens of media vehicles, including satellite trucks and aircraft, with no warning.

But our experience suggests that it is a serious mistake to base planning or assumptions about high-profile cases on the most extraordinary matters, such as the O. J. Simpson, Scott Peterson, Kobe Bryant, and Michael Jackson trials. In other words, don’t assume that any high-profile case in your court will be, as some people put it, “another O. J.” Although the Simpson matters were litigated in our court, we do not view the level or nature of media attention they received as the norm—even for L.A. (Trials that depart so much from the norm are rare but not unprecedented. The 1935 Bruno Hauptmann trial in the murder of aviator Charles Lindbergh’s baby may actually stand as the 20th century’s most prominent example of a courthouse media extravaganza.) These incidents are *not* a reliable planning model for a very high percentage of the prominent cases that actually occur in

most jurisdictions. In nearly all cases, the situation will be more manageable than any of those examples.

Much closer to the norm for high-profile cases were the trials of actors Winona Ryder and Robert Blake and proceedings involving singer Courtney Love and record producer Phil Spector. As we go to press, the Spector murder trial has just begun. As discussed in chapter 3, Judge Larry Paul Fidler has permitted live camera coverage—the first time this has occurred in our jurisdiction since the Simpson matter in 1995. In media relations terms, we are not treating *this* like a mega-case. While we recognize the intense and broad levels of interest in it, Judge Fidler is holding control of his courtroom and ensuring that this matter flows in a typical way without untoward influence by the presence of cameras.

Reviewing media coverage of cases like these can be a good guide to how media interest typically plays out. Most times, interest is markedly diminished after an initial appearance but may pick up again at the preliminary hearing stage, for preliminary motions in limine, and during trial.

The sheer volume of high-profile matters that we handle means that cases that are extraordinary and highly unusual elsewhere are routine in Los Angeles. Yet we grapple with the same basic questions each time a new high-visibility case comes along. Here are some tips:

- It is critically important that all planning involve the court services contingent of your sheriff's department, the judge assigned to the case, the court executive officer, and the presiding judge. Not all

of these individuals may actually participate in the detail work of forming a security and media plan, but they must be aware of what is happening.

- A top-level priority for any court confronted with a high-profile case must be to ensure that court operations are not disrupted for other court customers. It is *essential* to remember that, to each person entering a courthouse, the case in which he or she is involved is just as important as a prominent actress's shoplifting trial may be to the media.
- Public access to the courthouse and all of its facilities should not be impaired by a concentrated media presence. As much as possible, public spaces should be kept clear of group interviews and other clusters of people. If the courthouse's interior design is inhospitable, a suitable exterior area can be identified. If inclement or cold weather is an issue, erecting a tent or creating a media center can be negotiated with media organizations.
- Creation of a media center should be considered in high-profile matters—especially if your courthouse (like most) does not have a permanent pressroom. Costs should be recovered from media organizations. However, cases of this magnitude are extremely rare.
- Although you may find yourself confronting dozens of news vans and hundreds of reporters, if you are a trial-level court you are most answerable to your local community. Freezing your own local-market media outlets out of a high-profile case is, in every situation, a bad mistake. It may be easy to succumb

to the allure of having nationally known network reporters standing in front of your courthouse or sitting in your courtroom, but remember who is going to be in that same courtroom next week when no celebrities are involved. In terms of its own public visibility and transparency, a local court should give priority to the needs of its own local-market media outlets.

- It is essential to be familiar with the options available to a judge and respond to his or her questions about expectations for media interest.
- A question you will confront early in any high-profile matter is whether you should move it from a tiny space—in our case, the family law courtrooms with fewer than 15 seats—to the largest courtroom available. At first the decision may seem obvious: choose the largest courtroom to maximize the number of media seats you can offer. The decision is not that straightforward, however, since there is a more fundamental question at hand: does your court want to establish the precedent and appearance that courtrooms are nothing more than sound stages? In L.A.'s case, our policy now and in the past has been that we do *not* move cases to different courtrooms simply to accommodate media seating demand. Cases may sometimes be moved if the presiding judge believes that extraordinary public interest—not just media interest or the need for an unusually large jury panel—justifies such a decision.

- The most common solution for limited seating in courtrooms is to instruct the media that coverage will be on a pool basis. The judge can stipulate that a pool arrangement *must* be used for “media coverage” within the meaning of rule 1.150.
- The mechanics of actually managing pool coverage is another matter. According to rule 1.150, media organizations wishing to cover a proceeding must agree among themselves which entity will be the pool feed. However, you must remember that the pool has to capture pictures with technology common to all outlets wishing to use the feed. In some situations, the first outlet arriving at the courthouse will self-select as the pool. It is in the court’s interest, however, to establish procedures under which no outlet can serve as a pool unless it can share pictures with all other outlets.
- Form MC-510, the order permitting media coverage, enumerates the judge’s options, including the option of delegating all aspects of media coverage to someone else. This is usually a designated administrative employee because few courts have public information officers on staff.
- Before 2005, it was comparatively easy to ensure universal access to pictures because virtually all television news outlets used either the Sony Beta format or Panasonic’s DVCPRO. But as stations adapt to new Federal Communications Commission rules that require high-definition technology, an entirely new set of formats has emerged, and, at this writing, it is incompatible with either Beta or

DVCPRO. Bottom line: Beta and DVCPRO can provide pictures to virtually any station, but, for now, HDTV cannot. And if the outlet acting as a pool originates pictures that other outlets cannot use, the court is going to take the blame—warranted or not.

- Limited seating may also require the use of a reporting pool, in which one or two reporters are chosen to act as fact-gatherers by consensus of the media outlets present. This is a rare occurrence, but it can commonly occur in jury selection, which is mandated to be open to the public but which, logistically, may fill an entire courtroom with prospective jurors. When seating is extremely limited, you should consider creating reporting pools for newspapers, wire services, TV outlets, and radio outlets. In today's media environment, it may also be necessary to select a pool for Internet news outlets. In extreme situations, a single reporter may have to be designated as the pool for all outlets.
- Our practice is to issue a media advisory several days—or, rarely, weeks—before a calendared appearance that is likely to attract a great deal of attention. The advisory, which we send by e-mail and fax, informs the media that they can make reservations by phone during a certain, specific time window. A seating list is developed in chronological order as these calls come in.
- We are often asked whether we can offer an audio feed from the courtroom's public-announcement system or whether we can provide an overflow

room that can have an audio and/or video feed from the courtroom. Our practice is that, if the judge assigned to the particular case consents, we will make an overflow room available if we can. However, in today's budgetary environment, it is often impossible to find such spaces in our court-houses. When an overflow room can be identified, the technical aspects of providing the audio and/or picture and getting the signal to an overflow room are entirely the responsibility of the media outlets. This includes paying for any additional security that may be necessary.

- Advance planning for parking will work to your advantage. We have consistently found that it is advantageous to work with whatever law enforcement agency has jurisdiction over parking in the court-house area to cooperate on selective enforcement, vehicle permitting, and selection of transmission locations for microwave and satellite.
- Remember that most news vans cannot fit into parking structures and that news vans engaged in live coverage must be positioned so they can transmit a live picture. The two most common transmission types are microwave and satellite. They have different positioning requirements. For microwave, which is essentially a line-of-sight medium, the van must be able to send a signal to a receiver that is not obstructed by terrain. For satellite, the truck must be able to point its dish to the southeast, without any structures or terrain in the way.

- An added consideration is that if television outlets plan to do live reporting from the courthouse area, they must be able to run cable from their live-shot positions directly to their vans.
- If the judge assigned to the case prohibits cameras in the courtroom, sketch artists may wish to attend proceedings. Their status is more of a philosophical question than might first appear. On the one hand, they are creating images for broadcast. On the other hand, they are fundamentally doing nothing but taking notes. In early 2007, rule 1.150 was amended to clarify that sketch artists and reporters taking notes are not subject to the provisions of that rule.
- Under extreme circumstances, you may wish to issue special media credentials for news people with courtroom access.
- In our jurisdiction, with celebrity proceedings commonplace, we say—in jest—that media coverage isn't massive unless more than three helicopters are circling the courthouse. In your jurisdiction, managing the size and behavior of a crowd of reporters may require that you have plans in place for both the interior and exterior of the courthouse. Remember that the judge to whom the case is assigned can control media behavior inside the courtroom. In the rest of the courthouse, however, the supervising judge for that courthouse has media-control authority. How far this authority extends outside of the courthouse building depends on many variables. However, the ability of the court to mandate

media placement or behavior generally does not reach very far outside actual courthouse property. You must be sensitive to judicial discretion and ensure that your bench officers are as fully informed as they wish to be.

- One of the most draining elements of high-profile case media management is demand for documents—mostly by the media but partly by the public. In this regard, scanning, e-mail, and the Internet are the court's best friends. Maximum use of electronic technology should be considered in every such case.

As we rush into the era of the Internet—and, in particular, blogging—determining who is a journalist and who is not will be an additional challenge. Is any blogger who writes about events inside a courtroom a reporter? This may be the question of the era.

Some final thoughts:

- Never forget the security implications of any plans you make for managing media coverage.
- Don't leave your judges or executive officer out of the loop.
- High-profile matters may be settled or continued with no notice. Nevertheless, it's wise to plan for every appearance as if it were going to occur. That means good communication with the courtroom, especially on changes in proceeding dates and whether the celebrity or notorious defendant is actually going to be present.

- Managing or facilitating news coverage requires people skills and an ability to remain calm. Good planning is the best way to ensure that you will be able to remain calm.

Throughout any experience with a high-profile case, it is most important to keep your perspective. Bottom line: It's just another case in your court, and it has to stay that way.

Court Web Site

When the Michael Jackson case hit the Superior Court of Santa Barbara County in 2004, so did 2,300 credentialed media from 35 countries. Requests for records and other information were immediately overwhelming. So the court established two Web sites, one for the public and one for the media (www.sbcspressinfo.org), which provided court information about the case, filed documents, protocols, forms, credentialing, seating charts, press pool and camera positions, and other relevant information. The court no longer needed to duplicate and distribute copies of documents, and the burden of sharing information shifted from court personnel to the individual media. It is an innovative, fair, and efficient way to handle multiple inquiries, and it won for the court a Judicial Council Kleps Award in 2005. The court made a CD to explain how it all works and how others can implement the system. For details, contact Executive Officer Gary M. Blair (ph: 805-568-3150; e-mail: gblair@sbcourts.org).

The Superior Courts of Fresno and San Mateo Counties have also provided court records electronically in high-profile criminal cases, a practice that's now allowed under rule 2.503 (formerly

rule 2073) of the California Rules of Court. All three courts say that their efforts successfully eliminated the burden on court staff while optimizing public access to information. And the Judicial Council's Court Technology Advisory Committee reports that

[n]one of the courts experienced any technical difficulties or computer security breaches, and no inappropriate or erroneous posting of sensitive personal information occurred. Counter and telephone requests were all but eliminated. While staff and computer resources had to be temporarily redirected to maintain the Web sites, no temporary staff was required in any court.

... The [Fresno] court also reported that posting information about future court events in the case was particularly helpful to the media.

... San Mateo County reported that congestion in the courthouse was eliminated by not having the 500 registered users of its Web site converging on the public counter for information. The site received thousands of hits a day while the case proceeded. The information was kept up on the Web site for six months after the case concluded; it has now been removed but archived.*

To assist courts in providing remote public access to records in extraordinary criminal cases, the Court Technology Advisory Committee has developed a procedure manual outlining best practices for implementing rule 2.503(e). The manual is included in the *Media Reference Kit* and is available on the Serranus Web site at <http://serranus.courtinfo.ca.gov/programs/tech/documents/mantxt02.pdf>.

*Judicial Council of Cal., Advisory Com. Rep., *Electronic Court Records: Remote Public Access in Extraordinary Criminal Cases: Procedure Manual to Implement Rule 2073(e)* (Oct. 25, 2005), pp. 2–3.

No Web Site

If you're getting multiple media inquiries but you determine that establishing and maintaining a court Web site are impractical for your situation, strive for consistency and evenhandedness in distributing information. Let the media know exactly what you will be releasing and how and when you will do it; then stick to that schedule. And do your best to make sure that all reporters receive the information at the same time, so there's no real or apparent favoritism.

Media Coordinator

When a case generates tremendous interest, including from the TV networks, courts may want to suggest to the media early in the process that they hire a "media coordinator." Having such a person would be especially helpful in courts that don't have an experienced public information officer or media liaison on staff.

The primary function of a media coordinator is to serve as a buffer between all the media and the court, attorneys, and law enforcement. Because the coordinator is paid by the media, he or she represents their interests. But such an arrangement can also provide enormous convenience for the court, because the court then has to deal with just one person, rather than several people from each media organization—who in total can number in the thousands.

The media coordinator's exact responsibilities will vary in each case depending on the individuals involved, how much confidence all parties have in the process, and the experience and competence of the media coordinator. The Superior Court of Fresno County's policy enumerating the media coordinator's responsibilities is included in the *Media Reference Kit*.

Peter Shaplen* is notable in this field, having served as media coordinator in numerous notorious cases, including the Michael Jackson trial in Santa Maria, which attracted thousands of journalists from all over the world, and the Scott Peterson trial in San Mateo, which brought 860 credentialed journalists. Shaplen explains the role of the coordinator this way:

The media coordinator represents the interests of the media to the court and other justice system representatives, but also attempts to represent everyone's interests so that all stakeholders get some satisfaction. He or she works to explain the media to the justice system, to resolve differences, to enhance access, and to erase lines in the sand regardless who wrote them in the first place.

The media coordinator can be of service to the court by handling some logistics, such as distributing evidence as it's cleared by the judge, setting up a system to review evidence in the court with the clerk, etc. I have also had occasion where I worked with the judge to resolve differences—for instance, reworking a decorum order that may not be to everyone's advantage.

Credentials are another area where a coordinator comes in handy—handling the assigned seats, flexibly handling any unassigned seats, setting up a lottery for seats. And it's useful to have a media resource 24/7 for both sides—including availability for those after-hours calls and those last-minute needs.

