Phoning It In: Chapter 268 Allows Court Appearances by Telephone

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Code Sections Affected

Code of Civil Procedure § 367.5 (new), §§ 575.5, 575.6, 1006.5 (repealed);
Government Code § 68070.1 (repealed).
AB 500 (Lieu); 2007 STAT. Ch. 268.

"*Keep up appearances whatever you do.*"[1]

I. INTRODUCTION

Everyone knows that you cannot be in two places at once. Suppose, as a busy litigator, you have two appearances scheduled within an hour of each other—one in Fresno and one in Santa Monica.[2] As an attorney, you would like to appear in person; you are aware that even relatively routine proceedings can become important.[3] Yet one look at your schedule—as well as a map—reveals that actual appearances at both places are impossible.[4] A continuance might answer the problem, but since the streamlining of the litigation process several years ago, courts are reluctant to grant continuances because it slows the pace of litigation.[5] So if appearing physically in person is out of the question, what do you do? If you had an office in one of the two locations, you could have local associate counsel make an appearance on your behalf.[6] But not all attorneys have such associates that can appear for them.[7] Another possibility springs to mind: you can look up an old law school friend and ask her to make the appearance—if she is willing to shoulder the risk of a future malpractice suit.[8] In another county, you

1. CHARLES DICKENS, MARTIN CHUZZLEWIT 171 (Oxford Univ. Press 1982) (1843-1844).

2. Adam K. Treiger, *Dangerous Appearances*, L.A. LAW., Feb. 2002, at 20, 20-22 (providing a similar hypothetical in regards to "special appearances" by opposing counsel).

3. *Id.*; *see also* Streit v. Covington & Crowe, 82 Cal. App. 4th 441, 448-50, 98 Cal. Rptr. 2d 193, 198-200 (4th Dist. 2000) (Ward, J., concurring) (describing the ability of any attorney, regardless of specialty, to render an appearance in any court).

4. Treiger, *supra* note 2, at 20-22.

5. Mark B. Canepa, *Caveat Associate Counsel: Guidelines to Consider When Agreeing to Appear as Associate Counsel*, S.F. ATT'Y, Oct./Nov. 2001, at 20, 20.

6. *See id.* ("The need for local associate counsel is particularly great where telephonic appearances are still not allowed.").

7. *See id.* (noting that small firms or solo practitioners sometimes lack the "bodies" needed to make such an appearance).

8. *Id.*; *see, e.g.*, *Streit*, 82 Cal. App. 4th at 447, 98 Cal. Rptr. 2d at 198 (holding that attorneys who "specially appear" on behalf of a client owe a duty of care to that client, thereby opening the door to attorney malpractice claims).

might have been able to make the appearance by telephone, but suppose this particular county has been slow to adopt the rules on remote appearances.[9] So, apart from managing your calendar better, the question remains: what do you do?

With the enactment of Chapter 268, relief is at one's fingertip because a perfunctory appearance can be handled by a simple phone call.[10] Moreover, Chapter 268 assures statewide consistency in telephonic appearances for litigators.[11]

II. BACKGROUND

A. California Judicial Council

The California Constitution empowers the Judicial Council to "adopt rules for court administration," survey the practices and procedures of the courts, and "make recommendations annually to the Governor and Legislature."[12] The Judicial Council consists of the Chief Justice of the California State Supreme Court, one California Supreme Court judge, three appellate judges, ten superior court judges, two nonvoting court administrators, four members of the State Bar, and one member from each house of the Legislature.[13] The Chief Justice appoints the members, except for the members of the Bar and the representatives of the Legislature.[14] The Judicial Council's goal is to "improve the administration of justice,"[15] and the Chief Justice is to "expedite judicial business."[16]

B. Trial Court Delay Reduction Act of 1986[17]

Under the burden of ever-increasing dockets, the California Legislature sought to have the Judicial Council improve the speed with which trials were heard.[18] The Trial Court Delay Reduction Act of 1986 (TCDRA) set the stage for

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9. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007) (noting that there is no statewide policy regarding telephonic appearances); Canepa, *supra* note 5, at 20.

10. CAL. CIV. PROC. CODE § 367.5 (enacted by Chapter 268).

11. *See id.* § 367.5(a) (enacted by Chapter 268) ("It is the intent of this section to promote uniformity in the procedures and practices relating to telephone appearances in civil cases.").

12. CAL. CONST. art VI, § 6(d).

13. *Id.* § 6(a).

14. *Id.*

15. *Id.* § 6(d).

16. *Id.* § 6(e); *see also* Greg Moran, *Chief Justice Has Revolutionized California's Judiciary; George Marks 10th Year as Leader of Court System*, SAN DIEGO UNION-TRIB., May 1, 2006, at A1 (noting that Chief Justice George's major influence has been in changing the organization and administration of the state's court system).

17. CAL. GOV'T CODE §§ 68600-68620 (West 1997 & Supp. 2008).

18. EILEEN C. MOORE, JAMES R. LAMBDEN & MICHAEL PAUL THOMAS, CALIFORNIA CIVIL PRACTICE PROCEDURE § 12 (2007); 7 B.E. WITKIN, CALIFORNIA PROCEDURE, *Trial* § 38 (4th ed. 1997 & Supp. 2007).

improvements in the timely disposition of civil and criminal actions.[19] On the heels of the new legislation, California Government Code section 68070.1 enabled counsel to appear by telephone in non-evidentiary law and motion hearings, probate hearings, and conferences.[20] The statute provided the Judicial Council with the responsibility of forming a pilot project to implement the teleconferencing program.[21] While the TCDRA remains in effect, Chapter 268 repeals California Government Code section 68070.1.[22]

C. Proposition 220

In 1998, Proposition 220 amended the California Constitution, combining municipal courts and superior courts into one superior court system.[23] Before the consolidation, superior courts heard felonies, family law, and civil cases (in excess of $25,000), and municipal courts, widely regarded as "the people's court,"[24] heard misdemeanors and infractions.[25] Supporters of the Proposition saw the consolidation of the courts as an opportunity to save the "Three Strikes" law by opening up more courtrooms to felony trials.[26] After Proposition 220's enactment, the state's single court system faced increased pressure to fully utilize all available time-saving measures.[27] Judges found that allowing telephonic appearances helped reduce time spent on crowded dockets.[28]

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19. *See, e.g.*, Cottle v. Super. Ct., 3 Cal. App. 4th 1367, 1379, 5 Cal. Rptr. 2d 882, 888 (2d Dist. 1992) ("Under the Trial Court Delay Reduction Act, designated counties . . . have been given wide latitude in developing their own rules and procedures to reduce litigation delays that have reached 'scandalous proportions' in some counties." (citation omitted)).

20. CAL. GOV'T CODE § 68070.1 (repealed by Chapter 268).

21. *Id.* § 68070.1(b) (repealed by Chapter 268) (setting the date for a pilot program at March 1, 1988).

22. CAL. CIV. PROC. CODE § 367.5(a) (enacted by Chapter 268).

23. Legislative Analyst's Office, Proposition 220: Courts. Superior & Municipal Court Consolidation, June 1998, http://www.lao.ca.gov/ballot/1998/220_06_1998.htm [hereinafter Proposition 220] (on file with the *McGeorge Law Review*).

24. Editorial, *Streamlining the Judiciary*, S.F. CHRON., May 26, 1998, at A16.

25. Proposition 220, *supra* note 23.

26. Editorial, *The Examiner's Editorials on Statewide Ballot Measures*, S.F. EXAMINER, May 31, 1998, at C13. *But see* Howard Mintz, *Politics Enliven Prop. 220 Debate Court-Unification Measure Raises 'Three Strikes' Issue*, SAN JOSE MERCURY NEWS, May, 5, 1998, at 1B (noting that scholars have questioned whether "Three Strikes" was used as a hot button issue in the campaign in order to mask its more mundane purpose—i.e., judicial administration). The "Three Strikes" law is codified in CAL. PENAL CODE § 1170.12 (West 2004).

27. Susan E. Davis, *Heard But Not Seen: Thanks to Rule 298, Lawyers May Phone in Some of Their Court Appearances*, CAL. LAW., June 1999, (spec. reprint 2008), *available at* http://www.courtcall.com/images/CourtCallNews/CaliforniaLawyerArticleJune1999_2.pdf ("Using telephonic appearance really cuts down on the crowd and makes it easier for the staff because the vendor gets the attorneys lined up and processed before their cases are heard.") (quoting Los Angeles Superior Court Judge Florence-Marie Cooper).

28. *Id.* ("It makes the whole process less chaotic."); *see Reducing Court Costs and Delay*, A.B.A. J., Nov. 1984, at 142, 142 [hereinafter *Reducing Court Costs*] (stating that teleconferencing reduced the time attorneys spent on motion hearings by one-half in Colorado and New Jersey).

D. Federal System

Under the Federal Rules of Civil Procedure, a party may offer contemporaneous remote testimony on a showing of "good cause . . . in compelling circumstances."[29] While remote appearances are allowed in many instances, "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial."[30] The 1996 Advisory Committee notes for Federal Rule of Civil Procedure 43 illustrate a showing of "compelling circumstances" as an inability to attend the trial for "unexpected reasons, such as accident or illness."[31] Yet the Committee, assured of the importance of live testimony, keeps a watchful eye on remote appearances by noting that "[o]ther possible justifications for remote transmission must be approached cautiously."[32]

E. Existing California Rules

Currently, California Rule of Court 3.670 dictates when a party may appear by telephone.[33] However, courts have discretion in determining whether to adopt the rule.[34] While California Code of Civil Procedure section 575.5 authorizes telephonic appearances, a superior court is not obligated to adopt the rule.[35] Such discretion has led to inconsistency.[36] In general, courts do not permit telephonic appearances at settlement conferences or case management conferences.[37] Furthermore, the court can require a personal appearance in any type of case if the court decides that the appearance would "materially assist" in the proceeding or resolution of the case.[38] As a result of this judicial latitude, predicting with certainty whether a court will allow a telephonic appearance is unclear.[39]

A party who wishes to appear telephonically is required to notify the court and all other parties of his or her intention and must notify such persons through

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29. FED. R. CIV. P. 43(a).

30. FED. R. CIV. P. 43 advisory committee's note (1996).

31. *Id.*

32. *Id.* ("The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling.").

33. CAL. R. CT. 3.670.

34. CAL CIV. PROC. CODE § 575.5(c) (repealed by Chapter 268) (allowing courts to exercise discretion regarding the implementation of rules for telephone appearances); ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007) (discussing the unwillingness of some courts to allow telephone appearances).

35. CAL CIV. PROC. CODE § 575.5(c) (repealed by Chapter 268).

36. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007) ("[T]he unwillingness of some courts to apply the rule consistently and fairly has caused some confusion . . . .").

37. CAL. R. CT. 3.670(c)(1)-(2).

38. CAL. R. CT. 3.670(c)(3).

39. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007) ("[T]here appears to be no consistent policy across the state.").

one of two options.[40] First, a party may simply "[p]lace the phrase 'Telephone Appearance' below the title of the moving or opposing papers."[41] Alternatively, the party may inform the court of its intent to appear telephonically either in person or by telephone;[42] either way, the moving party must notify the court of its intention five court days[43] before the appearance.[44] If the court requires that the moving party appear in person after a motion has been made, the court must notify all parties by telephone at least one court day before the hearing.[45]

As a practical matter, a court may enter into a contract with a phone service provider and allow the provider to impose a reasonable fee for telephone appearance services.[46] Currently, most courts in California employ a provider located in Southern California that charges thirty-five to sixty dollars per call.[47] The court record of telephone appearances must be kept to the same extent and in the same manner as a regular hearing.[48]

III. CHAPTER 268

Chapter 268 enables a party to appear by telephone at specified types of conferences, hearings, and proceedings in civil cases.[49] Existing court rules brought telephonic appearances to most counties.[50] Chapter 268 expands the availability of telephonic appearances, improves access to the method of appearance, and seeks to promote uniformity in all courts.[51]

Chapter 268 places control for the adoption of measures with the Judicial Council.[52] The rules promulgated by the Judicial Council may include the manner in which appearances are conducted, the conditions required for

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40. CAL. R. CT. 3.670(d)(1)(A)-(B).

41. CAL. R. CT. 3.670(d)(1)(A).

42. CAL. R. CT. 3.670(d)(1)(B).

43. BLACK'S LAW DICTIONARY 424 (8th ed. 2004) (defining a "court day" as "[a] day on which a particular court is open for court business").

44. CAL. R. CT. 3.670(d)(1)(B).

45. CAL. R. CT. 3.670(e).

46. CAL. R. CT. 3.670(f); *see also* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007) (noting that most courts "enthusiastically and efficiently" apply the rule through a private vendor, CourtCall).

47. CourtCall, LLC, Participating Courts and Fee List (Dec. 2007), http://docs.courtcall.com/ccall/docstore/December_%2007_Participating_Courts_List.pdf (on file with the *McGeorge Law Review*); *see also* CourtCall, Frequently Asked Questions, http://www.courtcall.com/ccallp/FAQPage_Public# (last visited Jan. 2, 2008) (on file with the *McGeorge Law Review*) (stating that the fee is high because a telephonic appearance is not simply a phone call–it is a "Court Appearance").

48. CAL. R. CT. 3.670(h).

49. CAL. CIV. PROC. CODE § 367.5(a) (enacted by Chapter 268).

50. CAL. R. CT. 3.670; *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007) (explaining that "many" judges throughout the state used the rule).

51. CAL. CIV. PROC. CODE § 367.5(a) (enacted by Chapter 268).

52. *Id.* § 367.5(d) (enacted by Chapter 268) ("[T]he Judicial Council shall adopt rules . . . by January 1, 2008 . . . .").

appearances, and the provisions relating to the use of private vendors who supply the telephonic appearance services.[53]

Chapter 268 lists six types of proceedings available for telephonic appearances.[54] However, it grants the court discretion to allow telephonic appearances in other proceedings when appropriate.[55] The court also has considerable discretion to constrain or expand telephonic appearances.[56] The law gives authority to the court to mandate that a party actually appear if the court deems that the appearance will "materially assist in the determination of the proceedings or in the effective management or resolution of the particular case."[57]

Chapter 268 limits the new statute's authority to the types of proceedings listed in the statute itself.[58] However, it also enables the Judicial Council, consistent with its rulemaking authority, to create rules for telephonic appearances where appropriate.[59]

IV. ANALYSIS OF CHAPTER 268

A. Tool for Efficient Judicial Administration

Supporters of Chapter 268 pointed to the convenience and ease of appearances by telephone.[60] Appearances by telephone keep litigants off of crowded highways, and the time saved by attorneys can reduce litigation costs.[61] In addition, courts handle simple matters in less time, leaving valuable court time open for more complex matters.[62] Sponsors of the bill also point to the difficulties encountered by small-firm attorneys who struggle to make appointments in different counties due to inconsistency in the rules.[63] For example, many attorneys complain of "home-towning," a process by which judges allow local attorneys to make telephonic appearances but require out-of-

53. *Id.* (enacted by Chapter 268).

54. *Id.* § 367.5(b) (enacted by Chapter 268). The six categories of permitted proceedings are: case management conferences, trial setting conferences, law and motion hearings, discovery motion hearings, arbitration or mediation status conferences, and review of dismissal hearings. *Id.* § 367.5(b)(1)-(6) (enacted by Chapter 268). However, a court may also allow "[a]ny other hearing, conference, or proceeding if the court determines that a telephone appearance is appropriate." *Id.* § 367.5(b)(7) (enacted by Chapter 268).

55. *Id.* § 367.5(b)(7) (enacted by Chapter 268).

56. *Id.* § 367.5(e) (enacted by Chapter 268) (granting authority to the Judicial Council to provide rules for appearances not expressly stated in Chapter 268).

57. *Id.* § 367.5(c) (enacted by Chapter 268).

58. *Id.* § 367.5(e) (enacted by Chapter 268).

59. *Id.* § 367.5(d), (e) (enacted by Chapter 268).

60. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007).

61. *Id.*; SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 500, at 4 (June 20, 2007). *But see Reducing Court Costs*, *supra* note 28, at 142 (stating that while teleconferencing and other streamlining measures reduced the costs of hourly services to clients, the cost of litigation with contingent fee lawyers was not reduced).

62. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007).

63. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 500, at 3 (June 20, 2007).

county attorneys to make actual appearances.[64] The new rule will bring consistency to the entire state by allowing all attorneys to appear telephonically.[65] Although a mere telephonic appearance may sound quaint in the age of broadband internet, it may be a stepping-stone to implement future technological devices in the courtroom.[66]

While less convenient, there are some indirect benefits to actual appearances.[67] For example, when trial courts in Manhattan allowed parties to appear by phone, one judge noted, "many attorneys work out the details of discovery schedules while they are in court waiting for their cases to be called."[68] According to that judge, this face-to-face time serves the court indirectly because these routine issues need not come before a judicial hearing officer or judge if they can be worked out among the attorneys.[69]

B. Constitutional Due Process and Access to the Courts

A chief concern regarding teleconferencing and remote appearances is the potential conflict with the procedural due process provisions of the U.S. Constitution.[70] The Fourteenth Amendment[71] affords parties an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[72] Under the appropriate analysis, a court must determine what kind of due process is required in any given situation.

On the one hand, a remote appearance may be the only possible means to preserve due process requirements.[73] Thus, a telephone call may be a perfectly feasible means of making a court appearance.[74] In *Hoversten v. Superior Court*, an incarcerated plaintiff was unable to appear in court for a custody hearing.[75] As a result, he lost custody and visitation rights with his children.[76] On appeal, the

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64. *Id.*

65. *Id.*

66. Kenneth Ofgang, *C.A. Holds First Teleconferenced Arguments; Presiding Justice Calls It Success*, METRO. NEWS ENTER., June 23, 1997, at 3.

67. Daniel Wise, *Plan Allows Lawyers to Make Appearance by Phoning Court*, N.Y. L.J., Jan. 26, 2004, at 231, 231.

68. *Id.* (quoting Justice Stanley Sklar).

69. *Id.*

70. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

71. U.S. CONST. amend. XIV.

72. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (holding that an evidentiary hearing was not required prior to termination of disability benefits).

73. *See* Hoversten v. Super. Ct., 74 Cal. App. 4th 636, 639, 88 Cal. Rptr. 2d 197, 199 (2d Dist. 1995) (holding that prison inmates should be provided alternative and meaningful access to courts when personal appearances are restrained).

74. *Id.* at 643, 88 Cal. Rptr. 2d at 202 (quoting Wantuch v. Davis, 32 Cal. App. 786, 792-93, 39 Cal. Rptr. 29, 47 (2d Dist. 1995)).

75. *Id.* at 639, 88 Cal. Rptr. 2d at 199.

76. *Id.*

California Court of Appeal reversed, ruling that the plaintiff's inability to actually appear deprived him of "'meaningful' access" to the judicial system.[77] Thus, the court suggested that the trial court judge should have fashioned some alternative means of appearing for the plaintiff due to his inability to physically appear.[78] The court proposed several solutions, including the possibility of conducting pretrial proceedings by telephone.[79]

On the other hand, some courts have been more skeptical of the proposition that remote appearances and due process go hand-in-hand.[80] In *Rusu v. U.S. Immigration & Naturalization Service*, the Fourth Circuit Court of Appeals held that video conferencing in an asylum proceeding, while not impeding the due process of the applicant, "created additional barriers" to the effectiveness of the proceeding.[81] The court noted that the credibility of the petitioner carries significant weight in such a proceeding and the inability of the court to assess the credibility and demeanor of a party can be detrimental to a case.[82] Furthermore, the court noted the dilemma forced by remote appearances when counsel, client, and judge are in at least two different locations.[83] If the attorney is present with the client in a remote location, he may confer with the client but not the judge.[84] If the attorney is present with the judge while the client appears by video conference, then the attorney loses the opportunity to confer with the client.[85] The court ultimately held that the petitioner was afforded due process in so much as Rusu had the "opportunity" to be heard;[86] however, the court noted that the "presentation" of his claim was problematic.[87]

Chapter 268 obviates many of these concerns by limiting the availability of telephonic appearances to general civil proceedings;[88] yet the presence and application of technology in the courtroom will likely increase.[89] As the benefits

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77. *Id.* at 642, 88 Cal. Rptr. 2d at 201 (quoting *Wantuch*, 32 Cal. App. 4th at 792, 39 Cal. Rptr. 2d at 51). "One of the goals of our legal system is to secure access to the courts for everyone." *Id.* at 641, 88 Cal. Rptr. 2d at 201.

78. *Id.* at 642, 88 Cal. Rptr. 2d at 201.

79. *Id.* at 643, 88 Cal. Rptr. 2d at 202 (quoting *Wantuch*, 32 Cal. App. 4th at 792-93, 39 Cal. Rptr. 2d at 47).

80. Rusu v. U.S. Immigration & Naturalization Serv., 296 F.3d 316, 318, 322 (4th Cir. 2002).

81. *Id.* at 323; *see also* FED. R. CIV. P. 43 advisory committee's note (1996) ("The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling.").

82. *Rusu*, 296 F.3d at 323.

83. *See id.* (explaining that the separation of the parties in any remote appearance can add barriers to free conversation).

84. *Id.*

85. *See id.* (describing the lawyer's predicament as a "Catch 22").

86. *Id.* at 324.

87. *Id.* at 323.

88. CAL. CIV. PROC. CODE § 367.5(b) (enacted by Chapter 268). "'General civil case' means all civil cases except probate, guardianship, conservatorship, juvenile, and family law proceedings . . ., small claims proceedings, unlawful detainer proceedings, and 'other civil petitions' . . . ." CAL. R. CT. 1.6(4).

89. Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1097 (1994); *see also* Ofgang, *supra* note 66 (quoting Justice David Sills of California's Fifth District Court of Appeal as

of technology become more apparent and highway travel becomes more burdensome, attorneys will likely embrace methods for remote court appearances.[90] Plaintiffs who previously could not bring claims can now appear telephonically.[91] Despite these benefits, the possibility remains that new forms of appearances might be challenged on due process grounds under the Fourteenth Amendment.[92]

V. CONCLUSION

Chapter 268 recognizes what has been a simple court rule for many years and seeks to ensure consistency in its application.[93] As a practical matter, telephonic appearances save time and money associated with attorney travel.[94] Chapter 268 gives the Judicial Council latitude to implement new rules for a wide variety of proceedings.[95] Until the Council creates such new rules, appearances at general civil proceedings will be as simple as dialing a few numbers.[96]

saying that the court will write a policy to "make teleconferencing a regular part of the court's procedures").

90. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 500, at 4 (June 20, 2007) (noting that for solo practitioners or non-profit organizations the inability to make a remote appearance may be "especially burdensome").

91. *See* Karen DeMasters, *Getting Day in Court Via the Internet*, N.Y. TIMES, Oct. 4, 1998, at 14NJ.9 (citing the case of a quadriplegic man's testimony via teleconferencing).

92. *See, e.g.*, *Rusu*, 296 F.3d at 318 (holding that teleconferencing, while not officially denying due process, was "problematic" in an asylum proceeding).

93. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 500, at 2 (Mar. 24, 2007).

94. Robert V. Alvarado, Jr. & Mark S. Wapnick, *Telephonic Court Appearances: An Easy Way to Reduce Litigation Costs*, CASE IN POINT, Winter/Spring 2006, at 24, 24, http://www.courtcall.com/images/CourtCallNews/caseinpoint_winter06.pdf (on file with the *McGeorge Law Review*).

95. CAL. CIV. PROC. CODE § 367.5(d), (e) (enacted by Chapter 268).

96. *Id.* § 367.5(b)(1)-(7) (enacted by Chapter 268) (listing appropriate proceedings).

Chapter 436: More Than Just a Clean-Up Bill?

Chad Bacchus

Code Sections Affected

Code of Civil Procedure § 1255.410 (amended); Government Code § 7267.2 (amended).
SB 698 (Torlakson); 2007 STAT. Ch. 436.