The coordinator's duties should also include problem solving. During both the Peterson and Jackson trials there were incidents of media misconduct that were solved/settled/smoothed over by the coordinator and

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court executive working together to achieve a mutually satisfactory understanding.

I win some, I lose many, but I treat all sides like they're my clients, and the arrangement works.

Emergency Communications

It takes only one mishandled crisis to cause your agency to lose the respect and trust that it has been building for decades.

—*Communicators Guide for Federal, State, Regional, and Local Communicators*

Fires, earthquakes, floods, chemical leaks, violent and disruptive incidents, employee issues—they can and do happen in the court environment, usually without warning. Depending on the magnitude of the event, you can expect immediate and intense concern from every direction. In fact, the demand for information may quickly exceed your capacity to accommodate it. And your response will be scrutinized.

Many courts now have disaster plans in place that address safety, recovery, and business continuity. Disaster plans should also include a communications component because the best, most accurate information about the court will come from the court itself. If the court fails to be proactive in sharing its own news, that role will be filled by inferior and potentially damaging sources.

Keep in mind that your primary objective as a court communicator during a crisis is to maintain the public's trust and confidence in the justice system. You accomplish that by offering accurate, consistent, and comprehensive information in a timely manner, which provides reassurance that the court remains solid and stable, even in emergencies.

Advance Planning

For the communications component of your disaster plan to be effective, it is critical that you lay the groundwork well before any emergency. These elements can form the backbone of your communications plan.

- **Contribute.** Make every effort to participate in management strategy sessions so that you can lend your communications expertise to the process.
- **Get in the loop.** Establish with management that you expect direct and frequent access to the person who has the most authority during the crisis. You must be in the top-level loop so you can provide accurate, current information.
- **Create a team.** Identify the specific individuals from across the court who will participate in message formation during a crisis—for instance, the head of security, the jury manager, and a human resources representative. Justice system partners should also be included, such as a bar administrator and a media representative from your bench-bar-media committee.
- **Compose key messages** that reflect your overarching message strategy (e.g., “access to justice in a secure and safe environment is one of our primary obligations”).
- **Keep your media lists current and handy**—including a hard copy in your office, one at home, and one in your car.
- **Keep a list of cell-phone numbers and home phone numbers** so you can contact managers, other key staff, and important stakeholders. Keep a hard copy in your office, one at home, and one in your car.

- Designate someone to be responsible for updating your electronic publishing channels—your Web site, listserves, and e-newsletters.
- Identify areas where you can hold news conferences, where you want reporters to congregate, and where TV satellite trucks can park.

Strategy Huddle

When that unforeseen event occurs, once again it's time for a huddle (see chapter 7). Get the decision makers together to agree on the facts. Make specific determinations about what information can and should be shared and what information must be kept confidential.

Decide whether to take questions. If so, anticipate what specific questions will be asked by reporters and the public—from basic information to colorful anecdotes. Then draft your answers. Determine who will answer which questions.

Take notes during your huddle; write it all down so there's no confusion later. Then stick to your plan.

Target Your Audience

During any circumstance that disrupts your normal business activity, you must identify the individuals and groups who will depend on you for critical information in that particular situation. They may include

- The public and court users
- Other courts
- Jurors

- Employees, judicial officers, contractors, and others who work at the court facility
- The AOC's Emergency Response and Security unit
- Justice system partners
- City, county, state, and federal agencies

The Public Through the News Media

Members of the community are interested in and entitled to know what's happening in their courts. Your task is to inform them about the emergency and how it affects court operations, such as operating hours and alternate court sites. People with scheduled courtroom appearances should be notified, especially in criminal cases.

Because most people turn to traditional media in times of emergencies (primarily radio and TV), the most efficient way to share information quickly is through the news media. So the productive and mutually trusting relationship that you've developed over time with the media will be especially helpful during a crisis or disaster situation.

As soon as you can, establish lines of communication with local TV, radio, and newspapers. And remember to tap into the resources of the Judicial Council's Public Information Office and the AOC's Office of Communications. Their staff stand ready to assist you in getting the word out to regional and statewide media.

Have on hand all relevant information, statistics, contacts, and fact sheets (see chapter 8), and then be available 24/7 after that, until the emergency is over.

Convey to the media that you are trying to be open and helpful, not an obstruction. If you don't know the answers to some of their questions, say so. And predict, if you can, when you may have the answers or where they should go for the answers.

To convey the seriousness the court places on the situation, it's important for the presiding judge and/or the court executive officer to be prominently visible in public statements—e.g., being quoted in news releases, participating in news conferences, and providing interview opportunities. If the circumstances are sufficiently grave, that “top management visibility” might include the Chief Justice, the Administrative Director of the Courts, or other senior executives.

If people have been injured or killed, begin by expressing your sympathy and genuine concern for those affected. Never forget that you are referring to human beings who are suffering, not just statistics. Craft your statements carefully to reflect sensitivity and compassion for those who've been hurt. And if you release names, be certain that they're cleared for publication.

Remain calm and unflustered, so listeners are reassured that you're in control.

You should be prepared with answers to the following:

- Who is in charge? Of exactly what?
- What happened, when, where, why?
- How many people are affected? How are they affected?
- Were there injuries and casualties? What were the circumstances?
- What are the victims' names and titles? What is their current condition?
- Who responded? How?
- Are there any further risks to people or property?
- What is the status of records and other paperwork?
- How are court operations affected? Give hours of operation, emergency locations, information on file access, and other critical information about court operations.

- Are there alternate court sites? Who should report where?
- How long will it take to get back to normal? Or back open?
- How will case processing be affected?
- What is the legal authority to extend time for arraignments and felony preliminary hearings?
- Does the court have a local rule covering these circumstances? Are there emergency rules of court? Has the Chief Justice issued emergency orders?
- Is there structural damage to court buildings?
- Can the media see the site? Take pictures? If not now, when?
- What are estimates of repair completion and costs? Who will pay?
- When's the next update? Where?
- What about contact information for the public—telephone or Web site?
- Any information limitations? Embargoes?

Reporters may ask you seemingly accusatory and confrontational questions. Be ready to answer the following questions that may apply:

- How could such a thing have happened?
- Whose fault is it? What will be the repercussions?
- Was there negligence? Illegal activity?
- Did you know about the risk/danger beforehand? If yes, who else knew? If not, why not? Who should have known?
- What is your security arrangement? Was it at fault?
- Has this happened before? What were the circumstances?

- Will there be an investigation? Who will conduct it? When can we get results?
- Can we talk to the victims? Can we talk to staff? To the presiding judge or court executive officer?
- Do you have photos of the victims? Family contact information?
- If a judge is involved, can we see his or her bio?
- What could have been done differently to avoid this?
- What are you doing to prevent this from happening again?

If you don't know the answer to any question, say so. Or, if appropriate, say that it's under investigation. And be prepared to address or debunk rumors that are raised.

DEALING WITH THE NEGATIVE

Remember the advice in chapter 7: You should be the one to reveal your own bad news. Some media experts call it “taking out your own trash.” If the facts are embarrassing or negative, it is far better to get them out early and fully and then move on as soon as it's reasonable. Such an approach reaffirms the court's commitment to transparency and allows you to guide the public's attention to more constructive areas in the future.

ACCENTUATE THE POSITIVE

Take the opportunity to humanize the situation and the court people involved. Offer specific individuals who will speak directly with reporters—judicial officers, executives—to provide evaluative quotes and anecdotes, expressions of sympathy, resolutions for future improvements.

Actively search for the positive stories that can be told, too. Almost every situation will provide human-interest stories—people behaving remarkably well in difficult situations, coping, overcoming challenges, acting heroically.

After the fire in Merced’s main courthouse, Judge Ronald Hansen expressed his pleasant surprise at the way folks responded: “All those petty issues that existed before in your normal day-to-day operations are put on the back burner,” he said. “They just flat disappear; everyone kind of rises to the occasion.” Specific examples of such positive behavior can be the basis for a positive feature story or sidebar that you can pitch to the media.

ACKNOWLEDGE LESSONS LEARNED

If the crisis has revealed flaws in the court’s operations or response, call the AOC’s Office of the General Counsel to discuss possible liability issues. Attorneys will help you craft an appropriate statement acknowledging that the court has learned from mistakes that might have occurred and declaring when and how the court will make changes for the future.

NEWS BRIEFINGS

When you need to get information out to as many people as possible as soon as possible, a news conference is a convenient way to accomplish that. And when all media are invited and welcome and you’re sharing with all media exactly the same information at exactly the same time, everyone knows that you’re being fair and not favoring one reporter over another. See chapter 8 for suggestions on news conferences.

You should schedule the briefing as soon as you have information to share. Invite the media by fax, e-mail, and/or phone with as much advance notice as possible and with an eye on deadlines. If you have time and the equipment, prepare a hard-copy news release and fact sheet. If time or equipment is lacking, go with your handwritten notes. Better to get the information out as quickly as possible than to wait for presentational excellence.

Articulate the ground rules: Where can the media take pictures? What information is off-limits? What interviews will be available? Will questions be entertained? Be clear about logistics like parking, audio feeds, and gathering places.

Lay out the confirmed facts.

Follow-up Briefings. Circumstances continually evolve during a crisis, so you should provide periodic updates to share new information. Determine an appropriate frequency: daily? twice daily? every hour? If at all possible, schedule regular updates at specific times rather than calling extemporaneous news conferences to announce new developments. This lets you control the flow of information, it will free you from having to respond to media inquiries in between briefings, and the media will appreciate the ability to plan their coverage.

Stick to your schedule. Resist the temptation to talk between briefings, which would only confuse the situation.

If your next scheduled briefing is imminent and you have no new information, fax, e-mail, and/or phone your media list contacts to cancel that particular update and let them know that the subsequent scheduled briefings are still planned.

Say Thank You. Frequently express your thanks to media representatives for their contributions during your emergency. They are providing a valuable service by publicizing the information that you need to share.

MONITOR THE MEDIA

Designate someone to watch/listen/read/clip news reports and keep a log; correct inaccuracies quickly (see chapter 6).

PURCHASING TIME

If you're not getting sufficient free airtime or inches to get your message out to the public to your satisfaction, consider buying airtime or newspaper space to post the information.

THE COURT WEB SITE

Because some people rely on their computers to keep current, the home page of your court's Web site should be continually updated with the latest information on court operations for the public. Identify in advance who will be responsible for updating the site.

Also consider a special section for justice system partners and a special section for the media if circumstances call for it (see chapter 10).

The Courts Through Internal Media

Don't forget to inform court media, too—AOC-TV's *California Courts News (CCN)* and *Court News Update (CNU)*. AOC staff and folks in other courts are keenly interested in your court's news. They may offer assistance, and they can learn from your experience.

Jurors

Citizens who have been summoned for jury service and those already assigned to a case must be told whether they're still needed and when and where to appear. The news media can help get the word out.

The Superior Court of Sacramento County has a continuity-of-operations plan (COOP) that spells out who will be responsible to inform jurors through their interactive voice response (IVR) phone system and their interactive Web response (IWR) system. They also designate a backup person to do the job.

The Superior Courts of Fresno, Tulare, Orange, and Ventura Counties plan to use the same systems. But if you're planning to update your IVR by computer, you'd better be able to *get* to your computer—not always possible in an emergency. And there had better be electricity. Jury Supervisor Lynda Pierini of the Superior Court of Madera County says her court is sometimes reduced to basics:

Without power, there is no way we can give information on the IVR or the IWR—it is all connected to our jury management program. Our phone system is also down when there's a power failure.

We have had more than one power failure on a Tuesday, when jurors were walking in our door. So I keep hard copies of all the necessary paperwork that goes into the courtroom with the jurors. I put it in a metal box with ink pens, paperclips, cellophane tape, stapler, etc.—things we would require in such an emergency. This particular metal box is located off site.

Not too long ago we were without power for several hours. As jurors walked in our office to be checked in, we wrote their names on the random lists.

As far as notifying jurors ahead of time, I don't really see how one would do that, unless the emergency didn't affect our computer system. All telephone numbers and contact info are in our computer. The only way we would be able to notify jurors would be with the media.

When a portion of our courthouse burned down in 1998, there were articles in the newspaper and announcements on radio stations. We also set up information tables in the parking lot for all jurors walking in, directing them to off-site temporary locations.

Judicial Officers and Court Employees

Keep judicial officers and staff in the loop. It's demoralizing if their only source of information is the media. Even if they are not directly affected by the information you share, they will appreciate being "in the know."

The more they know, the less fuel there will be for the rumor mill. And if they are kept up to date, they can help disseminate accurate, needed information to the public.

If your court is small, face-to-face group meetings could work. Larger courts may rely on e-mails or hard-copy distributions to each office.

Some of the topics to address with your colleagues:

- Casualties, injuries
- Locations of emergency court sites
- Court operating hours

- Development of a phone tree
- Traffic information, if alternate routes are necessary
- Telecommuting options
- Human resources issues (getting paychecks, how down-time will be compensated, and so forth)
- Insurance claims

Administrative Office of the Courts' Emergency Response and Security Unit

The primary purpose of the Emergency Response and Security unit (ERS) is the emergency planning and security needs of the AOC and all court systems statewide. In November 2006 the unit assigned a full-time emergency planning analyst to help courts develop their comprehensive emergency plans.

If you keep ERS in your information loop, they can assist your court during disaster recovery operations, continuity-of-operations, and liaison operations with other governmental agencies.

Justice System Partners

Depending on the nature of the emergency, other justice system agencies may need specific information. Consider contacting law enforcement, jails, the district attorney, the public defender, victim-witness advocates, and other appropriate organizations and officials.

Attorneys will have many questions, whether they are in trial or have other business with the court. If a bar representative is on your emergency team, the communications task is easier. Frequently asked questions include these:

- With the clerk's office closed, where do I file paperwork?
- I'm in the middle of a trial; is there an alternate location?
- Where's my jury?

Other Government Agencies

Consider what other agencies may benefit from your information during the emergency or with whom you should coordinate the release of information. Local law enforcement and fire departments, county public health officials, emergency medical services, and the Federal Emergency Management Agency (FEMA) are just a few of the agencies that may become involved. It would be prudent to establish contacts within these agencies before an actual crisis.

Tips for Success During a Crisis

Of course, no two emergencies are alike, and different approaches may be required. But the following suggestions should apply to many situations:

- One person does the talking. Abide by the single-spokesperson rule to avoid confusion, conflicting messages, and errors.
- Be cautious about what you "know." Realize that early information that emerges in a crisis is usually inaccurate. Stick to the facts. Share only the information you're certain about.

- Don't speculate, guess, estimate, or offer opinions about what did or did not happen.
- Recognize that information and messages will change. Adjust. Be flexible.
- State the problems and their implications so that it's clear that you "get it."
- Express sympathy and understanding for victims and their families.
- Don't assign blame.
- Tell the truth—but know your informational boundaries. If you don't know, say so.
- Convey reassurance that court business will continue, albeit in some unusual settings and at different times.
- Keep notes on communication successes and failures, including a log of where your information was published or broadcast. You'll want to generate follow-up reports with this data, and your records will be useful when you do a postcrisis analysis.

Case Studies

Not all emergency situations involve physical, life-threatening disasters. Sometimes it's an unforeseen event that challenges internal communications and threatens to publicly embarrass the court.

Surviving a Court Crime

Karen Dalton, public affairs officer of the Superior Court of San Diego County, offers this case study in crisis communications:

On the weekend of January 20, 2006, surveillance cameras captured a court employee walking into and out of the courthouse. The following Monday, bank deposit bags from the court containing \$21,899 in cash, \$24,708 in checks, and \$15,179 in credit card receipts were missing, and so was the employee.

The dual detection of missing money and a longtime supervisor set the employee grapevine ablaze. The discovery also placed court managers on a tightrope: they needed to get information out to employees and the public in a timely and organized fashion while not damaging the theft investigation, the court's reputation, and, without full evidence, the character of the court veteran.

By the time the story ended, it was revealed that the employee had a gambling habit and had stolen from the court for years. He was eventually arrested, pled guilty, and received a prison sentence.

By adhering to the following points, the court not only weathered the storm but also improved its employee communications and media relations.

TAKE CONTROL: BE PROACTIVE, NOT REACTIVE, AND GET THE FACTS

From the very beginning, the court's goal was to "own" the story. Court managers wanted to be the ones to release information to the employees, the media, and the public. Employees in the superior court branch were

already hearing rumblings about the missing money, but the court's other employees had no knowledge of the situation. The court did not want employees to get their information through gossip, and it did not want to "react" to media requests. The clock was ticking for the court to release accurate information before the media heard of it.

Because there was a sheriff's investigation involved, it was important to work with investigators. This served two purposes: the court received confidential information on evidence pointing to the employee's guilt, and the court vetted all information it released to ensure that it did not harm the investigation. By the time the court issued an employee e-news bulletin and news release, it was assured that the information was correct and there was an understanding of what information the court could and could not release.

KNOW YOUR AUDIENCE: WHO NEEDS THIS INFORMATION?

In preparing information about the theft, the court determined the audiences who needed to receive it.

Employees. Because the suspect had worked at the court for decades, he was well known to many employees. Several were in tears at his disappearance and were concerned about foul play. It was important to release accurate information to the employees about the theft, his disappearance, and the fact that the sheriff's department considered him a "person of interest."

Because employees often feel they are “the last to know,” the court did not want them to hear the story from the media. Ten minutes before giving the media information about the theft, the court sent out a global e-mail explaining the situation to judicial officers and staff.

The court never took a position on the employee's potential guilt or innocence; it simply reported the facts approved for release by investigators. All questions concerning the theft went to the sheriff's department. Several employees remarked that this was a “first” for the court, and they appreciated receiving the information.

Public. The court theft included credit card receipts. With identity theft being a significant concern, it was imperative for the court to let the public know as soon as possible that a theft had occurred. It was understood that the public would be angry at the court if it “sat on” this information. The court identified what money was missing (money collected two days before the theft), what this meant to the public involved (their cases would not be adversely affected by the theft), and what was being done about the lost payments (the court asked people to cancel and reissue checks and report the theft to their credit card companies; the court absorbed the cash losses).

It was also important to provide the public with a course of action; once they heard the news, what were they to do? A special phone line was established for the public to ask questions and get answers about the incident.

Media. It was apparent from the start that a court theft and a missing court employee would grab media attention. It was also apparent that working with the media was the fastest way to get information to the public. It

was crucial for the court not only to be the first one out with the bad news but also to ensure that the information was understandable and as complete as possible.

The court developed a plan to determine what information would be released and who could provide answers. Before the initial news release was drafted, it was agreed that the sheriff's department would handle all questions about the crime. The court handled questions about the missing employee (i.e., longtime employee, no problems in the past, this event was out of character) and its discovery of the theft.

The court was also prepared to have the media come to the courthouse to see the "scene of the crime," and the public affairs officer was designated as the court spokesperson on this incident.

BE PREPARED TO ANSWER: WHAT ARE THE 10 WORST QUESTIONS?

Before the theft was announced, court managers and the public affairs officer developed interview guidelines. They determined the 10 most difficult questions the media might ask about the incident (How could this happen?, Was this employee ever in trouble?, and so forth). By brainstorming questions and writing down the answers the court vetted all information beforehand. When the public affairs officer went before the reporters, she had confidence that the answers she was giving were approved. By working with the sheriff's department beforehand, she also knew what could be answered by the court and what could be deferred to the sheriff's department and its public information officer.

The phrase “no comment” was never used. Because of preplanning and the vetting of information, there was always an answer for every question (although sometimes the answer was “We cannot release that information at this time”).

A “key message” was developed for all audiences: The court was concerned about the situation and was doing everything in its power to ensure that the theft did not affect those who entrusted their money to the court.

BE AVAILABLE: WE NEED NEWS NOW!

Once the employee e-news alert went out and the news release was sent, the media calls rolled into the court’s public affairs office. The media, as predicted, wanted interviews and wanted access to the courthouse. The court was ready and available to meet with reporters.

FOLLOW UP: THE STORY ISN’T OVER UNTIL IT’S OVER

Once the first chapter of the story played out, the court continued to keep employees informed. When the employee was found and arrested several weeks after the theft, the court sent an announcement to all staff. When the employee was arraigned and sentenced the court’s public affairs officer was available to reporters and was prepared to answer the question, What is the court doing now to ensure this doesn’t happen again?

IN CONCLUSION

In the case of the missing court funds, the court understood that the goal of crisis communications is to provide effective, timely information through immediate, accurate, and interactive channels. The court was able to avoid mistakes by

- Providing accurate and updated information as quickly as possible
- Having a key message
- Communicating with employees
- Working with the media
- Providing easy-to-understand information
- Giving the public a way to contact the court with concerns
- Not speaking for other agencies

There is a saying in crisis communications, Tell it all, tell it fast, and tell the truth. By following these basic rules during the incident the court was able to maintain credibility and confidence not only with its employees but also with the public it serves.

Fire Shuts Down Courtrooms

Kathie Goetsch, executive officer of the Superior Court of Merced County, got a call at 6:45 a.m. one hot Sunday in July 2006. Her main court building was on fire. It started in the district attorney's office under suspicious circumstances and took 17 firefighters two hours to put out. Three of the seven nearby courtrooms were bathed in smoke and soot. It was a smelly, unusable mess.

Since Merced is a small community, within a few hours all the court staff heard the news and gathered at the site. That was the first time they had had a chance to talk about emergency plans. Here are some of the lessons they learned from their experience, as related by Goetsch:

When people arrived that afternoon, they were wandering around looking and saying, “Where can we do this?” “How will we do that?” “What’ll we do Monday?” “Let’s try this or that.” “What’s going on?” The communication was difficult, so we decided to meet Sunday evening in one of the courtrooms. Everyone was there, including police, fire, court staff, the public defender, the D.A. We all shared information and within an hour decided what to do the next day. That was critical. We then knew where the people were going to go, where the police lines were going to be, what information we could make public, where we’d move courts around. One person was designated to call jurors on one case not to come in Monday; the case would be continued until Tuesday. After all those decisions were made, we all just fanned out and did what we had to do.

One important lesson learned is to have a complete list of everyone’s cell-phone numbers and to keep that list at home. What good does it do if it’s in the office and you can’t get into the office? It sounds simple, but it sure would’ve helped us.

After we got our power back, the most important thing was to decide where we were going to hold court—where to tell people to go. We picked the most critical courts and got them set.

The clerk's office was also a top priority. First thing Monday morning we set up a small temporary office where the clerks could do minute orders. It was clumsy and crowded, but at least it was air-conditioned in the 110-degree heat.

We put staff with a table and chairs in the shade on the street corner where most people would come by. We made big signs that read "Court Information" that cars could see as they drove by. We stocked the table with a cell phone, a phone book, copies of the calendars, and all the other information people needed to know. That helped a lot. And we put up lots of signs on buildings directing people where to go.

Then the restoration company trucks rolled in, wanting to know where to start. We had to develop a priority list of what departments we were going to restore first. I picked the clerk's office, to get infrastructure behind the courtrooms. You can actually have the judges, the district attorneys, the clerks, and the court reporters in another big room, but unless they have the files, they can't work.

The biggest challenge was communication, keeping people informed about what was happening. There are a lot of players involved. Security, where the public can go, where they can't go, where we need police lines or barriers, what courts are going to be open, which ones are closed, how people can find out about it so they show up at the right place.

Presiding Judge Frank Dougherty gave daily press briefings to reporters about what was happening. Those news articles helped us tell people what was going on.

We thought it would be good to put information up on the Web site, but no one had time to do that, and the information would have been out of date too quickly because everything was changing so fast. So we used paper-and-pencil signs, which worked just fine.

This all would have been much tougher in a large court. Here we're small enough that we all knew each other, we all worked together before and had good relationships, and we could all show up and work together. And everybody really, really wanted to get the court back up as soon as possible. We succeeded with excellent teamwork.

Blackout in a Courthouse

When unusual, unforeseen events disrupt normal court operations, the importance of effective communications becomes paramount, as Allan Parachini, public information officer of the Superior Court of Los Angeles, describes in this case study.

Although Los Angeles operates on a scale that may vastly exceed the experiences of other courts, it faces the same challenges as a two-judge court anywhere in California. When you need to make the public and justice system partners aware of a problem, L.A. isn't really much different from Colusa or Del Norte. The same basic principles apply.

One August morning in 2006, Judge Carl West arrived at the Central Civil West Courthouse at his usual early hour—just after 6 a.m. What he found was most definitely not normal. A massive electrical failure overnight had plunged the entire 19-story building into darkness, with

all power off—computers, lights, everything black. And it was a Monday, the busiest day of the week, when child support services alone sees about 250 clients.

Without warning, the court had lost one of its most important facilities. CCW houses the court's complex litigation unit with nine courtrooms and a child support complex with offices and three courtrooms.

And the electrical failure was so serious that it was impossible to predict its duration. (As it turned out, the courthouse was closed 15 days.)

A crowd of more than 350 people—including judges, staff, litigants, and attorneys—had formed on the plaza, wondering how the court could operate that day.

Judge Carolyn Kuhl, the courthouse's supervising judge, immediately formed a team of court administrators, staff, and judges as well as staff from the county's child support services department.

First, nearly all of the 60-member courthouse staff were alerted to the problem. Many, including the deputy executive officer, facilities director, and public information officer, were reached by cell phone while driving to work.

Central administration determined that judicial vacation schedules at the nearby Stanley Mosk Courthouse—the nation's largest civil facility—could accommodate all CCW services for a week or two. In the meantime, staff carried tables and lawn chairs onto the courthouse plaza. As customers arrived, either they were sent over to Mosk or their matters were continued.

The work group recognized that because CCW is so heavily involved in complex litigation, the bar was a priority constituency. Individual lawyers were quickly enlisted to get the word out through their private e-mail networks.

The first news releases we wrote included information from the court, child support services, and the Public Defender's office. This unusual cross-branch approach helped commercial news entities, especially television and radio stations and the ubiquitous City News Service, reach a broader public audience in the hope of preventing needless visits by clients.

On the day after the blackout, the *Los Angeles Daily Journal* and the *Metropolitan News-Enterprise* published stories on CCW.

Also on the second day, information went up on the court's Web site. A prominent moving headline on the main page announced the latest news and included a link that provided comprehensive information on temporary locations. By midweek the Web site carried complete temporary assignment tables for every courtroom and related service agencies' activities.

Word was getting out. By the third day the crowds of customers and attorneys on the courthouse plaza dwindled to almost nothing.

During the second week, an asset auction in an obscure civil case was on Judge Kuhl's calendar. Because it would have been impossible to timely notify all parties of a location change, the judge held the auction in the open plaza in front of the courthouse. The event attracted

media attention, telegraphing to the public that the court was doing its business on as close to normal a basis as possible—an important point to make.

The spectacle on the plaza had another benefit. I had been working with a *Los Angeles Times* reporter for months on a story on deficient court facilities county-wide. The outdoor auction provided an irresistible current news angle for the *Times*.

In all, the episode proved an important principle: just like other organizations, courts can successfully manage crisis situations by joining *all* essential players in a collaborative process to cope and seek long-term solutions.

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A Final Word and Additional Resources

No matter what media matter you're working on or what outreach project your court has undertaken, know that you and your court are not alone. Do not hesitate to ask for assistance or counsel from the AOC's Public Information Office (ph: 415-865-7740) or from the AOC's Office of Communications (ph: 415-865-7734). Their staff stand ready to help and share resources and knowledge. And keep in mind that a wealth of information is available from experienced outside sources. The Web sites of some of these organizations and a list of references available online or in print are listed below.

Know, too, that in your role as a communicator for the court, you are measurably supporting the mission and advancing the goals of the judicial branch. By effectively and proactively sharing information, you improve the public's understanding of the process, which inspires greater trust and confidence in the courts. And that is a significant contribution to the administration of justice in California.

Helpful Links

AMERICAN BAR ASSOCIATION

Tips for working with the media on Law Day events.
www.abanet.org/publiced/lawday/media/home.html

CALIFORNIA COURTS ONLINE PRESS CENTER

Designed to assist journalists in covering the courts by providing news and background materials about California's judicial branch. At the Online Press Center users can access news releases about the Judicial Council and Supreme Court, find out press contacts at local courts, and view a calendar of upcoming events.