I. INTRODUCTION

Part of the American dream is to own a home.[1] In 2006, Angelica Sheldon realized this dream when she purchased a home in Seaside, California.[2] Angelica's dream may not last very long as she could potentially lose her home to a development group.[3] The developer plans to build a 252-room hotel in an area currently occupied by family homes.[4] Voicing her frustration with the City of Seaside, Angelica said, "Everything has been very secretive . . . the way it's been handled is totally wrong."[5] This shows how property owners faced with the possibility of eminent domain,[6] because of redevelopment, are often not informed of the condemnation process.[7]

Though the City of Seaside has not resorted to eminent domain in this case, the City has hired a relocation consultant in case the developer cannot successfully negotiate with all of the residents.[8] If the City decides to utilize its eminent domain power, Chapter 436 may make it more difficult for citizens like Angelica Sheldon to oppose the government action.[9]

Redevelopment can be a positive outcome of the use of eminent domain and is considered an effective way to strengthen and even revitalize an economy.[10]

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1. U.S. Dep't of Hous. & Urban Dev., Owning a Home, http://www.hud.gov/owning/index.cfm (last visited Sept. 29, 2007) (on file with the *McGeorge Law Review*).

2. Andre Briscoe, *Residents Fear Force Out*, MONTEREY COUNTY HERALD, Apr. 17, 2007, at B1.

3. *See id.* (stating that citizens feel like the city is not as worried about the homeowners as it is about the potential income this project will bring in).

4. *Id.*

5. *Id.* (alteration in original).

6. *See* BLACK'S LAW DICTIONARY 562 (8th ed. 2004) (defining "imminent domain" as "[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking").

7. *See* Briscoe, *supra* note 2 ("The only thing that they have told us is not to worry. . . . It's been very confusing and we think there is a chance that [the city] will use eminent domain to take our property.").

8. *See id.* (explaining that although the city stated that it is not talking about eminent domain at this point, it has hired a relocation consultant).

9. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 698, at 1, 3 (Apr. 10, 2007) (outlining the requirements of homeowners wishing to oppose an order of possession, making it mandatory to submit a declaration of any hardships, which has to be signed under penalty of perjury).

10. *See* Cal. Redevelopment Ass'n, Redevelopment–An Essential Tool in Returning California to Economic Prosperity, http://www.calredevelop.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=3585 (last visited Sept. 29, 2007) [hereinafter Essential Tool] (on file with the

Statistics show that each dollar spent on redevelopment generates almost fourteen dollars "in total economic activity."[11] During the 2002-2003 fiscal year, over 300,000 jobs were created through redevelopment, along with "$1.58 billion [in] [s]tate and local taxes."[12] Such statistics lead supporters to advocate redevelopment as "a means to reduce urban sprawl."[13] Last year there were over 400 community redevelopment agencies in California with close to 800 potential projects.[14]

II. LEGAL BACKGROUND

A. Existing Federal Law

The U.S. Constitution prohibits the government from taking private property for public use without paying just compensation.[15] The act of taking private property for public use is referred to as eminent domain.[16] Eminent domain is regulated by the U.S. Code, which requires a party seeking to acquire private property in the name of the United States to file a "declaration of taking."[17] The declaration of taking contains a statement of authority, a description of the property taken, a statement of property taken for public use, a "plan showing the lands taken," and an estimate of what the just compensation will be.[18] Once the declaration of taking is filed in federal court, the property's title vests in the government.[19]

B. Existing California Law

The California Constitution allows for private property to be "taken or damaged for public use only when just compensation . . . has first been paid."[20] California Code of Civil Procedure section 1255.410 allows the government to

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McGeorge Law Review) (stating that redevelopment has improved the economy by creating business, affordable housing, and jobs).

11. Cal. Redevelopment Ass'n, Redevelopment Facts, http://www.calredevelop.org/AM/Template.cfm?Section=Home&CONTENTID=1753&TEMPLATE=/CM/ContentDisplay.cfm (last visited Sept. 29, 2007) (on file with the *McGeorge Law Review*).

12. *Id.* ("310,000[] [f]ull and part time jobs [were] created in just one year (2002-03).").

13. Essential Tool, *supra* note 10.

14. *See id.* ("There are 417 community redevelopment agencies and 772 project areas in the state.").

15. U.S. CONST. amend. V; *see supra* note 6 (defining eminent domain).

16. BLACK'S LAW DICTIONARY 562 (8th ed. 2004); *see also* Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), *reprinted as amended in* 5 U.S.C.A. § 601 (West 2007) ("Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use.").

17. 40 U.S.C.A. § 3114a (West Supp. 2007).

18. *Id.*

19. *Id.*

20. CAL. CONST. art. I, § 19.

file a motion in state court for an order of possession.[21] This section also allows a property owner to oppose the exercise of eminent domain by submitting a written document explaining how his or her life would be adversely affected by the taking.[22]

Section 1255.410 was recently amended to increase information and protection for property owners faced with eminent domain.[23] Specifically, language was inserted requiring the property owner facing eminent domain to sign a hardship document "under penalty of perjury."[24] Just prior to the enactment of these amendments, concerns arose that the "penalty of perjury" language was ambiguous.[25] Senator Tom Torlakson agreed to introduce a clean-up bill in the next session to correct the controversial language.[26] Senator Torlakson stated that his intent was to have the penalty of perjury apply only to the "declaration stating facts supporting a hardship asserted in written opposition, and not to the opposition itself."[27]

III. CHAPTER 436

Chapter 436 amends California Code of Civil Procedure section 1255.410, which requires a property owner opposing an order of possession[28] to make an assertion of the hardship he or she would endure if the court grants the order.[29] The property owner must sign a document, "under penalty of perjury," stating

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21. CAL. CIV. PROC. CODE § 1255.410 (West 2007).

22. *Id.* § 1255.410(c); ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1210, at 1 (Aug. 16, 2006).

23. *See generally* CAL. CIV. PROC. CODE § 1255.410(c) (amended by 2006 Cal. Stat. ch. 594) ("Not later than [thirty] days after service of the plaintiff's motion seeking to take possession of the property, any defendant or occupant of the property may oppose the motion in writing by serving the plaintiff and filing with the court the opposition."); ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1210, at 2 (Aug. 16, 2006) ("[T]his bill seeks to help property owners faced with the loss of their property through eminent domain."); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1210, at 4 (June 29, 2006) ("This bill apparently takes a cue from Justice Stevens' comment [in *Kelo v. City of London*] that states can provide greater restrictions on the use [of] eminent domain by providing certain procedural protections for property owners faced with losing their property through eminent domain.").

24. CAL. CIV. PROC. CODE § 1255.410(c).

25. *See* Letter from Senator Tom Torlakson, Cal. State Senate, to Gregory Schmidt, Sec'y of the Senate, Cal. State Senate (Aug. 30, 2006) [hereinafter Torlakson Letter] (on file with the *McGeorge Law Review*) (stating that during legislative hearings regarding SB 1210, "a concern was raised that the language regarding the penalty of perjury [was] unclear").

26. *Id.*

27. *Id.*

28. *See* CAL. CIV. PROC. CODE § 1255.460(a)-(c) (West 2007) ("An order for possession issued pursuant to Section 1255.410 shall: (a) Recite that it has been made under this section. (b) Describe the property to be acquired, which description may be by reference to the complaint. (c) State the date after which plaintiff is authorized to take possession of the property.").

29. CAL. CIV. PROC. CODE § 1255.410(c) (amended by Chapter 436); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 698, at 3 (Apr. 10, 2007).

facts that support the assertion of hardship.[30] Chapter 436 also requires government entities exercising eminent domain to provide a pamphlet detailing the condemnation process and outlining the property owner's rights at the time the government offers to purchase the property.[31]

IV. ANALYSIS OF CHAPTER 436

Chapter 436 clarifies the "penalty of perjury" language in California Civil Code section 1255.410.[32] According to Senator Torlakson, Chapter 436 is designed to clean up ambiguous language and correctly reflect his intent regarding what must be affirmed under "penalty of perjury."[33] Chapter 436 remedies the language problem by making it clear that "penalty of perjury" refers only to the written statement of hardship signed by the property owner affected by the taking, not the general opposition of the taking.[34]

Chapter 436 will not only remedy the language concern, but, according to some, it will also help to decrease time delays and costs in the takings process.[35] Supporters of Chapter 436 also believe that requiring property owners to sign their written statements of hardship under "penalty of perjury" is good public policy because it requires property owners to be accountable for their statements.[36] For example, the Association of California Water Agencies argues that property owners use their ability to oppose eminent domain to interrupt eminent domain proceedings, and that these owners do not always show a good reason for doing so.[37] These supporters seem to approve of Chapter 436 and its predecessor for different reasons than Senator Torlakson, whose stated intent in enacting the legislation was "to provide additional protections to property owners faced with losing their property through eminent domain."[38] Indeed, Chapter 436 requires government entities to provide informational pamphlets detailing the

30. CAL. CIV. PROC. CODE § 1255.410(c) (amended by Chapter 436); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 698, at 1, 3 (Apr. 10, 2007).

31. CAL. GOV'T CODE § 7267.2(a)(2) (amended by Chapter 436).

32. *See* CAL. CIV. PROC. CODE § 1255.410(c) (amended by Chapter 436) ("If the written opposition asserts a hardship, it shall be supported by a declaration signed under penalty of perjury stating facts supporting the hardship."); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 698, at 1-3 (Apr. 10, 2007) (explaining how SB 698 (Chapter 436) clarifies the "penalty of perjury" language to protect home owners).

33. Torlakson Letter, *supra* note 25.

34. *Id.*; CAL. CIV. PROC. CODE § 1255.410(c) (amended by Chapter 436).

35. Letter from Whitnie Henderson, Legislative Advocate, Ass'n of Cal. Water Agencies, to Senator Ellen Corbett, Cal. State Senate (Apr. 6, 2007) (on file with the *McGeorge Law Review*).

36. *See id.* ("Under current law, no showing of a hardship is required and such allegations are often used to interrupt the process whether the defendant has a substantial reason or not. ACWA believes this change will result in decreased costs and time delays in the process and is good public policy.").

37. *Id.*

38. *Compare id.* (approving Chapter 436 because it will help to eliminate attempts by property owners to interrupt eminent domain proceedings), *with* Torlakson Letter, *supra* note 25 (explaining the reason behind Chapter 436 was "to provide additional protections to property owners faced with . . . eminent domain").

property owners' rights and the condemnation process when making an offer to purchase.[39]

However, the clarifying language of Chapter 436 can potentially have a large impact on property owners' rights.[40] Requiring a property owner who is opposing the taking of their property to sign a declaration under penalty of perjury will likely limit property owner rights, not protect them.[41] Such a requirement will cause the property owner to think about the consequences of an overstatement of any hardship caused by the taking.[42] Property owners may decide that the possibility of a charge of perjury is too much to risk just to oppose eminent domain.[43] Thus, Chapter 436 seems to make the eminent domain process easier for the government and more difficult to challenge for the property owner.[44]

V. CONCLUSION

In the end, Chapter 436 does nothing more than what Senator Torlakson said it would do—clean up ambiguous language.[45] Though the clarification of the requirements for opposing eminent domain may seem to favor the property owner, it may effectively make it harder for people like Angelica Sheldon to keep their property when faced with eminent domain.[46]

39. CAL. GOV'T CODE § 7267.2(a)(2) (amended by Chapter 436).

40. Letter from Elizabeth Gavric, Legislative Advocate, Cal. Ass'n of Realtors, to Senator Tom Torlakson, Cal. State Senate (Apr. 9, 2007) (on file with the *McGeorge Law Review*) ("[SB 698 (Chapter 436)] will help ensure that private property owners will not be deprived of due process.").

41. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 698, at 5-6 (Apr. 10, 2007).

42. *Id.*

43. *Id.*

44. *Id.*

45. Torlakson Letter, *supra* note 25.

46. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 698, at 3 (Aug. 31, 2007) ("[SB 1210, 2006 Cal. Stat. ch. 594,] provided additional protections to property owners faced with losing their property through eminent domain.").