It also provides quick access to the forms needed to request permission to use cameras or recording devices in court.

www.courtinfo.ca.gov/presscenter

CALIFORNIA COURTS WEB SITE

Provides a wealth of information about the California courts and Judicial Council programs to support the judicial branch. On-line resources, such as fact sheets, court statistics, and special Web sites on jury reform, court interpreters, and court facilities, are great tools to keep reporters informed. Of particular interest to court media staff are reports on the 2005 Public Trust and Confidence Survey, which present findings on how the public receives information about the courts (see References section for Web addresses). The Web site also offers quick access to Supreme Court and Court of Appeal opinions as well as to the Online Self-Help Center.

www.courtinfo.ca.gov

CALIFORNIA FIRST AMENDMENT COALITION

Information on the California Public Records Act and First Amendment issues as well as archived reports on the public's right to information.

www.cfac.org

CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION

Legislative Affairs section includes a rundown of Freedom of Information issues in local and state government, public access laws, and positions taken by the CNPA on legislative measures affecting the media.

www.cnpa.com/Leg/GA/home.htm

CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS

A national organization that provides “a focal point to improve the skill and knowledge required of those performing the duties of court public information officer.” It sponsors conferences, seminars, and other educational programs and offers professional networking opportunities.

www.courtpio.org

FREEDOM FORUM'S JUSTICE AND JOURNALISM PROGRAM

Reports and articles on news reporting in the federal courts.

www.freedomforum.org/templates/document.asp?documentID=12816

NATIONAL CENTER FOR COURTS AND THE MEDIA

A program of the National Judicial College in conjunction with the Reynolds School of Journalism at the University of Nevada, designed to be an information source on the interaction of the press and the courts.

www.judges.org/nccm

OFFICE OF THE ATTORNEY GENERAL, STATE OF CALIFORNIA

Crime statistics and news and information about legal issues affecting the state.

www.ag.ca.gov/index.php

PUBLIC RELATIONS SOCIETY OF AMERICA

A Web site to inform PR professionals about continuing education programs, information exchange forums, and research projects conducted on the national and local levels.

www.prsa.org

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

“Information on Covering the Courts” includes a state-by-state guide to rules on cameras in court and links to articles on court access to the media.

www.rtndf.org/foi/cc.html

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Legal resources for reporters and information on protecting the media’s rights.

www.rcfp.org

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Beware of the Con in Conservatorships:
A Perfect Storm for Financial Elder Abuse in California
By Kenneth Heisz, Esq.

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Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California

By Kenneth Heisz, Esq.

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About the Author

Kenneth Heisz, an attorney at Gorman & Miller, with offices in Santa Monica and San Jose, California, is an accomplished litigator and skilled trial lawyer. He has served as lead counsel in complex cases in both state and federal courts at the trial and appellate levels. He also has tried many state court cases and conducted arbitration proceedings that led to favorable results.

I. Introduction

Social isolation from family and friends. Lack of mobility. The inability to leave home. Missed medical appointments. A decline in personal grooming. The accumulation of unpaid bills and other debt. The lack of food and other basic necessities. Feelings of depression and powerlessness.

Upon hearing of these conditions, a reasonable assumption would be that they describe the experience of many people under stay-at-home orders in the midst of the current COVID-19 pandemic. However, these conditions do not exist only during an unprecedented health pandemic. Unfortunately, these conditions exist in the throes of elder abuse, a different type of pandemic that impacts elders. The fact that these two pandemics are now overlapping can only be characterized as a perfect storm that has befallen elders.¹

Financial abuse is recognized as one of five types of elder abuse.² The other types are psychological abuse, physical abuse, sexual abuse, and neglect.³ Despite the fact that financial elder abuse is just as devastating as the other types, it has not

received as much attention by researchers and has received even less by the public.⁴ As noted by one federal agency in a recent report: “Financial exploitation is the most common form of elder abuse and yet the least studied”⁵

In California, most financial elder abuse claims are addressed by probate courts in the context of conservatorships, which are sought to prevent someone from abusing or exploiting a vulnerable adult. But what happens when the perpetrator is someone who was appointed by the court to prevent such abuse from happening in the first place (i.e., the conservator)? This article examines the issue of financial elder abuse and the potential danger of such abuse by conservators in California.⁶

II. What Is a Conservatorship in California?

In California, when an adult (an individual 18 or older) is unable to manage his or her personal and/or financial affairs, a court can appoint a third party (a conservator) to act on behalf of that incapacitated or incompetent adult (the

1 COVID-19 appears to prey disproportionately on older Americans; therefore, the Centers for Disease Control and Prevention has issued COVID-19 guidelines targeted to those who are 65 and older. As if this is not scary enough for those in this age bracket, many people express the opinion that our senior citizens are expendable because, the argument goes, the economy needs to be reopened immediately.

2 Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, 373 New Eng. J. Med. 1947, 1947–1948 tbl. 1 (2015). The National Center on Elder Abuse has identified two additional types of elder abuse: abandonment and self-neglect. Natl. Ctr. on Elder Abuse, *Types of Abuse*, <https://ncea.acl.gov/Suspect-Abuse/Abuse-Types.aspx> (accessed Dec. 1, 2020).

3 Lachs & Pillemer, *supra* n. 2.

4 Lisa Nerenberg, *Introduction*, 12 J. Elder Abuse & Neglect 1 (2000).

5 Stephen Deane, *Elder Financial Exploitation: Why It Is a Concern, What Regulators Are Doing About It, and Looking Ahead* 14 (Sec. & Exch. Commn. Off. of Investor Advoc. June 2018), <https://www.sec.gov/files/elder-financial-exploitation.pdf> (accessed January 29, 2021).

6 Part of the impetus for writing this article is the fact that June 15, 2020, was the 15th anniversary of World Elder Abuse Awareness Day, whose organizers held its inaugural meeting at the United Nations on June 15, 2006. Moreover, in California in 2018, the month of June of that year and every June thereafter was proclaimed Elder and Vulnerable Adult Abuse Awareness Month. See Assembly Bill 238 (2017–2018 Reg. Sess.), Stats. 2018, ch. 135 (effective Aug. 17, 2018).

conservatee). The court procedure for this appointment is called a probate conservatorship.⁷

California Probate Code § 1801 provides for two types of probate conservatorships: a conservator of the person⁸ and a conservator of the estate.⁹ A conservator of the person is appointed to take over decisions concerning the personal care of the conservatee (e.g., health care, food, clothing, housing). A conservator of the estate is appointed to take over decisions regarding the conservatee's financial affairs.

Conservators in California are required to adhere to the statutory laws set forth in the state's Probate Code. In addition, California law requires that private conservators be provided with a reference manual that delineates their duties and responsibilities: the *Handbook for Conservators*.¹⁰ In this handbook, the concept

of conservatorship is characterized as follows: "A conservator is an individual or organization chosen to protect and manage the personal care or finances, or both, of a person who has been found by a judge or a jury to be unable to manage his or her own affairs."¹¹

The stated legislative intent of the establishment of a probate conservatorship is commendable. Indeed, the goals of a probate conservatorship are to "[p]rotect the rights" of the conservatee in a way that "allow[s] the conservatee to remain as independent [as possible]," to "[e]nsure that the conservatee's basic needs ... are met," and to "[p]rovide for the proper management and protection of the conservatee's real and personal property."¹² Moreover, no conservatorship can be established "unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee."¹³

A review of the historical reality, however, is that there is ample evidence that too often these statutory requirements have been disregarded or given short shrift. The reasons for this situation are both complex and varied.

III. Conservatorship and the California Elder Abuse Act

The California Probate Code and

tion, is published by the Judicial Council of California and contains information *required to be provided to private conservators* under Probate Code sections 1834–1835. ... The Judicial Council also recommends and welcomes use of the *Handbook for Conservators* by public conservators and trust companies for educational purposes." Jud. Council of Cal., *Handbook for Conservators* ii (rev. ed. 2016) (emphasis added).

¹¹ *Id.* at 1-1.

¹² Cal. Prob. Code § 1800.

¹³ *Id.* at § 1800.3(b).

⁷ In some states, this court procedure is referred to as a guardianship, in which conservators are referred to as guardians and conservatees are referred to as wards. California used this terminology before 1957, when it enacted its first conservatorship statute, at which time the state began using the term guardianship to refer to the care of a minor and conservatorship to refer to the care of an adult. See Background Paper of Tom Clark, Counsel to Assembly Jud. Comm., *Better Protection for Our Most Vulnerable Adults: Is It Time to Reform the Conservatorship Process?* (2005).

⁸ California Probate Code § 1801(a) provides that a conservator may be appointed for any adult who is "unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter" (*Stats. 1990, c. 79 (A.B. 759), § 14, operative July 1, 1991; amended by Stats. 1995, c. 842 (S.B. 730), § 7.*)

⁹ California Probate Code § 1801(b) provides that a conservator may be appointed for any adult "who is substantially unable to manage his or her own financial resources or resist fraud or undue influence ... "

¹⁰ As stated in the book's front matter: "The *Handbook for Conservators: 2016 Revised Edi-*

Handbook for Conservators provide a clear mandate to the conservator to act in the best interests of the conservatee.¹⁴ While this mandate seems fairly obvious and straightforward, it is impossible to deny that, as discussed later in this article, the history of conservatorships in California is a checkered one, particularly regarding elderly conservatees.¹⁵

Still, it should be acknowledged initially that California rightfully can be considered a pioneer regarding its early recognition of elder abuse as an existential problem.¹⁶ Indeed, California was one of the first states to enact a law specifically designed to provide civil remedies for elder abuse. In 1982, the California legislature enacted the Elder Abuse Act,¹⁷ which was passed “to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse

and custodial neglect.”¹⁸ The measures enacted as part of the Elder Abuse Act were designed to encourage the reporting of elder abuse claims and to facilitate criminal prosecution of such claims.¹⁹

Although the passage of the Elder Abuse Act was praiseworthy, its advocates came to realize that it had structural flaws. In amending the Elder Abuse Act in 1991,²⁰ the California legislature noted that “cases of abuse of these [elderly and dependent] persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.”²¹

Therefore, the California legislature added § 15657 to shift the focus “to private, civil enforcement of laws against elder abuse and neglect.”²² The significance of § 15657 is that it provides a scheme for enhanced civil remedies, including the recovery of attorney fees and punitive damages and exemption from certain limitations on recoverable damages in survivorship actions.²³

Since 1991, California’s conservator-

14 While the *Handbook for Conservators* is not technically a legal authority, it is given some authoritative weight because it is the “written information concerning a conservator’s rights, duties, limitations, and responsibilities” that “[e]very superior court” is to provide to private conservators. Cal. Prob. Code § 1835(a).

15 Under California law, an elder is defined by statute as “any person residing in this state, 65 years or older.” Cal. Welf. & Inst. Code § 15610.27 (1994) (*Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.*)

16 At the federal level, Title XX of the Social Security Act of 1974 helped states begin adult protective services (APS) programs by providing federal funds for the protection of older adults. However, the first comprehensive federal legislation, the Elder Justice Act, which was passed to improve APS programs’ ability to address the abuse and exploitation of vulnerable adults, was not enacted until 2010. The reason for this could be that elder abuse was traditionally considered a state rather than a federal concern.

17 Cal. Welf. & Inst. Code § 15600 (*Added by Stats. 1982, ch. 1184, § 3.*)

18 *Delaney v. Baker*, 20 Cal. 4th 23, 33 (1999).

19 *ARA Living Ctrs.-Pacific, Inc. v. Super. Ct.*, 18 Cal. App. 4th 1556, 1559–1560 (1993).

20 Although the California legislature made various changes to the Elder Abuse Act in the intervening years, the 1991 amendment was part of the first major overhaul of the California Probate Code in 1990, which became operative on July 1, 1991. See Cal. L. Rev. Commn., *Revised and Supplemental Comments to the New Probate Code* (Sept. 1990).

21 Cal. Welf. & Inst. Code § 15600, subdiv. (h), added by Stats. 1991, ch. 774 (S.B. 679), § 2. As part of the 1991 amendment, the Elder Abuse Act was retitled as the Elder Abuse and Dependent Adult Civil Protection Act. For brevity, it will still be referred to as the Elder Abuse Act in this article.

22 *Delaney*, 20 Cal. 4th 23.

23 Cal. Welf. & Inst. Code § 15657.

ship laws have continued to evolve, with laws passed in 2000 and 2001 that provide additional warranted protections for proposed conservatees. For example, in 2000, the California legislature enacted laws to impose stricter accounting procedures and shorter deadlines for the conservator to provide accountings to the court. Moreover, the legislature established a statewide registry, which is maintained by the California Department of Justice, of all persons seeking to act as conservators, guardians, and trustees.²⁴

Additionally, in 2001 the California legislature rewrote the accounting sections to require the conservator to provide original account statements at the beginning of the conservatorship and at the end of each accounting period and provide for various remedies when accountings are not filed in a timely manner.²⁵ The next major legislation enacted resulted from a renowned *Los Angeles Times* series of articles in 2005 that highlighted various forms of financial elder abuse by conservators. This law became known as the Omnibus Conservatorship and Guardianship Reform Act of 2006 (2006 Reform Act).

IV. Los Angeles Times Reporting and the 2006 Reform Act

In November 2005, the *Los Angeles Times* published a four-part series of articles based on its research on professional

conservators in more than 2,400 conservatorship cases in Southern California between 1997 and 2003.²⁶ The articles detailed numerous cases of horrendous financial elder abuse by conservators. For example, one conservator paid his own taxes and invested in a friend's restaurant using the conservatee's savings; another conservator sold a conservatee's house to herself at below-market value; still another conservator charged \$1,700 to attend the conservatee's funeral service. Following are some pertinent findings from the *Los Angeles Times* articles:²⁷

- More than half of the professional conservatorships were granted on an emergency basis, which led to procedural safeguards being ignored (i.e., 56 percent were granted without notice to the proposed conservatee or family; 64 percent were granted before an attorney was appointed; and 92 percent were granted before the court saw the court investigator's report).
- Conservators sometimes "misuse[d] their near-parental power over fragile adults, ignoring their needs and insulating them from loved ones."
- "In the most egregious cases, conservators plunder[ed] seniors' estates."
- "More commonly, conservators [ran] up their fees in ways large and small, eating into seniors' assets."
- Once a conservatorship was established, it was both difficult and expensive to terminate.

24 Assembly Bill 925 (1999–2000 Reg. Sess.), Stats. 1999, ch. 409, Prob. Code §§ 2850– 2854. Anyone covered by this law is required to register with the California Department of Justice by providing specific information in a declaration.

25 For a useful discussion and analysis of the legislative efforts and changing laws of conservatorship from 1990 to 2006, see Edward J. Corey Jr. et al., 13(1) *Crisis in Conservatorships*, Cal. Trusts & Ests. Q. (Spring 2007).

26 Robin Fields et al., L.A. Times, *Guardians for Profit: When a Family Matter Turns Into a Business* 1 (Nov. 13, 2005), *Guardians for Profit: Justice Sleeps While Seniors Suffer* 1 (Nov. 14, 2005), *Guardians for Profit: Missing Money, Unpaid Bills and Forgotten Clients* 1 (Nov. 15, 2005), *Guardians for Profit: For Most Vulnerable, a Promise Abandoned* 1 (Nov. 16, 2005).

27 *Id.*

- Conservators ignored their conservatee's wishes, particularly regarding the conservatee's living situation, finances, communications, and social interactions.
- Conservators lacked certification and training.
- Probate court supervision was inadequate (i.e., probate courts "are supposed to monitor [the conservator's] conduct, scrutinize their financial reports and fine or remove those who misuse their authority. Yet the courts have failed dismally in this vital role" and "frequently overlooked incompetence, neglect and outright theft.").
- Court investigators were underfunded and overloaded by the number of conservatorship cases they oversaw (i.e., the number of court investigators (10) remained unchanged from 1995 to 2005 despite the caseload increasing from 1,024 cases to 1,408 cases, a 38 percent increase).²⁸
- The statewide registry that is supposed to track abusive and incompetent conservators was rarely used despite being mandatory (e.g., only two of the state's 58 counties reported removal of a conservator from the registry, thus allowing "[r]ogue [conservators] [to] evade accountability by crossing county lines").

In response to the *Los Angeles Times* articles, the Judicial Council of California promptly formed a task force on conservatorships, which held hearings and sought

input from all stakeholders. In addition, the California legislature conducted its own parallel investigation and held hearings. The California legislature ultimately concluded in one of its main findings that "the conservatorship system in California [was] fundamentally flawed and in need of reform,"²⁹ whereas others criticized the *Los Angeles Times* study as overstated and thus questioned the need for a new law.³⁰

Nevertheless, for many in California, the *Los Angeles Times* articles provided a much-needed clarion call to action for the California legislature to address the systemic problems that existed in the conservatorship system. Accordingly, the California legislature enacted the 2006 Reform Act, which comprises four conservatorship bills:

1. Senate Bill 1116. This bill focused on protecting the right of conservatees to stay in their homes and created a presumption that the least restrictive living arrangement for a conservatee is the personal residence of that conservatee, unless proven otherwise at a court hearing.
2. Senate Bill 1550. This bill added the Professional Fiduciaries Act (discussed in more detail later in the article) to the Business and Professions Code.
3. Senate Bill 1716. This bill added a

²⁸ Judge Robert Letteau, a judge who supervised the

Los Angeles and Santa Monica probate courts from 1995 to 2002, acknowledged that the problem boiled down to the simple fact that "[i]f no one complains, the court isn't out there to investigate"; therefore, "[i]f stuff's being stolen, misappropriated, we wouldn't know about it." Fields et al., *Guardians for Profit: Justice Sleeps While Seniors Suffer*, *supra* n. 26.

²⁹ This finding appears in § 2(g) of Assembly Bill 1363, which became the Omnibus Conservatorship and Guardianship Reform Act of 2006 (2006 Reform Act).

³⁰ See Corey et al., *supra* n. 25 ("The study was journalistic, sensational and flawed. The articles reported specific outrages, but gave no consideration to the thousands of cases that are well handled throughout the state's court system. ... Again, it was not the present law that failed to protect the people whose stories the *Los Angeles Times* told. The courts failed and did so largely because they lack the resources necessary to succeed.").

critical right allowing ex parte communications with the court regarding actions by fiduciaries or other matters involving conservatees.

4. Assembly Bill 1363. This bill made changes throughout conservatorship law, including revising the roles of court investigators and imposing new court oversight practices.³¹

The 2006 Reform Act was intended to address certain systemic problems with the conservatorship system; unfortunately, the California legislature failed to provide essential funding for any of the reforms. The Judicial Council estimated that \$17.4 million was needed to implement the reforms for fiscal year 2007–2008. However, the necessary appropriation based on this estimate was removed from the final budget.³² As a result, court resources were strained as the courts gamely attempted to satisfy the new requirements without any additional funding from the state.

In May 2009, a somewhat obscure academic report assessing the effectiveness of the 2006 Reform Act and conservatorship laws in general was published.³³ This report, based on a review

of 60 conservatorship cases filed in 2007 in San Francisco County as well as “numerous interviews with relevant parties,” acknowledged that although the 2006 Reform Act had “strengthened the [conservatorship] system,” the fact that it “[had] not been funded, result[ed] in incomplete implementation.”³⁴ As part of its conclusion, the report identified three distinct problems:

- California lack[ed] an adequate information system for oversight of conservatorships.
- The current probate procedure [did] not sufficiently protect [conservatees’] due process rights.
- California’s process place[d] insufficient emphasis on [pursuing] less-restrictive forms of conservatorship.³⁵

The May 2009 report was prescient. In 2012, *The Mercury News* demonstrated that some of the same issues that the *Los Angeles Times* focused on in 2005 still existed years later. *The Mercury News* published its own series of articles detailing financial abuses by private fiduciaries and court-appointed attorneys in Santa Clara County based on a 6-month investigation. The newspaper noted various examples of conservators charging inappropriate fees and families being reluctant to challenge such fees due to the possibility of being forced to pay “fees on fees.”³⁶

31 See Jud. Council of Cal., *Governor Signs Legislation to Improve Probate Conservatorship Cases*, News Release 1 (Sept. 27, 2006).

32 Probate Conservatorship Task Force, *Probate Conservatorship Task Force Recommendations to the Judicial Council* 2–3 (Dec. 9, 2008); see also Corey et al., *supra* n. 25 (“Tragically ... the Act provides no funding for those who must administer the new laws.”).

33 See Sarah Anders et al., *Conservatorship Reform in California: Three Cost-Effective Recommendations*, U. Cal., Berkeley, Goldman Sch. of Pub. Policy, May 2009). This report was created in collaboration with the California Advocates for Nursing Home Reform as part of a program for fulfillment of the authors’ course requirements for the Master of Public Policy degree.

34 *Id.* at 19.

35 *Id.*

36 As the newspaper pointed out, “Under California law, challenging an excessive bill presents an astounding damned-if-you-do dilemma: A private estate manager can bill the cost to defend his charges right back to the person who protested the bill in the first place.” Karen de Sa, *Santa Clara County’s Court-Appointed Personal and Estate Managers Are Handing Out Costly and Questionable Bills*, *Mercury News* (June 30, 2012). This is known as the “fees on fees” dilemma.

Such examples include one conservator who “charged a Belmont dementia patient \$1,062 to help celebrate her birthday. Another billed an incapacitated Sunnyvale couple \$26,946, including attorneys’ fees, for the 12 days she spent sorting through mail and orchestrating a cleanup of their roach-infested home.”³⁷

The California legislature made a short-lived attempt to relieve elders from the fees-on-fees quandary (i.e., from being put in the untenable position of having to accept the exorbitant costs because it would cost more to challenge them in court, regardless of whether the elders won or lost their cases). However, the proposed law (Senate Bill 156) was vetoed by Gov. Jerry Brown on September 24, 2013. While this legislation would have prevented these fees on fees, Brown reportedly vetoed it as a result of a late amendment that limited judges’ ability to award fees in some cases.

V. Celebrity Cases and Public Awareness

As a general proposition, most people probably would agree that public policy should not be based on media reports, particularly when considering that such reports are driven by the mixed motives of legitimate concerns and commercial pressure. However, it can be argued that media reports do have value by heightening public interest in a specific issue,³⁸ which is necessary for the implementation of any real reform.

This dynamic seems particularly true regarding financial elder abuse involving celebrities. Examples of such cases include those involving Mickey Rooney, Harper Lee, and Katherine Jackson. But the one case that many elder abuse professionals and experts say really “raised the public’s awareness and understanding of elder abuse”³⁹ is that of Brooke Astor, the renowned New York philanthropist.

In the Astor case (which began in 2006 and ended in 2009), a petition was filed to remove Astor’s son, Anthony Marshall, as guardian. In addition to this petition, there was a criminal trial, which resulted in a jury convicting Marshall for crimes of financial exploitation along with Marshall’s attorney for forging the signature on one of Astor’s wills. “The Astor case ... brought to the fore crimes often overlooked as elder abuse: financial exploitation, for example.”⁴⁰ As a result of this case, one commentator predicted that “societal attention to financial abuse of the elderly is likely to increase.”⁴¹

However, the public attention generated by these occasional publicity laden cases is fleeting. Indeed, “researchers, social workers and advocates argue that while awareness is growing, there may not be enough momentum to make a significant dent in the problem before we’re hit with the so-called ‘silver tsunami’ of aging Baby Boomers in California.”⁴² This

³⁷ *Id.*

³⁸ For example, in the second season of Netflix’s investigative documentary series *Dirty Money*, the episode “Guardians, Inc.” (released Mar. 11, 2020) profiled cases of financial exploitation of elders by their court-appointed guardians and examined how easily this can happen to any elder.

³⁹ Sean Gardiner, *Astor Case Raises Awareness of Elder Abuse and Need to Fight It*, AARP Bulletin (Oct. 15, 2009).

⁴⁰ *Id.*

⁴¹ *Id.* Indeed, the “[p]ublicity from the Astor case may finally help usher into law the Elder Justice Act,” which Congress finally passed in 2010. *Id.*

⁴² Michelle Raghavan, *LA County Is Reporting More Elder Abuse Than Ever Before*, USC Annenberg Ctr. for Health Journalism (June 10, 2019), <https://centerforhealthjournalism>.

is a harrowing prospect, given the current projection that California's over-65 population will be 8.6 million by 2030.⁴³

VI. Who Are the Conservators in California?

Three types of conservators exist under California law: relatives or friends, professional fiduciaries, and public guardians. Professional fiduciaries are private professional conservators who must be licensed. By contrast, the public guardian in each county serves as a public conservator, usually for low-income seniors who are receiving or are in need of public benefits.

If a proposed conservatee has the capacity to decide whom he or she would like to serve as his or her conservator, "[t]he court shall appoint the [proposed conservatee's] nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee."⁴⁴ However, if the conservatee does not or cannot nominate someone, California law provides an order of priority for conservator selection. This order of priority follows:

1. The spouse or domestic partner of the proposed conservatee or someone the spouse or domestic partner nominates
2. An adult child of the proposed conservatee or someone the adult child nominates
3. A parent of the proposed conservatee or someone the parent nominates
4. A sibling of the proposed conservatee or someone the sibling nominates

[org/fellowships/projects/la-county-reporting-more-elder-abuse-ever](https://www.fellowships/projects/la-county-reporting-more-elder-abuse-ever) (accessed Dec. 4, 2020).

43 Cal. Health & Human Servs. Agency, *Master Plan for Aging*, <https://www.chhs.ca.gov/home/master-plan-for-aging> (accessed Dec. 4, 2020).

44 Cal. Prob. Code § 1810.

5. Any other person whom California law deems acceptable⁴⁵

If no relative or friend is willing or able to be appointed, the choice of conservator comes down to either a professional fiduciary or public guardian.

Professional fiduciaries are individuals licensed by the California Professional Fiduciaries Bureau (PFB). When the 2006 Reform Act was passed, it included the Professional Fiduciaries Act (PFA), which created the PFB to improve court oversight of probate conservatorship cases.⁴⁶ The PFA established new licensing requirements for professional fiduciaries, and the PFB's purpose was to oversee these licensing requirements and the activities of professional fiduciaries.⁴⁷ Those covered

45 Cal. Prob. Code § 1812(b); *see also id.* at §§ 1810, 1811, 1813.

46 The primary provisions of the PFA are set forth in California Business and Professions Code §§ 6500–6592 (2007). *See also* Cal. Prob. Code §§ 60.1 (2008), 2340 (2009).

47 The PFB is managed by California's Department of Consumer Affairs and has a website for use by both professional conservators and the public. Dept. of Consumer Affairs, Prof. Fiduciaries Bureau, *Welcome to the Professional Fiduciaries Bureau's Website*, <https://www.fiduciary.ca.gov> (accessed Dec. 4, 2020). Significantly, this website allows the public to confirm whether a conservator is licensed as a professional fiduciary in addition to whether the PFB has taken any action against the conservator. Specifically, one can look at the web-site's Bureau Actions link under Quick Hits to see every disciplinary action, citation, and fine issued by the PFB against a licensee from 2011 to 2020. One of the PFB official actions is called an accusation, defined as a "formal, written statement of charges filed against a licensee," which can result in suspension or revocation of a conservator's license. Dept. of Consumer Affairs, Prof. Fiduciaries Bureau, *Bureau Actions*, <https://www.fiduciary.ca.gov/enforcement/index.shtml> (accessed Jan. 8, 2021).

by the PFA are private fiduciaries who are not family members, including conservators, guardians, trustees, and agents under durable powers of attorney as dictated by the PFA.

As of June 2019, there were 800 registered professional fiduciaries in California over whom oversight was provided by the PFB.⁴⁸ The PFA does grant a broad exemption for attorneys, CPAs, persons who are licensed by the IRS as enrolled agents, banks and trust companies, and licensed investment advisors,⁴⁹ presumably because these professionals and organizations are already being monitored by their respective accrediting and licensing authorities.