Chapter 567: Saying "I Do" to Name Changes by Husbands and Domestic Partners

Yury Kolesnikov

Code Sections Affected

Code of Civil Procedure § 1279.6 (amended); Family Code §§ 298.6, 306.5 (new), §§ 298, 298.5, 355, 358 (amended); Health and Safety Code §§ 103175, 103180 (amended).
AB 102 (Ma); 2007 STAT. Ch. 567.

> *"An old Roman maxim runs, 'Sine nomine homo non est' (without a name a person is nothing). One's name is a signboard to the world. It is one of the most permanent of possessions; it remains when everything else is lost; it is owned by those who possess nothing else. A name is the only efficient means to describe someone to contemporaries and to posterity. When one dies it is the only part that lives on in the world."*
>
> —Bill Lockyer[1]

I. INTRODUCTION

"In the Shakespeare play [*Romeo and Juliet*], Juliet asks Romeo to doff the Montague family name, and Romeo says he'd willingly do so to win Juliet's love."[2] In Marina Del Ray, California, a twenty-nine-year-old Mike Buday decided similarly.[3] That decision, however, was met with fierce resistance—not from swords, as with Romeo, but from bureaucracy.[4] Mike "had to go through the courts, pay a court filing fee [of $320], pay a $32 application fee in addition to the $70 marriage license fee, and publish the name change in a local newspaper for four weeks" (which cost an additional several hundred dollars).[5]

Mike found the ordeal to be both time consuming and expensive, to say the least.[6] However, if instead it had been Mike's wife who wanted to change her name, all she would have had to do was fill in the appropriate space in the license

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1. 83 Op. Cal. Att'y Gen. 136, 136 (2000) (quoting *In re* Marriage of Gulsvig, 498 N.W.2d 725, 730 (Iowa 1993) (Snell, J., dissenting)).

2. Editorial, *Let Men, Women Change Surnames Equally*, APOSTILLE US (New York, N.Y.), Mar. 26, 2007, at B4, *available at* http://apostille.us/news/let_men_women_change_surnames_equally.shtml [hereinafter Editorial] (on file with the *McGeorge Law Review*).

3. Nannette Miranda, *Man Tries to Change to Wife's Name: But Red Tape Makes It Difficult*, ABC7 NEWS, Mar. 27, 2007, http://abclocal.go.com/kgo/story?section=politics&id=5157115 (on file with the *McGeorge Law Review*) ("The 29-year-old wanted to take his wife Diana Bijon's last name to show love for his father-in-law . . . .").

4. *See id.*

5. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 102, at 4 (Mar. 24, 2007); Miranda, *supra* note 3.

6. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 102, at 4 (Mar. 24, 2007).

document.[7] "Diana and I only ask that the state treat us as equals in marriage and allow us to pursue our family under the name that we choose."[8] Upon learning of Mike's plea, the American Civil Liberties Union of Southern California decided to help and filed a lawsuit in federal court on his and his wife's behalf.[9] The lawsuit alleged that California law violated the Equal Protection Clause of the Fourteenth Amendment and asked the court to hold that such disparate treatment was unconstitutional.[10]

In addition, to remedy this injustice, Assembly Member Ma introduced the Name Equality Act of 2007 (Chapter 567).[11] As Juliet told Romeo, "O, be some other name! What's in a name? That which we call a rose by any other name would smell as sweet."[12] With Chapter 567 now in effect, a Romeo of today would have no trouble changing his name from Montague to Capulet.[13]

II. LEGAL BACKGROUND

A. Common Law Right to Change One's Name

Under English common law, a person could change his or her name at will,[14] as long as there was no fraudulent intent.[15] Subject to a few exceptions,[16] this common law right has not been abrogated by statute in California.[17] As such, any person is free to change his or her name at will, without resort to legal proceedings.[18]

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7. *Id.*

8. Miranda, *supra* note 3.

9. EQUALITY CAL., FACT SHEET: NAME EQUALITY ACT (AB 102) 2, http://www.eqca.org/atf/cf/%7B687DF34F-6480-4BCD-9C2B-1F33FD8E1294%7D/AB%20102%20FACT%20SHEET.PDF (last visited Jan. 5, 2007) [hereinafter FACT SHEET] (on file with the *McGeorge Law Review*).

10. Martin Kasindorf, *L.A. Man Sues to Take Wife's Last Name; ACLU Suit Alleges Gender Discrimination*, USA TODAY, Jan. 12, 2007, at 3A.

11. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 102, at 4 (Mar. 24, 2007).

12. Editorial, *supra* note 2.

13. *See infra* Part III (describing the benefits of the Name Equality Act of 2007).

14. *See* 83 Op. Cal. Att'y Gen. 136, 136 (2000) ("The phrase 'common law change of name' refers to the adoption and use of a name different from the one by which a person was formerly known, without resort to judicial process or other intervention by the state.").

15. Michael Rosensaft, Comment, *The Right of Men to Change Their Names upon Marriage*, 5 U. PA. J. CONST. L. 186, 211 (2002) (defining "fraudulent intent" as a change of name for "the specific purpose of . . . conceal[ing] one's true identity").

16. The right to change one's name is denied to state prisoners (unless with permission of the Director of Corrections), any person "under the jurisdiction of the Department of Corrections" (unless with permission of that person's parole agent or probation officer), and any person "who is required to register as a sex offender under Section 290 of the Penal Code" ("unless the court determines that it is in the best interest of justice to grant the petition and that doing so will not adversely affect the public safety"). CAL. CIV. PROC. CODE § 1279.5(b)-(d) (West 2007).

17. CAL. CIV. CODE § 22.2 (West 2007); CAL. CIV. PROC. CODE § 1279.5(a) (West 2007).

18. *In re* Ross, 8 Cal. 2d 608, 609, 67 P.2d 94, 95 (1937); *see also* FACT SHEET, *supra* note 9, at 1 ("California has long recognized, through the common law, a person's right to change their name through

This common law right, however, "carries with it no mandate to those with whom one comes in contact to accept at face value the nexus between the new name and the individual who assumes it."[19] Thus, while the common law change of name is "valid" in California, this validity does not include "a requirement that it be recognized or accepted by the world at large, or indeed, by anyone" except the person changing his or her name.[20] While this might not have been a problem at common law in England, in today's society a change of name is "meaningless" unless there is also some official proof "that one's name has actually been changed."[21]

B. Change of Name upon Marriage

Marriage is one context in which a name change occurs in the United States. Despite prevalent practice, however, English common law never *required* that a woman adopt her husband's last name upon marriage.[22] Nevertheless, up until the end of the 1960s, a number of American jurisdictions erroneously held that "a woman automatically lost her maiden name upon marriage and, in its place, took her husband's surname as her legal name."[23] Most jurisdictions have since retreated from this position.[24] Beginning in the 1970s, feminist groups successfully fought this "male dominated practice," and today all jurisdictions allow a woman to either keep her maiden name or take her husband's last name upon marriage.[25]

Not surprisingly, the feminist movement did little to advance the cause of male surname changes.[26] In California, for example, prior law "require[d] that a marriage license form contain certain minimum information, including the maiden name of the female."[27] However, whether there was a field on the

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continuous usage over time and without fraudulent intent.").

19. 83 Op. Cal. Att'y Gen. 136, 136 (2000).

20. *Id.*

21. Rosensaft, *supra* note 15, at 212. Rosensaft notes that, "[i]n eighteenth century England, people did not have to worry about driver's licenses, social security cards, or bank applications." *Id.* at 211.

22. Yasuhide Kawashima, *Marriage and Name Change in Japanese Family Law*, 26 U. BRIT. COLUM. L. REV. 87, 88 (1992). *But see* Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 5 (1997) ("Whether courts, attorneys general and legal treatises correctly interpreted the common law or distorted and misinterpreted it to further a particular view of women's dependence is debatable.").

23. Kawashima, *supra* note 22, at 88; *see also* Augustine-Adams, *supra* note 22, at 5 (noting that, by 1971, even the Department of State "refused to issue passports to married women in their maiden names," maintaining that upon marriage the woman's legal name changed to that of her husband).

24. *See, e.g.*, Weathers v. Super. Ct., 54 Cal. App. 3d 286, 289, 126 Cal. Rptr. 547, 549 (2d Dist. 1976) ("[W]hen a woman marries, she may *choose* to be known by the surname of her husband or by her maiden surname." (emphasis added)). For a list of cases from other jurisdictions concluding that the law does not require a woman to change her name upon marriage, see Augustine-Adams, *supra* note 22, at 6 n.18.

25. Rosensaft, *supra* note 15, at 186.

26. *Id.* at 187.

27. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 102, at 3 (Mar. 24, 2007).

marriage license form for the male's birth name was in the discretion of each county.[28]

C. Statutory Change of Name

As already noted, today, an official proof of a name change is required if a person also wants to change that name on his or her credit cards, driver's license, or social security card.[29] Thus, collaboration with the state government is essential.[30] In California, this has been accomplished via sections 1275 through 1278 of the Code of Civil Procedure, which provide a person with an official record of his or her name change.[31]

For an adult[32] to make a statutory name change, he or she needs to submit a signed petition to the superior court of the county in which he or she lives.[33] The petition needs to specify the person's place of birth and residence, the current and proposed names, and the reason for the change.[34] The court will then issue an order, setting the time for a hearing[35] and directing all persons interested in the matter to appear before the court and "to show cause why the application for change of name should not be granted."[36] The copy of the order must be published in a newspaper of general circulation or "in three of the most public places in the county" for four weeks.[37]

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28. *Id.* It must be noted that Mike Buday's lawsuit did not focus on specific statutory language but rather attacked "how marriage licenses are worded and how state employees respond to a groom's name-changing request without a court order." Jim Sanders, *Groom Alleges Bias on Identity: Suit Says Man Was Blocked From Taking His Bride's Last Name*, SACRAMENTO BEE, Jan. 7, 2007, at A3. This is precisely the ambiguity that the Name Equality Act of 2007 was intended to address. *Id*.

29. *See* Rosensaft, *supra* note 15, at 212 (noting that a name change is "meaningless" without some official proof).

30. *Id.* at 206.

31. CAL. CIV. PROC. CODE §§ 1275-1278 (West 2007); *see also In re* Ross, 8 Cal. 2d 608, 609, 67 P.2d 94, 95 (1937) ("[T]he purpose of the statutory procedure is simply to have, wherever possible, a record of the change."); 83 Op. Cal. Att'y Gen. 136, 136 (2000) (stating that the statutory process is needed to provide official documentation that is definite and one that can be relied upon "even after the death of all contemporaneous witnesses").

32. The process is different when the person changing the name is a minor, with either a parent, guardian, or relative being able to sign the petition, and with the requirement that notice be sent to the minor's parents or grandparents. CAL. CIV. PROC. CODE §§ 1276(a)-(f), 1277(e) (West 2007). Furthermore, whenever "a petition has been filed [for] a minor, and both parents, if living, do not join in consent, the court may deny the petition in whole or in part if it finds that any portion of the proposed name change is not in the best interest of the child." *Id*. § 1278.5 (West 2007).

33. *Id.* § 1276(a).

34. *Id.*

35. The hearing date cannot be "less than six nor more than [twelve] weeks from the time of making the order." *Id.* § 1277(a).

36. *Id.*

37. *Id.*

This process, however, does not guarantee that the court will grant the petition.[38] If there are any objections filed, the court, after examining under oath all the petitioners, remonstrants,[39] and others, "may make an order changing the name, or dismissing the petition or application, *as to the court may seem right and proper*."[40] Even if no written objection is timely filed,[41] the statute only provides that "the court *may* grant the petition without a hearing."[42]

Despite this seemingly broad discretion, the California Supreme Court has determined that at least "some substantial reason must exist for the denial."[43] What this "substantial reason" will be, however, is determined on a case-by-case basis.[44] A court is not likely to grant the change of name if the change is for a fraudulent purpose,[45] if the new name is bizarre or confusing,[46] or if the name is offensive.[47] Nevertheless, even if a court denies an application and withholds its sanction, the court cannot permanently enjoin a petitioner from using the proposed name.[48] When the statutory process fails, an individual still retains the common law right to change his or her name through usage.[49] Absent court approval, however, this new name will not be legally recognized.[50]

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38. *See In re* Ross, 8 Cal. 2d 608, 609, 67 P.2d 94, 95 (1937) ("This provision permits the court in the exercise of its discretion to deny the application . . . .").

39. A "remonstrant" is one who "vigorously object[s] or oppose[s]." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 989 (10th ed. 1999).

40. CAL. CIV. PROC. CODE § 1278(a) (West 2007) (emphasis added).

41. An objection must be filed "at least two court days before the matter is scheduled to be heard." *Id.* § 1277(a) (West 2007).

42. *Id.* (emphasis added).

43. *In re Ross*, 8 Cal. 2d at 610, 67 P.2d at 95-96 (holding that a prior debt discharged in bankruptcy was not a "substantial reason" to deny the petition).

44. *See In re* Useldinger, 35 Cal. App. 2d 723, 726-27, 96 P.2d 958, 960 (1st Dist. 1939) (holding, inter alia, that a change of name should not have been denied where the applicant used the proposed name for fourteen years and where there was no showing of fraud or of any invasion of any legal right of the remonstrant with a similar, but not the same, name).

45. *See, e.g.*, Weingand v. Lorre, 231 Cal. App. 2d 289, 293-94, 41 Cal. Rptr. 778, 781-82 (2d Dist. 1964) (denying the petition for a change of name where, contrary to his assertions, the applicant's name was not hard to pronounce, he had no family connections to the proposed name, and the change was likely motivated by the desire to "cash in" on the reputation of the remonstrant).

46. *See, e.g.*, Ritchie v. Super. Ct., 159 Cal. App. 3d 1070, 1073-74, 206 Cal. Rptr. 239, 240-41 (1st Dist. 1984) (denying the petition to change the applicant's name to "III" and stating that the common law does not recognize a change of name to one consisting solely of numbers or symbols).

47. *See, e.g.*, Lee v. Super. Ct., 9 Cal. App. 4th 510, 514, 11 Cal. Rptr. 2d 763, 765 (2d Dist. 1992) (denying an African-American's petition for change of name to "'Misteri Nigger'" and stating that "no person has a statutory *right* to officially change his or her name to a name universally recognized as being offensive").

48. *Weingand*, 231 Cal. App. 2d at 294, 41 Cal. Rptr. at 782.

49. *Id.*

50. *See* Rosensaft, *supra* note 15, at 207-11 (explaining that the common law right, although available, is impractical today).

III. CHAPTER 567

Chapter 567, also known as the Name Equality Act of 2007,[51] ensures that in California, the option to change one's name on marriage license or domestic partnership registration forms is available to every individual, regardless of gender or sexual orientation.[52] A qualified individual wishing to change his or her name is no longer required to resort to the statutory provision set out in sections 1275 through 1278 of the Code of Civil Procedure.[53]

A. Marriages

Chapter 567 provides that either party to a marriage, or both, can change his or her middle and last name simply by writing the new name on the marriage license application.[54] The parties are not required to have the same name and neither of them is required to change his or her name upon marriage.[55]

If a party elects to change his or her middle or last name, the party can choose between (1) "[t]he current last name of the other spouse," (2) "[t]he last name of either spouse given at birth," (3) "[a] name combining into a single last name[56] all or a segment of the current last name or the last name of either spouse given at birth," or (4) "[a] hyphenated combination of last names."[57] The new name must be chosen "without intent to defraud."[58]

Once a party decides whether to adopt a new name, Chapter 567 provides that a certified copy of the marriage certificate, which contains either the new or former name, is "proof that the use of the new name or retention of the former name is lawful."[59]

Chapter 567 also makes changes to the marriage license itself.[60] Instead of requiring only the maiden name of each party's mother, the marriage license must now state the "last names at birth of each party's parents."[61] Likewise, instead of stating only the maiden name of the female, the marriage license must now state "the name used prior to the intended marriage by each party."[62] Finally,

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51. 2007 Cal. Stat. ch. 567, § 1.

52. *Id.* § 2(b)(1)-(2).

53. *Id.* § 2(b)(3). See *supra* Part II.C for a discussion of the procedure involved in a statutory name change.

54. CAL. FAM. CODE § 306.5(b)(1) (enacted by Chapter 567).

55. *Id.* § 306.5(a) (enacted by Chapter 567).

56. It is not clear why, even though the paragraph refers to choosing either a new middle or last name, this sub-division refers solely to the "last name." *See id.* § 306.5(b)(2)(C) (enacted by Chapter 567).

57. *Id.* § 306.5(b)(2) (enacted by Chapter 567).

58. *Id.* § 306.5(b)(1) (enacted by Chapter 567).

59. *Id.* § 306.5(b)(3)(A) (enacted by Chapter 567).

60. *See generally* CAL. HEALTH & SAFETY CODE § 103175 (amended by Chapter 567) (outlining the requirements of a valid California marriage license).

61. *Id.* § 103175(a)(1) (amended by Chapter 567).

62. *Id.* (amended by Chapter 567).

the marriage license must state the new name, if any, chosen by each party.[63] Similar changes[64] apply to the License and Certificate of Non-Clergy Marriage.[65]

Whether the parties decide to change their names upon marriage or not, Chapter 567 does not permit them to amend the marriage certificate at a later date.[66] If a party wants to add or change his or her name in the future, he or she must do so either through usage or by petitioning the court pursuant to sections 1275 through 1278 of the Code of Civil Procedure.[67]

B. Domestic Partnerships

Chapter 567 also provides that parties to a registered domestic partnership can similarly choose to change their middle and last names by writing the new name on the Declaration of Domestic Partnership form.[68] The choices available to domestic partners are identical to those available to spouses.[69] In addition, as with the change of name upon marriage, the parties to a domestic partnership are not required to have the same name and neither party is required to change his or her name upon registration of a domestic partnership.[70] However, the new name must be chosen "without intent to defraud."[71]

Furthermore, as with a marriage certificate, once a party decides to adopt a new name, Chapter 567 permits a certified copy of the Certificate of Registered Domestic Partnership to operate as "proof that the use of the new name or retention of the former name is lawful."[72]

Finally, Chapter 567 provides that the Certificate of Registered Domestic Partnership shall include "the name used by each party before registration of the domestic partnership," as well as the new name, if any, chosen by each party upon registration.[73]

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63. *Id.* (amended by Chapter 567).

64. *Id.* § 103180(c)(1) (amended by Chapter 567).

65. Pursuant to section 307 of the Family Code, "members of a particular religious society or denomination not having clergy for the purpose of solemnizing marriage or entering the marriage relation" are not bound by the Family Code provision on the validity of marriage as long as the parties sign and endorse a statement as prescribed by the Department of Health Services and as long as the "License and Certificate of Non-Clergy Marriage . . . is returned to the county recorder . . . within [ten] days after the ceremony." CAL. FAM. CODE § 307 (West Supp. 2007).

66. *Id.* § 306.5(b)(4) (enacted by Chapter 567).

67. *Id.* (enacted by Chapter 567).

68. *Id.* § 298.6(b)(1) (enacted by Chapter 567).

69. *Id.* § 298.6(b)(2) (enacted by Chapter 567). For the available choices, see *supra* notes 56-58 and accompanying text.

70. *Id.* § 298.6(a) (enacted by Chapter 567).

71. *Id.* § 298.6(b)(1) (enacted by Chapter 567).

72. *Id.* § 298.6(b)(3)(A) (enacted by Chapter 567).

73. *Id.* § 298.5(e) (amended by Chapter 567).

C. Protections Against Discrimination

In addition to establishing the right to change one's name upon marriage or registration of a domestic partnership, Chapter 567 protects all electing parties, not just female spouses, "from discrimination based on their name choices."[74] Specifically, it prohibits persons engaged in a trade or business or in the provision of service from refusing to do business with or provide service to a person because of the name he or she chooses to use.[75] It also prohibits such persons from imposing, as a condition of doing business or providing service, a requirement that a person use a name other than the one that he or she chose to use.[76]

D. Additional Changes

Chapter 567 also requires that the State Department of Public Health (DPH) prepare and publish a brochure that contains information about the option to change one's name upon marriage or registration of a domestic partnership.[77]

Furthermore, when applying for an original or duplicate driver's license, Chapter 567 provides that certified copies of the following shall serve as acceptable forms of identification: a Certificate of Registered Domestic Partnership, a document "substantially equivalent to a Certificate of Registered Domestic Partnership," a marriage certificate, or "a marriage certificate recording a marriage outside of [California]."[78]

Finally, nothing in Chapter 567 abrogates the common law right of any person to change his or her name through usage or the statutory right to seek a name change pursuant to sections 1275 through 1278 of the Code of Civil Procedure.[79]

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74. FACT SHEET, *supra* note 9, at 1.

75. CAL. CIV. PROC. CODE § 1279.6(a) (amended by Chapter 567).

76. *Id.* § 1279.6(b) (amended by Chapter 567).

77. CAL. FAM. CODE § 358(a)(4) (amended by Chapter 567). Pursuant to this section, the brochure must also contain information concerning genetic defects and diseases, AIDS, and domestic violence, as well as resources that the parties can utilize to get help in such situations. *Id.* § 358(a)(1)-(3) (amended by Chapter 567). County clerks distribute the brochures to each applicant for a marriage license, while the Secretary of State (SOS) distributes a copy to persons who qualify as domestic partners. *Id.* § 358(b) (amended by Chapter 567). The DPH must also prepare and provide to the SOS, who will make it available, a separate domestic abuse brochure specific to lesbian, gay, bisexual, and transgender partners. *Id.* § 358(c) (amended by Chapter 567).

78. *Id.* §§ 298.6(b)(3)(B)-(C), 306.5(b)(3)(B)-(C) (enacted by Chapter 567). A document is "substantially equivalent" to a Certificate of Registered Domestic Partnership if it records either "[a] legal union of two persons that was validly formed in another jurisdiction and is recognized as a valid domestic partnership in [California] pursuant to Section 299.2" of the Family Code or "[a] legal union of domestic partners as defined by a local jurisdiction pursuant to Section 299.6" of the Family Code. *Id.* § 298.6(b)(3)(C) (enacted by Chapter 567).

79. *Id.* §§ 298.6(b)(4)-298.6(c), 306.5(b)(4)-306.5(c) (enacted by Chapter 567).

IV. ANALYSIS

Chapter 567 "is about equity, flexibility and getting with the times."[80] According to its sponsor, "[c]ouples should not be penalized for being in love or wanting to be in a committed, loving relationship."[81] No longer will men in traditional marriages or domestic partners have to jump through a series of hoops, pay for costly court proceedings and newspaper publications, and wait at least four weeks (and sometimes several months) to get their names changed upon marriage or registration of a domestic partnership.[82]

In addition, Chapter 567 removes the "gender-biased language" in prior law, updates California's forms and certificates for marriages and domestic partnerships, and ensures "that name changes are expedient and can be recorded for legal and identification purposes."[83]

A. Addressing the Arguments of the Opposition

Typically, those opposed to the right of men[84] to change their names upon marriage base their arguments on five separate grounds: (1) custom, (2) "preservation of the family unit," (3) administrative convenience, (4) prevention of fraud, and (5) "de minimis injury."[85]

Custom as an independent and distinct argument lacks merit.[86] Just because something has been done for a long time does not mean that it is the only legitimate approach.[87] Social values continuously change and evolve over time.[88] Many practices once thought sound are no longer followed,[89] including the "custom" that women automatically take their husband's name as their "legal

80. Press Release, Equality Cal., Assembly Passes Bill Ending Gender Bias in Marriage, Domestic Partnerships (May 7, 2007), http://www.eqca.org/site/apps/nl/content2.asp?c=9oINKWMCF&b=2667047&ct=3843963 (on file with the *McGeorge Law Review*) (quoting Assembly Member Fiona Ma, Cal. State Assembly).

81. *Id.*

82. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 102, at 4 (Mar. 24, 2007).