Under California law, someone appointed as conservator for a family member does not need to become a licensed professional fiduciary in order to fulfill that role. Only someone who acts as a conservator “for two or more individuals at the same time who are not related to ... each other”⁵⁰ must be licensed.

A private professional fiduciary is paid by the family or the conservatee. Importantly, the fees paid to any court-appointed conservator must be approved by the court so that family members have an opportunity to object to fees they deem excessive.

The alternative to appointing a professional fiduciary is appointing a public guardian.⁵¹ Each county in California has

a public guardian, who is appointed to serve as conservator for a person who needs one — if no one else has petitioned to fulfill that role.⁵² In such a case, the public guardian, like anyone else, is required to apply to the court for appointment to act as conservator.⁵³ If the conservatee has any assets, the public guardian’s compensation comes from the conservatee’s estate.⁵⁴

California Probate Code § 1820 lists the persons and entities that can file for the establishment of a conservatorship. Specifically, under § 1820(a), any of the following can file a petition for the appointment of a conservator:

- (1) The proposed conservatee.
- (2) The spouse or domestic partner of the proposed conservatee.
- (3) A relative of the proposed conservatee.
- (4) Any interested state or local entity or agency of [the] state or any interested public officer or employee of [the] state or of a local public entity of [the] state.
- (5) Any other interested person or friend of the proposed conservatee.⁵⁵

VII. What Is Financial Elder Abuse?

Financial elder abuse touches everyone.⁵⁶ Your aging parents, relatives,

48 Blaine F. Aikin, *What You Need to Know About Professional Fiduciaries*, Investment News (June 3, 2019).

49 Cal. Bus. & Prof. Code § 6530.

50 *Id.* at § 6501(f)(1)(A).

51 Referrals are usually made to the public guardian through the county’s APS agency, but they also may be made directly by a relative, friend, neighbor, the court, or any concerned third party.

52 “The services of the Public Guardian may be provided through a separate county department, an elected official, or incorporated into a larger department such as health or human services.” Cal. St. Assn. of Cos., *Public Guardian*, <https://www.counties.org/county-office/public-guardian> (accessed Dec. 5, 2020).

53 Cal. Prob. Code §§ 2920–2923.

54 *Id.* at § 2942.

55 “The standard of proof for the appointment of a conservator ... shall be clear and convincing evidence.” *Id.* at § 1801(e).

56 According to a research article published in 2014 in the *Journal of General Internal Medi-*

friends, and neighbors are all potential victims. And whether or not financial elder abuse touches you, all of us are potentially at risk due to the negative consequences of the aging process (e.g., cognitive decline, poor physical health, functional impairment, loss of independence).

Financial elder abuse is universally recognized as a significant problem that is only going to get worse.⁵⁷ Yet, according to the National Adult Protective Services Association, financial elder abuse is “vastly under-reported; only one in 44 cases of financial abuse is ever reported.”⁵⁸ Moreover, it impacts all of us as taxpayers because “[a]lmost one in ten financial abuse victims will turn to Medicaid as a direct result of their own monies being stolen from them.”⁵⁹

The definition of financial elder abuse varies from state to state. California’s definition of financial elder abuse is set forth in the Elder Abuse Act:

- (a) “Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:
 - (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful

use or with intent to defraud, or both.

- (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.⁶⁰

Some typical examples of financial elder abuse include stealing an elder’s cash, withdrawing money from an elder’s bank account, cashing an elder’s checks or misusing his or her credit cards, stealing an elder’s jewelry, transferring an elder’s property deeds, misusing an elder’s power of attorney, stealing an elder’s identity, and persuading an elder to put funds into an investment scam.⁶¹

Tragically, elder abuse in general is most often committed by those who are closest to the elder. In residential settings, 90 percent of elder abuse is committed by family members,⁶² with the elder’s adult offspring and spouses accounting for about 70 percent of such cases.⁶³ Equally

cine, “Financial exploitation is the most common and least studied form of elder abuse.”

Janey C. Peterson et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, 29(12) J. Gen. Internal Med. 1615 (2014).

57 A comprehensive study of elder abuse published in the *New England Journal of Medicine* reported that “recent studies suggest financial exploitation is emerging as the most prevalent form of abuse.” Lachs & Pillemer, *supra* n. 2.

58 Natl. Adult Protective Servs. Assn., *Elder Financial Exploitation*, <https://www.napsa-now.org/get-informed/exploitation-resources> (accessed Dec. 5, 2020).

59 *Id.*

60 Cal. Welf. & Inst. Code § 15610.30.

61 Govt. Accountability Off., *Elder Justice: Stronger Federal Leadership Could Enhance National Response to Elder Abuse* (GAO-11-208) 4 (Mar. 2011), <https://www.gao.gov/new.items/d11208.pdf> (accessed Dec. 5, 2020); see also Deane, *supra* n. 5, at 1.

62 Mary Twomey et al., *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. Ctr. for Fams., Children & Cts. 73 (2005).

63 *Id.* See also Tom Schoenberg, *At 93, She Waged War on JPMorgan and Her Own Grandsons*, Bloomberg Wealth, (Feb. 17, 2021)

disturbing, based on the 2005 *Los Angeles Times* and 2012 *Mercury News* articles, it appears that a significant number of perpetrators in California are the conservators appointed by the court to protect the elders in the first place.

Dell'Oso et al., 230 Cal. App. 4th 834, 838 (2014) (The court re-

A. Financial Elder Abuse by Conservators

This article is not intended to discredit conservators. Most conservators are conscientious in fulfilling their legal mandate. Still, some conservators use their trusted position as an opportunity to enrich themselves financially.⁶⁴ The spectrum of

<https://www.bloomberg.com/news/features/2021-02-17/at-93-she-waged-war-on-jpmorgan-and-two-financial-advisors-her-grandsons>. On February 5, 2021, an arbitration panel from the Financial Industry Regulatory Authority issued a decision in favor of a 93-year-old grandmother, Beverly Schottenstein, and ordered her two grandsons and JPMorgan to pay her \$19 million. Among other claims decided in her favor, the arbitrators found the bank and one grandson liable to her for elder abuse.

⁶⁴ See, e.g. Tony Saavedra, *State Moves to Discipline Orange County Probate Conservator Accused of Improperly Removing Money*, Orange Cty. Register (updated Aug. 16, 2019, 4:47 p.m.), <https://www.ocregister.com/2019/08/16/state-moves-to-discipline-orange-county-probate-conservator-accused-of-improperly-removing-money> (accessed Dec. 4, 2020). (“State regulators have accused an Orange County probate conservator with transferring tens of thousands of dollars without consent from the financial accounts of a former client who died. An accusation filed this month by the state Professional Fiduciaries Bureau alleges [the conservator] ... repeatedly transferred money out of financial accounts ... even though she no longer represented the client, and failed to notify the probate court. The state bureau ... could suspend or revoke [the conservator’s] license ... if the charges are sustained. *The bureau is not seeking criminal charges.*” (emphasis added)); see also *Stine v.*

such financial abuse, as mentioned previously, ranges from the most egregious and obvious cases in which the conservator plunders the conservatee's estate in a single occurrence to the more common and less obvious cases in which the conservator runs up his or her fees gradually to avoid detection and siphons off smaller amounts of the conservatee's estate over months or even years.

The question: How prevalent is the problem of financial elder abuse by conservators in California? The answer: No one knows for sure.⁶⁵ The unfortunate reality is that no one knows how widespread financial elder abuse is, let alone how much of it is due to improper conduct by conservators.⁶⁶ The reason for

moved the conservator after it learned he had misappropriated more than \$1 million dollars of conservatorship assets.).

65 One researcher made the following somewhat dated claim about California: "A review of California reports from 1987 found that fiduciary abuse was the most prevalent type of exploitation and appeared in 41.5 percent of the cases" Thomas L. Hafemeister, *Financial Abuse of the Elderly in Domestic Setting* 6, NCBI Bookshelf, Natl. Insts. of Health, Natl. Lib. of Med. (2003), <https://www.ncbi.nlm.nih.gov/books/NBK98784/?report=printable> (accessed Dec. 5, 2020). Of course, this review happened after passage of the Elder Abuse Act but years before subsequent changes were made to the conservatorship laws, including the 2006 Reform Act.

66 One commentator noted: "Much of the criticism of guardianship proceedings stems from a few highly publicized, notorious, and particularly heinous examples of guardians' abuse and neglect of wards. Whether these examples constitute the exceptions or the rule of how guardianships actually function [is] unknown" Erica F. Wood, *State-Level Adult Guardianship Data: An Exploratory Survey* 9 (ABA Commn. on L. & Aging Aug. 2006) (citing Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of*

this is surprisingly simple: There is no actual or current data on this issue.⁶⁷ Moreover, this is not just a problem in California, it is a problem nationwide. “The prevalence of financial abuse of the elderly (like elder abuse in general) is difficult to estimate because there is no national reporting mechanism to record and analyze it, cases often are not reported, definitions vary, and it is difficult to detect. However, the consensus is that it is a significant problem.”⁶⁸

This is not a new revelation by any means. Over the years, numerous studies and reports have found or concluded that the lack of any kind of data system for conservatorships is the primary problem in identifying and responding to misconduct by conservators. The following studies and reports are illustrative.

the Courts in Guardianship and Conservatorship Proceedings, 2 Elder L.J. 147, 150 (1994).

⁶⁷ Although it does not cover conservatorships or alleged abuse by conservators, the federal National Adult Maltreatment Reporting System, which is administered by the Administration for Community Living, was created in 2016 to collect adult maltreatment data from state APS programs. “The National Adult Maltreatment Reporting System (NAMRS) is the first comprehensive, national reporting system for APS programs. ... The goal of NAMRS is to collect consistent and accurate national data on investigations and services by APS programs.” Adult Protective Servs. Technical Assistance Resource Ctr., *Adult Maltreatment Report 2018* 5 (Nat'l. Adult Maltreatment Reporting Sys. 2018). Notably, “While NAMRS collects several data elements on perpetrators, most states do not submit these data elements because they do not collect data on perpetrators.” *Id.* at 16.

⁶⁸ Hafemeister, *supra* n. 65 (citations omitted).

B. Lack of Data on Financial Elder Abuse by Conservators

2004

The U.S. Government Accountability Office (GAO) issued a report highlighting the lack of data on conservatorships nationwide. Of the courts the GAO surveyed, less than one-third tracked the number of active conservatorships. The GAO concluded that the lack of data obstructed reform and oversight efforts, thus also concluding that there was no way to determine whether incidents of abuse were “isolated examples of abuse in an otherwise well-functioning process or accurately portray[ed] the norm”⁶⁹ Moreover, the GAO acknowledged that “[s]ufficient data are not available to determine the incidence of abuse of incapacitated people by [conservators] nor the extent to which [conservators] are protecting incapacitated people from abuse.”⁷⁰

2008

The Judicial Council of California acknowledged the lack of data on conservatorships in the state. In its report, the council stated, “Because currently no statewide case management system is in place, and local systems capture data elements differently, basic information on conservatorship cases is not readily available for more than a handful of trial courts.”⁷¹ The council further asserted: “Baseline and ongoing data collection will facilitate systemwide oversight. It is essential to collect baseline and ongoing data for this case type. Ongoing evaluation of

⁶⁹ Wood, *supra* n. 66.

⁷⁰ Govt. Accountability Off., *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* 30 (July 2004).

⁷¹ Jud. Council of Cal., *Court Effectiveness in Conservatorship Case Processing: A Report to the Legislature* 4 (Jan. 2008).

the conservatorship system must begin with increasing the availability of descriptive baseline data.”⁷²

From another 2008 report: “The ABA and National Center on Elder Abuse recently published the results from their survey of adult guardianship data collected from state court administrators. The survey found that state court administrators do not receive adequate information about trial court guardianships. ... The survey authors concluded there is a profound need for uniform, consistent guardianship data, which will become ever more important as demographic trends increase the number of guardianships in the future.”⁷³

2009

An academic report prepared in collaboration with the California Advocates for Nursing Home Reform recommended establishing a web-based filing system to address the lack of data in conservatorship cases. The report stated: “California does not currently aggregate extensive data on conservatorship cases. To collect data on the state’s 45,000-plus active conservatorships, one would need to visit every county courthouse to review individual case files. Such data collection is impractical, onerous and time consuming. Furthermore, as we discovered through our own data-gathering effort, deciphering a case file is a highly subjective process. Forms are sometimes incorrectly completed, and occasionally missing from the file alto-

gether. Such patchwork data is an obvious impediment to ongoing oversight and reform efforts.”⁷⁴

2015

A report prepared for the California Senate Committee on Judiciary indicated that the number of probate conservatorships being supervised by California courts was unknown because of the lack of a statewide database and the lack of surveying by the Judicial Council of California to obtain such data.⁷⁵

2016

The GAO issued a report that repeated the findings from its 2004 report regarding the lack of data on conservatorships. The GAO concluded that “the extent of elder abuse by guardians nationally is unknown due to limited data on the numbers of guardians serving older adults, older adults in guardianships, and cases of elder abuse by a guardian. While courts are responsible for guardianship appointment and monitoring activities, among other things, court officials from the six selected states that we spoke to were not able to provide exact numbers of guardians for older adults or of older adults with guardians in their states. Also, on the basis of our interviews with court officials, none of the six selected states appear to consistently track the number of cases related to elder abuse by guardians. Court officials from the six states we spoke with described the varied, albeit limited, information they have related to elder abuse by guardians and noted the various data limi-

⁷² *Id.* at 16.

⁷³ Judge David Hardy, CELA, noted the results of this survey in the following article: David Hardy, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring* 6–7 (2008), <http://www.steve-miller4lasvegas.com/JudgeHardyPaper.pdf> (accessed Dec. 5, 2020) (citations omitted).

⁷⁴ Anders et al., *supra* n. 33, at 6.