83. Letter from Francisco Lobaco, Legislative Dir., ACLU and Vivek Malhotra, Legislative Advocate, ACLU, to Assembly Member Fiona Ma, Cal. State Assembly (Feb. 15, 2007) (on file with the *McGeorge Law Review*).

84. Arguably, since name changes by domestic partners are more frowned upon than name changes by husbands, similar arguments could also be asserted against domestic partners.

85. Rosensaft, *supra* note 15, at 200.

86. *Id.* at 201.

87. *Id.*

88. *Id.*

89. *See id.* (noting that if custom always prevailed, then interracial marriages would never have been allowed and the juries would still be composed only of white jurors). Indeed, as Justice Kennedy famously stated, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." Lawrence v. Texas, 539 U.S. 558, 579 (2003). The same is true of custom.

name" upon marriage.[90] As a result, a custom in and of itself is not a sufficient reason for allowing only women to change their names upon marriage.[91]

It is also "easy to dispense with" the argument that Chapter 567 is contrary to preservation of the family unit.[92] It seems quite a stretch to argue that a name change by the husband will create a stigma for children.[93] In today's society, where people frequently divorce and remarry, the fact that a child does not have the same last name as his mother or his father is no longer seen as stigmatizing.[94] In fact, by allowing husbands or domestic partners to change their last names, Chapter 567 decreases the likelihood of stigma by increasing the probability that children *will* have the same last name as both of their parents.[95]

Furthermore, a common last name helps preserve the family unit among domestic partners.[96] By changing their last names, domestic partners can "create a more unified environment for themselves and their family members."[97] As one couple stated, "[i]t was important for us to be recognized as a family, particularly for the health and safety of our son, and therefore we wanted our last names to be the same."[98] In addition, by allowing the Certificate of Registered Domestic Partnership to be an acceptable form of identification, Chapter 567 simplifies the complex process that registered domestic partners must go through to become "a licensed foster-care home for youth that are in need of one."[99]

As for the administrative convenience argument, California already allows women to change their names upon marriage.[100] Thus, unless California has "different databases based on the gender of [its] citizens," allowing men and

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90. Augustine-Adams, *supra* note 22.

91. *See* Rosensaft, *supra* note 15, at 201 (noting that, although "[c]ustom may raise some administrative convenience questions," the proposition that "custom controls *for its own sake* is meritless" (emphasis added)). To see problems that arise "as a result of a system based on customs and traditions attached to surnames," one only needs to read Shakespearean *Romeo and Juliet*. *See* K.M. Sharma, *What's in a Name?: Law, Religion, and Islamic Names*, 26 DENVER J. INT'L L. & POL'Y 151, 151 n.1 (1998) (noting the "fatal outcome[s]" of such a system).

92. *Id.*

93. *Id.* at 201-02.

94. *Id.* ("[S]ociety has changed, and today it is not all that uncommon for a child to have a different last name than his or her mother.").

95. *Id.* at 201 ("[G]iving a man the right to adopt his wife's name would not present any illegitimacy problems. The mother and child would, in fact, have the same name—as would the husband and wife.").

96. Letter from Howard Jacobs, Dir. of Gov't Relations, Gay & Lesbian Adolescent Soc. Servs., Inc., to Assembly Member Fiona Ma, Cal. State Assembly (Mar. 20, 2007) [hereinafter Jacobs Letter] (on file with the *McGeorge Law Review*); *see also* Press Release, Equality Cal., Bill Giving Domestic Partners Equal Opportunity to Change Names Passes First Committee (Mar. 27, 2007), http://www.eqca.org/site/apps/nl/content2.asp?c=9oINKWMCF&b=2667047&ct=3707795 [hereinafter March Press Release] (on file with the *McGeorge Law Review*) (explaining that the ability to change names allows domestic partners to be recognized as a family).

97. Jacobs Letter, *supra* note 96.

98. March Press Release, *supra* note 96.

99. Jacobs Letter, *supra* note 96.

100. *See, e.g.*, FACT SHEET, *supra* note 9, at 1 (noting that, prior to Chapter 567, "marriage applications [already] included a space for a female spouse to indicate a change in name").

domestic partners to change their names will not require a tremendous change to the system.[101] In fact, the fiscal effect will be minimal over the long run because individual counties will be able to recoup the increased costs by raising the license fees.[102] Furthermore, it is unlikely that an overwhelming number of people will rush to change their names.[103] Just because there is a choice does not mean that it will be acted upon. In the 1970s, when women received the choice to either change their name to that of their husband or keep their own, many of them continued to follow the custom of taking their husband's name.[104] Similarly, even though they now have a choice, many men are likely to continue with the custom of keeping their names.[105]

Another argument against allowing name changes for men and domestic partners is that such name changes could lead to fraud.[106] The argument is that those who cannot ordinarily change their names under the common law or pursuant to the statutory option will now be able to circumvent those exceptions.[107] These concerns, however, are unwarranted for two reasons. First, in order to commit fraud, an individual would need to be single and would then need to get married or enter into a domestic partnership.[108] It is unlikely that people would go to such lengths (and possibly divorce or annulment afterwards) just to change their name.[109] Second, and more importantly, seeing as this option was already available to women, it appears that California lacked a compelling interest in preventing such "sham" marriages to begin with.[110]

Finally, the argument that the injury from not being able to change one's name upon marriage or registration of a domestic partnership is "de minimis,"[111]

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101. Rosensaft, *supra* note 15, at 203.

102. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 102, at 1-2 (Apr. 17, 2007) (noting that the DPH would incur "minor absorbable costs" to change the forms and to incorporate the changes into its brochure, that the SOS would incur "minor absorbable costs" to incorporate the DPH brochure into its website, and that "counties would incur reprogramming costs of up to several thousand dollars each," which could later be recouped through increased license fees).

103. Sanders, *supra* note 28 (noting that Kimberly Salter, President of the California chapter of the National Organization for Women, "doubted that [Chapter 567] would prompt massive numbers of men to take their wife's last name").

104. Rosensaft, *supra* note 15, at 186-87 (noting that, after being presented with the choice of changing their name to that of their husband or keeping their own, "roughly ninety percent of women still adopted their husband's name upon marriage").

105. *See* Sanders, *supra* note 28.

106. Rosensaft, *supra* note 15, at 203-05.

107. *See id.* at 204 ("Allowing convicted murderers or sex offenders who have recently been released to easily change their names could promote fraudulent or unlawful conduct.").

108. *Id*. at 204-05 (noting that to effect the name change, the defrauder would first need to be single and would then need to "find someone willing to participate in a 'sham' marriage").

109. *Id.*

110. *Id.* at 205 ("If [preventing sham marriages was] an important state objective, then the state should place restrictions on *both* men and women with regard to name change upon marriage and divorce–not only men." (emphasis added)).

111. "De minimis" injury refers to one that is trifling or minimal. BLACK'S LAW DICTIONARY 443 (7th ed. 1999).

because common law and statutory name changes are readily available, disregards the trouble and time needed to establish a name change using either of these alternatives.[112] First, a common law change of name, without an official record to back it up, is practically "meaningless" in today's society.[113] Second, a statutory change of name, while providing an official record, requires time, money, and possible embarrassment.[114] In addition, since courts have broad discretion to deny an application seeking a name change, the statutory approach does not always guarantee that the individual will be successful in changing his or her name.[115] Thus, the trouble and the uncertainty associated with both of these alternatives demonstrate that the injury from not being able to change one's name in these circumstances is far from "de minimis."[116]

B. Condoning Same-Sex Marriages and Confusing Husbands

As noted earlier, Chapter 567 helps preserve the family unit among domestic partners.[117] Some people, however, see this fact as "creating same-sex 'marriages' in name," if not in practice.[118] According to the Campaign for Children and Families, Chapter 567 "violates the spirit of Proposition 22,[119] in which California voters demanded that marriage stay between a man and a woman."[120] Likewise, Concerned Women for America believed that "[Chapter 567] is another attempt to mimic marriage through a relationship that is not [a]

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112. *See* Rosensaft, *supra* note 15, at 205-09. With regard to the common law alternative, Rosensaft concludes that "[it] is not a serious answer to the inequity presented by male name change upon marriage." *Id*. at 207. As for the statutory alternative, Rosensaft concludes that "[it] involve[s] time, money, perhaps embarrassment, and do[es] not always provide the relief sought." *Id*. at 209.

113. *Id.* at 206 ("It is little comfort or help to grooms who might want to change their last name that they can call themselves whatever they want [pursuant to a common law change of name], if they will not be able to obtain credit cards, bank accounts, mortgages, or many other necessities of today's life.").

114. *Id.* at 208-09 (noting that a petitioner might be "required to make public very private information, such as if he or she has ever been convicted of a crime or gone into bankruptcy").

115. *Id.*

116. *Id*. at 205-09.

117. *See* Jacobs Letter, *supra* note 96 (noting that name changes create a more unified environment for domestic partners and their family members).

118. Frank D. Russo, *Why Did 26 of 32 California Assembly Republicans Vote Against the Name Equality Act?*, CAL. PROGRESS REP., May 9, 2007, http://californiaprogressreport.com/2007/05/why_did_26_of_3.html (on file with the *McGeorge Law Review*) (noting that Randy Thomasson, President of the Campaign for Children and Families, stated that "'[t]his is creating same-sex "marriages" in name by calling two homosexual men "Mr. and Mr. Smith" to give them the honor and appearance of marriage'").

119. Proposition 22, which was overwhelmingly approved by California voters on March 7, 2000, was "a proposal to enact a state 'Defense of Marriage Act' as an initiative statute." MarriageWatch.org, California Proposition 22, 2001, http://www.marriagewatch.org/media/prop22.htm (on file with the *McGeorge Law Review*). The final votes were 4,618,673 in favor and 2,909,370 against, with only six counties out of fifty-eight not approving the Proposition. *Id.* The Proposition declared that "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.*

120. Russo, *supra* note 118 (quoting Randy Thomasson, President of the Campaign for Children and Families).

traditional marriage. Allowing unmarried persons to routinely change their names as though married is an affront to this foundational and honored institution."[121]

However, there is little basis to such allegations. Chapter 567 "does not give any new rights to domestic partners";[122] it simply "provide[s] for equality"[123] and ensures that "both partners in a committed relationship have equal rights."[124] Since the right to change one's name is already available to domestic partners, Chapter 567 should not be seen as providing domestic partners with something uniquely reserved to married couples, but as making the process equally simple for both.[125]

In addition, opponents of Chapter 567 also argued that it is "wrong" for the government "to make it easier for men to take their wives' last names" because it will lead to the deterioration of a traditional male role.[126] That argument, however, ignores the fact that there are many commendable reasons why a man would change his last name to that of his wife. Some men, like Mike Buday, do it to carry on their wife's family name, especially when the wife does not have any brothers.[127] Others do it to show their love.[128] Still others do it because they do not have ties to their own last name or because they prefer their wife's name.[129] Finally, there are also couples who, either because of ethnic custom or desire, need to change both their last and middle names upon marriage.[130] The only reasonable conclusion to be drawn from this is that, in the end, Chapter 567 only

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121. Letter from Penny P. Harrington, Dir. of Legislation, Concerned Women for Am. of Cal., to Assembly Member Fiona Ma, Cal. State Assembly (Apr. 25, 2007) (on file with the *McGeorge Law Review*) ("A domestic partnership is not a marriage. Marriage is a union between a man and a woman and is granted certain privileges and traditions because of the unique role it plays in our society. One of these traditions is the wife taking the husband's name as evidence of their oneness and the formation of a family.").

122. Telephone Interview with Catalina Hayes-Bautista, Staff Member, Office of Assembly Member Fiona Ma, in Sacramento, Cal. (May 30, 2007) (notes on file with the *McGeorge Law Review*).

123. *Id.*

124. Press Release, Equality Cal., Bill Gives Domestic Partners, Married Spouses Equal Opportunity to Take Surname of Choice, (Feb. 13, 2007), http://www.eqca.org/site/apps/nl/content2.asp?c=9oINKWMCF&b=1716333&ct=3542861 [hereinafter February Press Release] (on file with the *McGeorge Law Review*).

125. *See id.* ("[Chapter 567] ensures that the rules regarding changing surnames apply to all Californians equally, regardless of gender or sexual orientation." (quoting Geoff Kors, Executive Director of Equality California)).

126. Russo, *supra* note 118 ("'Government needs to encourage men to be stronger fathers who provide for and protect their families, . . . not to be sissy men who abdicate their masculine leadership role because they're confused.'" (quoting Randy Thomasson, President of the Campaign for Children and Families)).

127. Kasindorf, *supra* note 10; *see also* Jessica McBride, *More Grooms are Saying 'I Do' to Taking Bride's Last Name in the Name of Love*, MILWAUKEE J. SENTINEL, Nov. 28, 1999, at 1 (noting that David Falk of Milwaukee took his wife's name because she had no brothers).

128. *See, e.g.*, John Ferri, *New Rules in the Name Game; Some Husbands are Taking Their Wives' Last Names When They Marry*, TAMPA TRIB., July 17, 1995, at 1 (noting that Steve Mackey took his wife's last name because of his love for her).

129. *See, e.g.*, Lou Gonzales, *Man Finds Resistance to Name Change*, FLA. TIMES-UNION, Feb. 10, 2000, at D-2 (stating that Dan Cipoletti changed his name because he did not meet his biological father until he was nineteen and because he did not think his stepfather's name was the right one either).

130. Catalina Hayes-Bautista, Background Report on AB 102, at 3 (2007) (on file with the *McGeorge Law Review*).

helps the families that need the help and does not infringe upon the rights of those that do not.[131]

C. Right to Privacy

Drawing upon Justice Brandeis' definition of privacy as "the right to be let alone,"[132] it can also be argued that the right to choose one's name upon marriage or registration of a domestic partnership is an integral part of the right to privacy.[133] Pursuant to this argument, supporters of Chapter 567 maintain that the "people, not the government, should decide basic issues like whose name to take."[134]

This argument finds some support in the U.S. Supreme Court's decisions. Specifically, the Court has indicated that personal decisions relating to marriages and/or family relationships are entitled to constitutional protection.[135] According to the Court, these choices are "central to personal dignity and autonomy" and are part of the liberty protected under the Due Process Clause.[136] Similarly, according to the proponents of Chapter 567, since one's name is central to one's family or partnership relationships, the decision of whether to change it upon

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131. *See* CAL. FAM. CODE §§ 298.6(a), 306.5(a) (enacted by Chapter 567) (noting that parties to a marriage or a registered domestic partnership "shall not be required to have the same name[s] [or] to change [their] name[s]" upon marriage or registration of a domestic partnership).

132. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled on other grounds by* Katz v. United States, 389 U.S. 347, 352-53 (1967).

133. *Cf.* Kawashima, *supra* note 22, at 94 ("'The choice of a name by which one is to be known for the rest of one's life may certainly be characterized as a "basic decision of one's life," particularly when that choice involves adoption or rejection of a role and set of values sanctioned by centuries of practices.'" (quoting M.E. Spencer, *A Woman's Right to Her Name*, 21 UCLA L. REV. 665, 682 (1973))).

134. Letter from James Vaughn, Dir., Log Cabin Republicans, to Assembly Member Fiona Ma, Cal. State Assembly (Mar. 19, 2007) [hereinafter Vaughn Letter] (on file with the *McGeorge Law Review*); *see also* February Press Release, *supra* note 124 ("'Deciding what's in a name is the province of committed couples, not the state.'" (quoting Mark Rosenbaum, Dir., ACLU)); Russell Shaw, *Another Inconvenient Truth: Joint-Hyphenated Married Names are a Hassle in Most States*, HUFFINGTON POST, June 11, 2007, http://www.huffingtonpost.com/russell-shaw/another-inconvenient-trut_b_51523.html (on file with the *McGeorge Law Review*) (arguing that no statute or "excessive red tape" should stand in the way of individuals who want to change their names).

135. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to *marriage*, procreation, contraception, *family relationships*, child rearing, and education." (emphases added)). This view was reaffirmed recently in *Lawrence v. Texas*. 539 U.S. 558, 573-74 (2003).

136. *Casey*, 505 U.S. at 851. The Court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id.

marriage or registration of domestic partnership should be left to the individuals affected.[137]

V. CONCLUSION

Overall, Chapter 567 is not a radical departure from prior law. Before Chapter 567, although only women could change their names on a marriage license form, other groups could accomplish the same result through either a common law or a statutory name change.[138] Chapter 567 does not abrogate any of these alternatives.[139] Instead, Chapter 567 makes California's law more consistent with modern beliefs and liberties,[140] as well as with the laws of seven other states.[141]

As such, the importance of Chapter 567 lies in providing individuals with a choice.[142] On the one hand, if a person decides not to change his or her name, it will now be the result of deliberation rather than inconvenience or inevitability. On the other hand, if an individual wants to change his or her name upon marriage or registration of a domestic partnership, Chapter 567 ensures that such a name change is available.[143] Indeed, if he so chooses, a Romeo of today would have no trouble winning the love of Juliet by doffing the Montague name and becoming a Capulet.[144]

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137. February Press Release, *supra* note 124 (stating that couples should decide which names to take; not the government); Vaughn Letter, *supra* note 134 (same).

138. *See supra* Parts II.A, II.C (explaining one's ability to change his or her name by common law or statute).

139. CAL. FAM. CODE §§ 298.6(b)(4)-298.6(c), 306.5(b)(4)-306.5(c) (enacted by Chapter 567) (noting that the Name Equality Act of 2007 does not abrogate an individual's common law right to change his or her name or to petition the court for a change of name).

140. *See supra* Parts IV.A, IV.C (describing modern arguments in opposition to traditional notions and suggesting that the right to a name change might implicate one's rights).

141. *See* Rosensaft, *supra* note 15, at 191 & n.29 (noting that only seven other states provided that either party to a marriage, or both, could legally change their surname). The provisions among these states vary significantly. *See* GA. CODE ANN. § 19-3-33.1 (1999); HAW. REV. STAT. § 574-1 (2006); IOWA CODE ANN. § 595.5 (West Supp. 2007); LA. CIV. CODE ANN. art. 100 (2007); MASS. GEN. LAWS ANN. ch. 46, § 1D (West 1994); N.Y. DOM. REL. LAW § 15 (McKinney 2007); N.D. CENT. CODE § 14-03-20.1 (2004). Notably, however, California is now the only state that extends the right of a name change to domestic partners *at the time* parties register their domestic partnership. FACT SHEET, *supra* note 9, at 1.

142. *See* CAL. FAM. CODE §§ 298.6(b), 306.5(b) (enacted by Chapter 567) (outlining the range of possible names available to individuals upon marriage or registration of a domestic partnership).

143. CAL. FAM. CODE §§ 298.6(b), 306.5(b).

144. *See id.* § 306.5(b) (allowing a spouse to take the last name of the other spouse).

Chapter 115: Time to Pay the Typer*

Daniel J. Boyle

Code Section Affected

Code of Civil Procedure § 2025.510 (amended).
AB 1211 (Price); 2007 STAT. Ch. 115.

I. INTRODUCTION

Robert Browning concludes *The Pied Piper of Hamelin* with the admonition, "And, whether they pipe us free from rats or from mice, If we've promised them aught, let us keep our promise!"[1] When it comes to noticing depositions and requesting stenographic services, current law makes it clear that the attorney or requesting party is responsible to pay the typist, but some attorneys play a shell game and refer court reporters to their clients for satisfaction of their bills.[2] Concerned over the long delay in payment to persons who should not have to carry the cost of legal services, Chapter 115 takes Browning's admonition a step further by requiring the attorney or party who requests the stenographic services to pay in a timely fashion.[3]

II. LEGAL BACKGROUND

Because attorneys request depositions and their recording as part of the attorney-client relationship, jurisdictions are split on whether the attorney is acting in an agency capacity on behalf of his client or as a principal in his own business interests.[4] California is among the majority of states that delineate who is responsible for paying the fees for court reporting.[5] Under section 2025.510(b) of the California Code of Civil Procedure, the party noticing the deposition bears

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* To "'pay the piper" is "to bear the cost of something." WEBSTER'S COLLEGIATE DICTIONARY 853 (10th ed. 1999).

1. ROBERT BROWNING, THE PIED PIPER OF HAMELIN 47 (London, Frederick Warne & Co. 1888), *available at* http://www.indiana.edu/~librcsd/etext/piper/47.html.

2. OFFICE OF ASSEMBLY MEMBER CURREN PRICE, AB 1211: TIMELY PAYMENT OF REASONABLE COURT REPORTER FEES, 2007-2008 SESS. (Cal. 2007) [hereinafter TIMELY PAYMENT] (concluding that unambiguous statutory language placing the burden of timely payment on the requesting attorney will give court reporters a fair chance in small claims court).

3. CAL. CIV. PROC. CODE § 2025.510(h)(1) (amended by Chapter 115); *see* TIMELY PAYMENT, *supra* note 2 (explaining that many deposition reporters work freelance as part-time independent contractors and that delay or failure in payment poses a unique burden on them; nearly a third are not paid for three months or longer, and some are never reimbursed).

4. William J. Riley, *Prompt Payment of Court Reporters*, NEB. LAW., June 2001, at 6, 7 (stating that the trend is against those states that do not hold attorneys personally liable because they are contracting for a disclosed principal and have not personally agreed to be bound).

5. Peter Wacht, *Who's Responsible for the Bill?*, J. CT. REPORTING, July-Aug. 2000, at 62, 62, 65 (stating that the article was based on responses to the survey, not a check of state regulations).

the cost of the deposition, absent a motion and court ruling based on good cause that another party should bear the cost.[6] California courts have found this statutory language to be a plain and simple expression of the principle of fairness, which could be paraphrased as, "you asked for it, you pay for it," but in doing so introduced an ambiguity by using the phrase "demanding party" almost interchangeably.[7] As described in the Part IV below, Chapter 115 strives to clarify this ambiguity.

Ambiguity is the attorney's bread and butter, sometimes leaving freelance deposition reporters, themselves not attorneys and often part-time contractors, with trouble collecting.[8] When attorneys fail to pay, the court reporter is left with two options: small claims court or an action for ethical violations against the non-paying attorney.[9] There are hurdles to jump under either approach.

A small claims action can be time consuming and costly.[10] An action for an ethical violation is similarly difficult to pursue because of the high standard of proof required.[11] In a formal opinion, the State Bar of California Standing Committee on Professional Responsibility and Conduct found that attorneys who fail to pay for contracted services have acted unethically but should only be disciplined when they intended not to pay at the time they contracted for the services.[12] The opinion concludes that to discipline the attorney, the contracted party must show dishonesty.[13] It borrows rules from other jurisdictions that

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6. CAL. CIV. PROC. CODE § 2025.510(b) (West 2007). Both before and after the passage of Chapter 115, the noticing party had responsibility to pay for reporting fees. *Id.*

7. *See* Toshiba Am. Elec. Components, Inc. v. Super. Ct., 124 Cal. App. 4th 762, 769, 21 Cal. Rptr. 3d 532, 538 (6th Dist. 2004) (holding that California statutes governing depositions require the noticing party to pay the costs of transcription, and explaining that the principles of fairness behind these statutes place the burden of the expense of depositions on the demanding party).

8. DEPOSITION REPORTERS ASS'N & CAL. CT. REPORTERS ASS'N, TIMELY PAYMENT OF REASONABLE COURT REPORTER FEES 1 (2007) [hereinafter REPORTER FEES] (on file with the *McGeorge Law Review*) (documenting the co-sponsors' reasons and analysis in support of AB 1211 in a fact sheet).

9. *See id.* (commenting that the non-lawyer reporters are up against attorneys in small claims court); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 3 (May 29, 2007).

> The author and sponsors also point out that filing a complaint with State of California is an inadequate remedy because current disciplinary actions only apply to intentional misconduct by the attorney. Therefore, attempting to prove that the attorney intended to evade payment for deposition services would be difficult for deposition reporting professionals.

Id.