⁷⁵ Sen. Comm. on Jud. Oversight Hrg. Background Paper, *The Role of the Courts in Protecting Californias’ Increasing Aging and Dependent Adult Population* 18 (Mar. 24, 2015).

tations that prevented them from providing reliable figures on the extent of elder abuse by a guardian ...”⁷⁶

From another GAO report published in 2016: “A court official in California stated that while the Judicial Council of California collects information about requests for restraining orders to prevent elder abuse, it does not separately identify those cases alleging elder abuse by a guardian. The council also collects the number of new guardianships filed each year statewide. The official stated the number of new adult guardianships is partially estimated because about half of the courts in the state report a combined number of guardianships for minors and adults.”⁷⁷

2018

The Office of the Investor Advocate of the U.S. Securities and Exchange Commission issued a report also acknowledging the lack of data on conservatorships:

76 Govt. Accountability Off., *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Are Being Taken to Help Protect Older Adults* (GAO-17-273T) 2 (2016), <https://www.gao.gov/assets/690/682241.pdf> (accessed Dec. 14, 2020). The GAO conducted this study because the number of older adults (i.e., those over the age of 65) is projected to almost double by 2050. Moreover, according to a recent U.S. Census Bureau report, in 2030 “all baby boomers will be older than 65 ... so that one in every five Americans is projected to be retirement age ... [and] by 2034, ... older adults will outnumber children for the first time in U.S. history.” Jonathan Vespa, David M. Armstrong & Lauren Medina, *Demographic Turning Points for the United States: Population Projections for 2020 to 2060*, Current Population Reports, P25-1144, U.S. Census Bureau (issued March 2018 and revised February 2020).

77 Govt. Accountability Off., *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults* (GAO-17-33) 6–7 (Nov. 2016).

“Ironically, it is easier to say why elder financial exploitation is expected to grow than to quantify how big a problem it is right now. Our knowledge suffers from a scarcity of research and researchers, and the studies that do exist have some significant limitations. ... There appear to be few national studies published in the past 10 years on elderly financial exploitation.”⁷⁸

2020

The Congressional Research Service prepared a report for members and committees of Congress identifying this lack of data at the federal level: “Federal efforts to collect data on elder abuse at the national level are complicated by variation in state statutory definitions of elder abuse, which makes it difficult to identify actions that constitute elder abuse, and by the absence of a uniform reporting system across states.”⁷⁹

These studies and reports are unanimous in concluding that, without actual empirical data, it is impossible to determine the extent of financial elder abuse by anyone, let alone by conservators.⁸⁰

78 Deane, *supra* n. 5, at 7, 12.

79 Kirsten J. Colello, *The Elder Justice Act: Background and Issues for Congress* 16, Cong. Research Serv. (R43707) (updated June 15, 2020).

80 Notwithstanding the 2005 *Los Angeles Times* and 2012 *Mercury News* articles mentioned herein, it still appears that very few studies have been conducted on alleged financial elder abuse by conservators. An example of such a study, in which the author compiled case studies from 2010–2012, follows: Linda Kincaid, *Conservatorship in Crisis: Civil Rights Violations & Abuses of Power* (Dec. 2012). Kincaid concluded that “[o]versight of conservators is inadequate. With little accountability for abusive actions, conservators exercise nearly absolute power over their conservatees.” *Id.* at 31.

VIII. California Adult Protective Services and Financial Elder Abuse

One agency exists in each California county to help elders who are victims of any kind of elder abuse: Adult Protective Services, which is administered by the California Department of Social Services. “Adult Protective Services (APS) is a social services program provided by state and/ or local governments nationwide serving older adults who are 65 years and older and adults with disabilities who need assistance.”⁸¹ A call to the California APS hotline is the first step in reporting any kind of elder abuse (with one major exception, which is noted later).

California law mandates that every county in California have a “county adult protective services system” that can respond 24 hours a day, 7 days a week, to reports of abuse and neglect of elderly and dependent adults.⁸² The APS agency in each county is generally responsible for investigating elder abuse claims, providing voluntary protective services, and coordinating with other agencies to protect older adults from any type of abuse.

Unfortunately, both nationwide and in California, APS agencies appear to have inadequate funding, thus compromising their effectiveness. In January 2020, a research report funded by the U.S. Department of Health and Human Services, Health Resources and Services Administration, was released. One key finding: “Dedicated funding to support APS is lacking, and this contributes to high rates of staff turnover and inefficient services delivery.”⁸³

This report was released prior to the onset of the COVID-19 pandemic, and the problem of inadequate funding will undoubtedly appear even worse when the total adverse economic impact of the pandemic on state and federal budgets is known. Moreover, APS agencies and mandated reporters⁸⁴ of abuse cannot do their jobs if they are prevented from accessing elders due to COVID-19 stay-at-home orders issued by civil authorities.⁸⁵

Adult Protective Services Workforce (U. Cal. San Francisco Health Workforce Research Ctr. on Long-Term Care Jan. 2020); see also CEJC (Cal. Elder Just. Coalition), *News & Updates* (Mar./Apr. 2020), <https://www.elderjusticecal.org/news-updates-marapr-2020.html> (accessed Dec. 7, 2020), which states, “CEJC has signed on as a co-sponsor to AB 2302, which addresses the under-funding of APS It requests \$100 million from the State General Fund to ... [among other things] [e]stablish a grant-based program to expand/add forensic centers and Financial Abuse Specialist Teams (FASTs).”

⁸⁴ California law provides: “Any person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult, whether or not that person receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, or employee of a county adult protective services agency or local law enforcement agency is a mandated reporter.” Cal. Welf. & Inst. Code § 15630(a). Under this law, a person deemed a mandated reporter is required to report known or suspected instances of elder or dependent adult abuse. Failure to do so is a misdemeanor punishable by both a fine and imprisonment. *Id.* at § 15630(h).

⁸⁵ This plight was acknowledged by the National Adult Protective Services Association (NAPSA) in a April 17, 2020, statement. NAPSA stated: “With nearly everyone isolated at home during the coronavirus pandemic, many older adults and younger adults with disabilities may be even more vulnerable to being victims

⁸¹ WDACS (Workforce Dev. Aging & Community Servs.), *What Is Adult Protective Services (APS)?* <https://wdacs.lacounty.gov/programs/aps/about> (accessed Dec. 5, 2020).

⁸² Cal. Welf. & Inst. Code §§ 15750–15766.

⁸³ Tim Bates & Susan Chapman, *Supporting the*

Table 1. Funding Provided for Adult Protective Services and Public Guardians Training

Breakdown of Contracts with Training Partners	FY 2019–2020	FY 2020–2021	FY 2021–2022	Total
San Diego State University	\$1,366,666	\$1,366,667	\$1,366,667	\$4,100,000
California State University, Fresno	\$1,366,666	\$1,366,667	\$1,366,667	\$4,100,000
California State University, Sacramento	\$683,333	\$683,333	\$683,334	\$2,050,000
California State Association of Public Administrators, Public Guardians, and Public Conservators	\$314,244	\$514,783	\$420,973	\$1,250,000
Total	\$3,730,909	\$3,931,450	\$3,837,641	\$11,500,000

This author communicated via email with an APS liaison at the California Department of Social Services in May and July 2020 about APS funding, the number of elder abuse cases and how many APS investigators are available to conduct investigations, and elder abuse by conservators in the state.

A. Adult Protective Services Funding

According to the APS liaison, Gov. Gavin Newsom’s 2019 budget provided \$11.5 million in one-time funding⁸⁶ for training APS social workers and for training their allied partners, the county public guardians. Table 1 reflects the funding

provided to training partners, with which the state contracts to provide the training.⁸⁷

In a follow-up email, this author asked whether the California APS budget would be impacted by Newsom’s May 2020 revision to his proposed 2020–2021 budget to address the economic impact of COVID-19. The APS liaison said, “The APS training budget was not impacted,” but the impact of funding changes on “the bulk of the APS program in California” was not known because “the state budget [for 2020–2021] [was] not yet final.”⁸⁸

B. Adult Protective Services Cases and Investigators Available to Conduct Investigations

In response to this author’s query regarding the number of elder abuse cases in California and how many APS investigators are available to conduct investigations, the APS liaison stated, “Since APS only practices short-term case management (less than 90 days), work is more

of abuse, neglect and/or financial exploitation During this time, mandated reporters of abuse ... are not available to observe and report suspected maltreatment to Adult Protective Services (APS)” NAPSA, *Older People and Adults With Disabilities at Risk of Abuse During Pandemic* (Apr. 17, 2020).

⁸⁶ Email from APS liaison to Kenneth Heisz (June 8, 2020). In this email message, the APS liaison clarified that Gov. Newsom had designated \$5.75 million in general funds from the state and that \$5.75 million would come from federal matching funds, for a total of \$11.5 million.

⁸⁷ Email from APS liaison, to Kenneth Heisz (May 26, 2020).

⁸⁸ Email from APS liaison, *supra* n. 86.

Table 2. California Adult Protective Services Cases and Available Investigators, Fiscal Year 2018–2019

No. of APS Investigations	No. of APS Investigators	Average No. of Investigations Closed per Investigator	Average No. of Investigations Closed per Month per Investigator
242,000	750	322	27

accurately measured in terms of investigations as a result of abuse reports received” (see Table 2).⁸⁹

The APS liaison explained that APS received 205,339 reports of elder abuse during fiscal year 2018–2019. However, because a single elder abuse report often leads to more than one investigation, the number of investigations — 242,000 — was higher than the number of reports received. Moreover, in fiscal year 2018–2019, each APS investigator closed an average of 27 investigations per month, or 322 investigations in total, meaning that the 750 APS investigators closed approximately 241,500 investigations during the fiscal year.⁹⁰ Importantly, out of the 242,000 investigations, there were “about 51,000 confirmed victims,” 49,141 to whom APS offered various “wide ranging” services.⁹¹ In the end, as if to emphasize how complex and problematic the overall issue of elder abuse is, the liaison explained, “More than 21,000 confirmed cases refused services.”⁹²

89 *Id.* The APS liaison stated that the number of APS investigations had increased to about 775 across the state.
90 Email from APS Liaison to Kenneth Heisz (July 2, 2020). “A closed investigation can be either no abuse found or the investigation has been completed and the client has been given proper assistance and resources and no longer needs the services of the APS.” *Id.*
91 *Id.*
92 *Id.*

C. Lack of Adult Protective Services Jurisdiction Over Financial Elder Abuse by Conservators

This author also asked the APS liaison the following question: “What does APS do if the alleged elder abuse is being committed by the appointed conservator?” The liaison’s answer: “Once an individual is conserved, APS no longer has jurisdiction. It is a matter for the courts and law enforcement.”⁹³

This is a major loophole in the effort to prevent financial elder abuse. In the typical sequence of events, if John Q. Public suspects that an elder is the victim of financial elder abuse, the course of action is to report the abuse to the APS hotline. However, if the financial elder abuse is being committed by a conservator, this is no longer an option because APS takes the position that it does not have jurisdiction over such a matter. Moreover, the only recourse for John Q. Public is to contact the courts and law enforcement, but this option does not seem practical or realistic. The apparent expectation is that John Q. Public will know the correct court in which to file such a claim and can figure out the process for doing so, which is a daunting task and more onerous than simply calling the APS hotline.

Furthermore, even assuming that John Q. Public is able to navigate the arduous process and contact the proper court,

⁹³ Email from APS Liaison, *supra* n. 86.

California courts have been hit with budget cuts over the years and are so overburdened with their existing caseload that a legitimate case of financial elder abuse may not receive prompt or adequate attention.⁹⁴ Alternatively, a claim could be made with law enforcement, which could result in inaction as well, because law enforcement is often reluctant to get involved in what it deems a civil matter that is not within its purview.⁹⁵

IX. Why Do Cases of Financial Elder Abuse Go Unreported?

There is widespread consensus among experts and researchers that elder abuse in all of its forms is vastly underreported.⁹⁶

However, with respect to financial elder abuse, “[T]here seems to be a general view that financial abuse of the elderly is perhaps even more likely to go unreported and thus undetected.”⁹⁷

The truth is that multiple issues exist with the reporting of financial elder abuse. For example, an elderly person might not even know that he or she is a victim of such abuse. If the elderly person does know, he or she might be too embarrassed or ashamed to say anything to anyone, let alone report the abuse to the authorities. The elderly person might not even know how to report financial elder abuse, or he or she might be afraid to report it for fear of not being believed or of being retaliated against if the perpetrator finds out. Moreover, if the perpetrator is the court-appointed conservator, the elderly person could feel that the court is going to believe the conservator rather than him or her.⁹⁸

94 A large part of the problem is that, unlike APS, the courts employ and rely heavily on probate investigators to investigate conservatorship cases. The number of current court investigators statewide is unknown, but there assuredly are not enough. One can surmise this situation from a 2014 article written by the executive director of the Spectrum Institute’s Disability and Guardianship Project, <https://spectruminstitute.org/guardianship/index.htm> (accessed February 4, 2021), which focuses on probate investigators who work for the Los Angeles Superior Court. See Thomas Coleman, *Ten Is Not Enough: Probate Investigators Cannot Comply With Legislative Mandates* (May 9, 2014).

95 Paul Greenwood, a deputy district attorney who headed the Elder Abuse Prosecution Unit at the San Diego County District Attorney’s office from 1996 to 2018, has written about how he frequently encounters this misperception by law enforcement. “In financial abuse investigations, officers should not dismiss the matter as ‘civil’ simply because of the existence of a power of attorney.” Paul R. Greenwood, *Our Graying Society: Issues of Elder Abuse and Age Bias*, 31(4)/32(1) Prosecutor’s Brief 41, 43 (2010) (citation omitted).

96 Deb Taylor, *The Biggest Reasons Elder Financial Abuse Goes Unreported* (Senior Community Servs. & Reimagine Aging Inst. 2016); Natl. Ctr. on Elder Abuse, *The National Elder Abuse Incidence Study: Final Report* (Natl. Ag-

ing Info. Ctr. 1998); C.E. Marshall et al., *Elder Abuse: Using Clinical Tools to Identify Clues of Mistreatment*, 55(2) Geriatrics 42 (2000); Sheri Gibson, *Understanding Underreporting of Elder Financial Abuse: Can Data Support the Assumptions?* (unpublished doctoral dissertation), U. Colo., Colo. Springs 2013).