10. On average, just over a third of the small claims in California during fiscal year 2005-2006 took over seventy days to dispose. JUD. COUNCIL OF CAL., 2007 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 1996-1997 THROUGH 2005-2006, at 113 (2007), http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf (on file with the *McGeorge Law Review*). The costs for small claims court include minor filing fees, plus lost time and expenses for preparation and appearance. *See* California Courts Self-Help Center, Small Claims Basics, Jan. 12, 2007, http://www.courtinfo.ca.gov/selfhelp/smallclaims/scbasics.htm#paytofile (on file with the *McGeorge Law Review*) (explaining procedures and fees associated with filing small claims).

11. *See* Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1979-48 (2007), *available at* 1979 WL 15840 (relying in part on Alkow v. State Bar, 38 Cal. 2d 257 (1952), where an attorney is only found dishonest if he did not intend to pay when he requested the reporter's services).

12. *Id.*

13. *Id.*

require a showing that the attorney did not intend to pay for the service at the time he contracted the reporter, but allows that finding to be inferred from "lengthy and unexplained passage of time without payment . . . or from unexplained repeated instances of nonpayment or unreasonably delayed payment."[14] The Committee continued by stating that there are two other circumstances in which it may be inferred that the attorney did not intend to pay the fees at the time he incurred the obligation: first,

> where the attorney failed to advise the reporter in writing at the time the services were contracted that he would not be responsible for payment and then seeks to excuse nonpayment on the basis his client is solely responsible for the fees, and [second] . . . failure to respond to communications from the reporter regarding nonpayment of the fees.[15]

Chapter 115 is an attempt to combat the hardships court reporters face in collecting fees.[16]

III. CHAPTER 115

Chapter 115 amends section 2025.510 of the California Code of Civil Procedure by clarifying that the "requesting attorney or party appearing in propria persona[17] shall timely pay the deposition officer or the entity providing the services of the deposition officer for the transcription or copy of the transcription . . . , and any other deposition products or services that are requested either orally or in writing."[18]

This rule does not apply when payment responsibility is otherwise provided by law or if the deposition officer or entity providing the service receives written notice at the time of the deposition as to who will be responsible for payment.[19] Chapter 115 was carefully drawn not to interfere with a party's freedom of contract; thus, the parties are still free to allocate payment responsibilities by separate agreement.[20]

Finally, Chapter 115 clarifies the types of products and services that can be charged by a court reporting professional. Specifically, "deposition product or

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14. *Id.* (citing opinions in Massachusetts and Minnesota, both of which require a showing of intention at the time the services are contracted, Massachusetts allowing an inference from circumstances such as delay in payment).

15. *Id.* (adopting the logic used in Massachusetts and Minnesota).

16. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 5 (May 22, 2007) (describing the obstacles and practical problems facing deposition reporting professionals).

17. *See* BLACK'S LAW DICTIONARY 796 (7th ed. 1999) (defining in propria persona as "in one's own person").

18. CAL. CIV. PROC. CODE § 2025.510(h)(1) (amended by Chapter 115).

19. *Id.* § 2025.510(h)(2) (amended by Chapter 115).

20. *Id.* § 2025.510(h)(3) (amended by Chapter 115).

service" is any product or service qualified as shorthand reporting under section 8017 of the Business and Professions Code.[21]

IV. ANALYSIS OF CHAPTER 115

Deposition reporters do not deserve comparison to the Pied Piper. They have never been known as a group to whisk the children of non-paying lawyers into oblivion, however deserved. Instead, reporters themselves are the victims. A more apt literary reference to describe their dilemma would be to compare it to a Catch 22,[22] where the "noticing party" attorney reroutes any attempt at invoicing to the "demanding party" client.[23] The client is often unaware of the mechanics of the legal proceedings and refers the court reporter back to the noticing attorney, as provided for under the statute.[24]

How were attorneys able to justify their actions? Prior to enactment of Chapter 115, the law required the party noticing the deposition to bear the cost of transcription.[25] In *Toshiba American Electronic Components, Inc. v. Superior Court*, the California Court of Appeals in the Sixth District addressed a case involving extraordinary expenses to comply with discovery demands and placed the burden of payment on the "demanding party."[26] Since then, the ambiguity in

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21. *Id.* § 2025.510(i) (amended by Chapter 115); *see also* CAL. BUS. & PROF. CODE § 8017 (West 2007) ("The practice of shorthand reporting is defined as the making, by means of written symbols or abbreviations in shorthand or machine shorthand writing, of a verbatim record of any oral court proceeding, deposition, court ordered hearing or arbitration, or proceeding before any grand jury, referee, or court commissioner and the accurate transcription thereof.").

22. Deposition reporters in small claims court trying to prove their right to payment from an unethical attorney, who noticed the deposition, finds themselves in the position of the old woman in war torn Rome responding to the famous novel's protagonist, Yossarian:

> "What right did they have?"
>
> "Catch-22. . . . Catch-22 says they have a right to do anything we can't stop them from doing. . . ."
>
> "Didn't they show it to you?" Yossarian demanded . . . .
>
> "They don't have to show us Catch-22," the old woman answered. "The law says they don't have to."
>
> "What law says they don't have to?"
>
> "Catch-22."

JOSEPH HELLER, CATCH-22, at 407-08 (Simon & Schuster 2004) (1955).

23. *See* Toshiba Am. Elec. Components, Inc. v. Super. Ct., 124 Cal. App. 4th 762, 769, 21 Cal. Rptr. 3d 532, 538-39 (6th Dist. 2004) (using the language "demanding party" to clarify responsibility for payment).

24. CAL. CIV. PROC. CODE § 2025.510(b) (West 2007). In one instance, a judge ruled on behalf of the court reporter after a Sacramento attorney tried to convince the court that he should not have to pay because his client had not paid him, or, in the alternate, because he only wanted a copy of an exhibit mentioned in the deposition, not a copy of the deposition itself. REPORTER FEES, *supra* note 8, at 3. Losing the case, the attorney transmitted the following message in his cover letter transmittal of the check: "Enclosed find my check for $125.38. You have just made an enemy for life and I will do everything in my power to ruin you. I hope it was worth it to you. Contemptuously yours, [name omitted]." *Id.*

25. CAL. CIV. PROC. CODE § 2025.510(b) (West 2007); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (May 22, 2007) (explaining the background and changes to existing law to address the stated need for the bill).

26. *Toshiba*, 124 Cal. App. 4th at 769, 21 Cal. Rptr. at 538-39.

language between "noticing" party and "demanding" party has allowed attorneys to claim their client was in fact the party who demanded the transcription.[27] Deposition reporters often have no contact with the client, and the client often is not in a position to pay.[28] Some attorneys play a shell game, either because they took the risk of payment from their client or especially when they risked winning the case under a contingency agreement.[29] When the results of the case are negative, the attorney tries to shift the payment risk to the court reporter.[30]

How much should one have to pay to collect on a relatively minor debt? The court reporters could add to their expense by bringing the non-paying attorney to small claims court where they would face a professional adversary trained to win cases.[31] They could also bring the non-paying attorney before the State Bar of California for unethical conduct, but the court reporters would prevail only if they could prove dishonesty, measured by the attorney's intention not to pay when he or she ordered the services.[32]

Deposition reporters do not prepare their transcriptions on a contingency fee basis and should not bear the risk of a client's non-payment, nor of the case outcome.[33] When a deposing party requests a reporter's presence at the deposition, the request itself is arguably an explicit contract between the attorney making the request and the reporter.[34] Even without an explicit agreement, alternative contract principles such as promissory estoppel and quantum meruit support the court reporter's right to reimbursement by the attorney.[35] Despite their weak premises for non-payment, some attorneys have attempted to shift responsibility to their client.[36] The clarifications in Chapter 115 were designed to put an end to these games.[37]

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27. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 5 (May 22, 2007).

28. Letter from Sandra Bunch VanderPol, President, Cal. Ct. Reporters Ass'n, to Assembly Member Curren D. Price, Jr., Cal. State Assembly (Mar. 26, 2007) (on file with the *McGeorge Law Review*).

29. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (Apr. 10, 2007).

30. *See id.* ("In too many instances, a lawyer either innocently, or not so innocently, using the language of current law as a pretext, will after-the-fact deny payment, directing the deposition reporter to try and collect from his client—a person deposition officer may never have met, may not even know."); REPORTER FEES, *supra* note 8, at 2-3 (providing examples of non-payment by attorneys).

31. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (May 22, 2007).

32. *See* Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1979-48 (2007), *available at* 1979 WL 15840 (citing opinions in Massachusetts and Minnesota, both of which require a showing of intention at the time the service are contracted).

33. *See* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (Apr. 10, 2007) (explaining that it is the attorney who takes the payment risk for his or her clients and that the cost of collection would be a unique burden to place on deposition reporters).

34. A contract is loosely defined as a "set of promises." BLACK'S LAW DICTIONARY 322 (6th ed. 1990).

35. Promissory estoppel allows a court to enforce a promise to prevent an injustice for compensation if the other party was induced to perform through reliance on the promise. BLACK'S LAW DICTIONARY 1093 (5th ed. 1979). Quantum meruit is an equitable doctrine that allows a person to recover the "reasonable value of services" performed. *Id.* at 1119.

36. In another anecdote where the attorney refused payment to the court reporter after the client did not pay the attorney, the reporter won in small claims and the attorney appealed. REPORTER FEES, *supra* note 8, at 2. At the appeal hearing, the judge ruled for the reporter instantly, "which caused the debtor to go ballistic,

The sponsors and supporters of Chapter 115 believe it will improve the reporters' chances in small claims court by clarifying that the attorney who requests the deposition is responsible for payment of the transcript;[38] proponents also wanted to clarify the definition of the products and services provided by court reporting professionals.[39] Chapter 115 was narrowly drafted to close loopholes in the prior statutory language without interfering with anyone's contract rights, including agreements between the attorney and the client.[40]

V. CONCLUSION

A minority of attorneys created the need for Chapter 115.[41] After gaining the benefit of legal services, they denied payment responsibility by passing the proverbial buck to their clients.[42] Court reporters had to bear the expense of fighting for payment in small claims court.[43] If the court reporter chose instead to challenge the attorney on ethical grounds, the reporter had to prove the attorney intended to defraud the reporter when the attorney ordered the service.[44] Chapter 115 closes the language loopholes between "noticing party" and "demanding party" by stating clearly that the responsibility for timely payment falls on the "requesting attorney or party appearing in propria persona."[45] Now, once the deposition transcript is ordered and delivered, there is no ambiguity as to who is responsible to pay the typer. The next battleground is likely to be over when that payment is "timely."

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verbally attacking the judge like nothing [the reporter had] ever seen, saying the judge obviously wasn't basing her ruling on the facts of the case." *Id.*

37. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 5 (May 22, 2007) ("The author and sponsors assert that AB1211 will clarify who is responsible for the timely payment of deposition services—the requesting attorney and/or persons representing themselves.").

38. REPORTER FEES, *supra* note 8, at 1 ("[W]hat is required to permit the deposition reporting professional a fair chance at small claims collections is unambiguous statutory language codifying that an attorney is responsible for paying for the transcript that he orders.").

39. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 6 (May 22, 2007).

40. Letter from Assembly Member Curren D. Price, Jr., Cal. State Assembly, to Arnold Schwarzenegger, Cal. State Governor (July 9, 2007) (on file with the *McGeorge Law Review*).

41. The measure had no opposition and was supported by the California Court Reporters Association and the Deposition Reporters Association on behalf of their members to "clarify the process for ordering and paying for transcripts." Letter from Sandra Bunch VanderPol, President, Cal. Ct. Reporters Ass'n, to Arnold Schwarzenegger, Cal. State Governor (Mar. 26, 2007) (on file with the *McGeorge Law Review*). Both the Senate and the House passed the bill unanimously. *Id.*

42. *Id.*

43. *Id.*

44. *See* Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1979-48 (2007), *available at* 1979 WL 15840 (adopting and citing the logic used in Massachusetts and Minnesota, both of which require a showing of intention at the time the service are contracted).

45. CAL. CIV. PROC. CODE § 2025.510(h)(1) (amended by Chapter 115).