97 Hafemeister, *supra* n. 65, at 23; see also Deane, *supra* n. 5, at i (“The overwhelming majority of incidents of elder financial exploitation go unreported to authorities. For every documented case of elder financial exploitation, 44 went unreported according to a New York state study.”).

98 See e.g., *Knox v. Dean II*, 205 Cal. App. 4th 417, 429 n. 3 (2012) (In a lawsuit against a former conservator for financial elder abuse and other causes of action, the court noted, “[W]e are troubled by the fact that [the conservatee] was placed under a conservatorship of his person and estate in 2002, even though [his doctor’s] declaration indicates [the conservatee] was capable of making his own informed decisions, and subsequent medical evaluations reached the same conclusion until, in 2009, the probate court terminated the conservatorship of

Therefore, on the spectrum of elder abuse, a seemingly unlimited number of reasons exist for why financial elder abuse goes unreported.

Further, it should be noted that unique obstacles exist in determining whether certain financial transactions constitute financial elder abuse. It can be difficult for even an experienced professional to distinguish between a legitimate financial transaction that is imprudent and an exploitative transaction that is the result of undue influence, duress, fraud, or lack of informed consent. Also, both elder and perpetrator could feel that the perpetrator is entitled to some of the elder's assets, or it might just be difficult to distinguish between "a transfer of assets made with consent [and] an abusive transfer."⁹⁹

X. Red Flags for Financial Elder Abuse

There are numerous red flags to be on the lookout for to determine whether financial elder abuse is about to take place or has already occurred. Some of the more common red flags are as follows:

- An unexpected appointment of a conservator
- The appearance of a new "friend" or caregiver
- A drastic change in the elder's daily routine without a reasonable explanation for such change
- Social isolation (i.e., a noticeable withdrawal from relatives, friends, and activities), which frequently is a sign that the elder is being controlled by a third party
- Lack of necessities (e.g., food, medical

care, clothing) that the elder can normally afford

- An unexplained transfer of title to real or personal property
- A change in financial practices (e.g., checks written to unusual recipients, suspicious bank withdrawals, newly created joint accounts)
- An atypical increase in credit card balances and/or large credit card transactions
- Complaints by the elder of missing credit cards, checkbooks, or valuables¹⁰⁰

XI. How to Prevent Financial Elder Abuse

The hard truth is that "[t]here are significant research and data gaps on effective strategies to prevent and intervene in cases of elder abuse."¹⁰¹ Ultimately, you and your elderly client are the best protection. You may not be able to depend on any outside help or resources. However, you can take some proven strategies or practical steps to prevent financial elder abuse, all of which can help elderly clients, and even you someday, avoid problematic conservatorships. These strategies include the following:

- Encourage elderly clients to maintain social contact.¹⁰² To avoid isolation, it

his person.").

99 Hafemeister, *supra* n. 65, at 55; see also K.H. Wilber & S.L. Reynolds, *Introducing a Framework for Defining Financial Abuse of the Elderly*, 8(2) J. Elder Abuse & Neglect 61 (1996).

100 More red flags exist than the ones listed here. For further examples, see Eileen Beal, *When Should You Act on Red Flags of Elder Financial Abuse?* Forbes (June 12, 2016); Charles Schwab, *What Elder Financial Exploitation Looks Like* (June 5, 2019).

101 Deane, *supra* n. 5, at 13; see also Dept. of Health & Human Servs., Admin. for Community Living, *National Voluntary Consensus Guidelines for State Adult Protective Services Systems* 4–5 (Sept. 2016).

102 See Betsy Abramson et al., *Isolation as a Domestic Violence Tactic in Later Life Cases: What Attorneys Need to Know*, 3 NAELA J. 47, 48 (2007) ("Abusers use their power and control

is imperative for elders to continually be in close contact with multiple relatives and friends and to be as active as possible in their communities (e.g., religious organizations, civic organizations, clubs, hobby groups). The pandemic stay-at-home orders are making this difficult, if not impossible, to maintain social contact, thus forcing elders and their advocates to become more vigilant and creative in accomplishing this goal.

- Ensure that elderly clients obtain a durable power of attorney, to cover their finances, and a health care power of attorney, to cover their medical decisions (i.e., an advance health care directive).¹⁰³ These two legal documents can go a long way in determining an elder's future, avoiding the need for the elder to go to court to continue to live on his or her own terms.
- Discuss the intent reflected in the elderly client's durable power of attorney and advance health care directive with

his or her trusted family members and/or friends and provide copies of these documents to them. California residents can register their advance health care directive with the California Secretary of State.

- Periodically review the elderly client's durable power of attorney and advance health care directive and direct the client to reaffirm these documents in writing. Have the reaffirmation document witnessed and, if possible, notarized, and give copies of the document to the client's trusted family members and/or friends.
- Keep copies of the elderly client's durable power of attorney and advance health care directive as well as a copy of each reaffirmation document and other estate planning documents.
- Direct elderly clients to nominate a conservator now. Handling this task now, while clients have the mental capacity, will help ensure that their selection of conservator cannot be challenged later by someone claiming that the elder lacked mental capacity when the nomination was made.
- Encourage elderly clients to arrange for autopayment of routine bills (e.g., utility bills). Inform clients that paying bills automatically via electronic withdrawals from a checking or savings account will help them avoid the risk of a caregiver or anyone else writing fraudulent checks and absconding funds, and also help them avoid late payments and the fees they generate.
- Send, and advocate that elderly clients send, letters to financial institutions reminding them of their mandated reporter status. California residents should send a letter to each financial institution in which they have an account reminding the institution that all

to isolate victims and, by so doing, make it easier to engage in physical, emotional and sexual abuse and financial exploitation. Abusers isolate their victims for two reasons. First, they want the victim to be focused entirely on the abuser's needs. Other social contacts leave victims less time for their abusers, which is a right of victims that abusers do not accept. Second, abusers do not want their victims to develop sources of strength that could contribute to their independence or make them desirable to others. Most abusers are aware that a victim's social contacts can bring her strength and support that could ultimately enable her to escape the abuser's control. Consequently, abusers commonly attempt to keep their victims completely dependent on them to increase their power.”).

¹⁰³ On July 1, 2000, the advance health care directive replaced the durable power of attorney for health care in California as the legal document for appointing a health care agent. Cal. Prob. Code § 4600 et seq.

of its officers and employees are deemed mandated reporters under California law and have a duty to report any suspected instance of financial abuse immediately.¹⁰⁴

- Warn elderly clients to be suspicious of email and phone solicitations.¹⁰⁵ Convince them not to answer the phone if they do not recognize the number; instruct them to let the caller leave a voicemail. Similarly, tell clients to avoid responding to any emails allegedly originating from a government agency or company threatening them with negative consequences if they do not provide their personal information or some type of payment (e.g., for alleged back taxes or unpaid traffic fines). Inform clients that these are phishing emails sent by scammers.

¹⁰⁴ California Welfare and Institutions Code § 15630

et seq. requires that all forms of elder abuse (except emotional abuse) be immediately reported by those whom the law identifies as mandated reporters (e.g., social workers, medical professionals, ministers, all officers and employees of financial institutions). The report is to be made to the county's APS agency. Moreover, the failure of an officer or employee of a financial institution to report financial abuse is punishable by a fine.

¹⁰⁵ For example, an individual posing as a public defender recently called an elderly client of this author's law firm. The individual claimed that he was representing the elderly client's daughter, whom he claimed had just been arrested for DUI, and told the client to send bail money to him immediately. Because the elderly client was having difficulty contacting his daughter, he considered sending the money before he contacted our law firm. We advised him it sounded like a scam and that he should not send the money until he had spoken directly with his daughter. In the end, the elderly client's daughter contacted her father, confirmed that she had not been arrested, and informed her father that the individual was trying to scam him.

- Urge elderly clients to take an inventory of, and photograph, their valuables. Inform clients that having a record of all their valuables is helpful in the event a caregiver, repair person, or other service person comes into their home and steals their property. Inform them that items such as jewelry can be easily taken and pawned or sold, and they might not realize immediately that these items were stolen. Let them know that an inventory also is helpful when they need to file an insurance claim.
- Persuade elderly clients to develop a buddy system with neighbors who can keep an eye on them and their home. Instruct clients to provide their buddies with contact information for their adult children or other responsible adults to enable the buddies to contact someone if they see that something is amiss.
- Advise elderly clients to contact the police if they suspect financial elder abuse, regardless of the perpetrator. Alert clients that they may get pushback from the police asserting that financial elder abuse is solely a civil matter. Tell clients that financial elder abuse is not just a civil matter; it's also a crime.
- Inform elderly clients that if they suspect that their conservator is committing financial abuse, they need to contact the judge who issued the order for conservatorship immediately.¹⁰⁶ Tell clients to contact you for assistance if they do not know who the judge is.¹⁰⁷

¹⁰⁶ Pursuant to California Probate Code § 1051 and Rule 7.10(c)(2) of the California Rules of Court, respectively, "a person" can communicate with the court "about a fiduciary's performance of his or her duties and responsibilities regarding a conservatee ..."

¹⁰⁷ Once a conservatorship is established and a conservator is appointed, it is often difficult to terminate the conservatorship. Therefore, in

XII. Synopsis

The problem of elder abuse in general has been viewed as an existential crisis in California for decades, certainly since 1982, when the state legislature passed the Elder Abuse Act. However, except for infrequent periods when the public has demanded action and the legislature has taken certain actions, financial elder abuse has been largely unaddressed, unmonitored, underfunded or not funded at all, and simply ignored. Yet financial elder abuse is a problem that is not going away; it is only going to get worse.

Further, the existence of financial elder abuse committed by conservators is an undeniable phenomenon, although the extent of the problem is admittedly unknown. There are measures that can help identify the extent of financial elder abuse and address this problem irrespective of whether the perpetrator is a conservator or someone else. Some of these measures are identified below.

Call to Action

For at least 4 decades in California, elder advocates, news media, legislators, and the public have made numerous calls to action to address the problem of financial elder abuse as well as problems with the conservatorship system. This author

suggests one more call to action, which consists of the following:

- Fund the 2006 Reform Act. This statute, which was never funded, needs to be funded to enable its measures to be fully and successfully implemented.
- Hire more probate court investigators. The number of probate court investigators needs to increase, whose hiring will also require more funding.
- Mandate use of the statewide registry of conservators. The statewide registry, which is mandated by California law, needs to be fully used in order for the courts and the public to be able to identify “bad” or “questionable” conservators and to prevent such conservators from escaping detection by moving among multiple counties.¹⁰⁸
- Create an elder court in every California county. An elder court in which all types of cases involving elders needs to be created in every county in California. Such a court exists in the Superior Court for Contra Costa County, which could be used as a model.
- Amend California Probate Code § 1471. Probate Code § 1471 needs to be amended to require that every proposed conservatee in a general conservatorship proceeding be represented by counsel.¹⁰⁹

most instances, the hiring of an attorney will be required. The termination of the conservatorship is done by order of the court pursuant to California Probate Code § 1860. Surprisingly, the termination of a conservatorship and restoration of the conservatee’s rights is a neglected issue. The American Bar Association, in issuing a 2017 report reflecting research and recommendations on this issue, noted that “[a]dult guardianship is generally viewed as permanent.” See Erica Wood et al., *Restoration of Rights in Adult Guardianship: Research & Recommendations* (ABA Commn. on L. & Aging with Va. Tech. Ctr. for Gerontology 2017).

¹⁰⁸ Formerly, a private professional conservator simply registered with the clerk of the county where the conservator sought appointment. The current statewide registry provides courts with “centralized information, including track records in other counties” for the court to use in making the decision to appoint a private conservator. See Off. of the Atty. Gen., St. of Cal., Dept. of Just., *Court-Appointed Conservators: Regulations*, <http://www.ossh.com/conservator/regulations.htm> (accessed Dec. 8, 2020).

¹⁰⁹ Under current law, unlike in a limited conservatorship proceeding in which the proposed

- Expand the jurisdiction of APS. The jurisdiction of APS needs to be expanded to include the investigation of claims of any type of elder abuse at any time, even after a conservator has been appointed. This would provide the public with an easy way to report any suspicion of elder abuse (i.e., a call to the APS hotline), including in cases in which the conservator is the suspected perpetrator.
- Recruit the assistance of technology organizations to improve the statewide registry of conservators. One or more organizations should be identified to provide resources and digital talent to improve the statewide registry of conservators and to create a better data collection system for tracking active conservatorships and claims of elder abuse by conservators. One example of such an organization is Code for America, which “uses the principles and practices of the digital age to improve

how government serves the American public, and how the public improves government.”¹¹⁰

XIV. Conclusion

The prescription for staying safe during the COVID-19 pandemic is to isolate oneself from family and friends, which is completely antithetical to how one combats elder abuse, and financial elder abuse in particular. In short, the pandemic stay-at-home orders are exacerbating the problem of financial elder abuse, thereby providing opportunity and justification for anyone (as well as a bad conservator) to isolate an elderly person.

Moreover, the economic impact of the pandemic stay-at-home orders is still not fully known, but it will assuredly worsen the effectiveness of already underfunded courts, their overworked probate investigators, and APS and law enforcement agencies, all of which are tasked with protecting our elders. Most of the measures in this author’s call to action will require additional funding in order to for them to be successfully implemented. Therefore, until there is adequate political will and necessary funding, it is incumbent upon all of us as responsible citizens to be on the lookout for signs that an elder we know (whether in a conservatorship or not) is a victim of, or is about to be a victim of, financial abuse.

conservatee must be represented by counsel, in a general conservatorship proceeding, the proposed conservatee does not have to be represented by counsel. In fact, the proposed conservatee has the initial burden of having to request counsel before the right to counsel applies. *See* Cal. Prob. Code § 1471(a). This is an onerous burden given that the proposed conservatee could have cognitive or communication disabilities. Therefore, when no such request is made, the court is required to appoint counsel only if it has information from a probate court investigator or “other source” that such appointment is either helpful or “necessary to protect the interests of the ... proposed conservatee.” *See id.* at § 1471(b).

110 Code for America focuses on “pioneering a new way to make government work in the digital age.” *See* Code for America, <https://www.codeforamerica.org> (accessed Dec. 8, 2020).