CHAPTER 1

THE PARALEGAL'S ROLE IN TRIAL

1.1 INTRODUCTION

Why a book on civil trials and evidence when paralegals are not licensed to appear in court? The answer is simple: The paralegal helps the lawyer prepare for trial by ensuring that all appropriate pre-trial motions are filed, that exhibits are organized and appropriately numbered, that witness lists are prepared and witnesses are subpoenaed, that demonstrative evidence is ready, and that the parties have met and conferred concerning all aspects of the trial. A trial is like a theatrical production. In order for the show to go well, the actors must have rehearsed their parts. The stage and the props must be set, and while stage fright is to be anticipated, preparation minimizes it. In addition, paralegals often sit in on the trial to help evaluate jurors during voir dire, locate exhibits, prepare witnesses to testify, prepare lawyers to ask the right questions, and to help use PowerPoint, the Elmo, and other demonstrative techniques.

1.2 PREPARATION FOR TRIAL

The paralegal's role in preparing for trial is crucial. In many cases, the paralegal will have been more involved with trial preparation than the lawyer. This is largely because from the outset, the paralegal has been drafting pleadings and discovery and has been managing the discovery with a view toward ensuring that the necessary evidence is available at trial. The paralegal has done so knowing that each element of a cause of action and affirmative defense must be established in order for the client to prevail. So, understanding how a trial actually unfolds is critically important for the paralegal. Without this knowledge, paralegals will have trouble appreciating the point of all their work. With a working familiarity of trial procedures, paralegals will know just how their efforts contribute to a victory in court.

➢ **Paralegal Pointer:** During the COVID-19 pandemic, notwithstanding any other law, the court had to conduct judicial proceedings and court operations remotely, including, but not limited to, the use of video, audio, and telephonic means; the electronic exchange and authentication of documentary evidence; e-filing and e-service; the use of remote interpreting; and the use of remote reporting and electronic recording to make the official record. [Judicial Council Emergency Rule 3(a)(1), (3); see Judicial Council Emergency Rule 3(b) – Rule effective until 90 days after Governor lifts COVID-19 state of emergency or Judicial Council amends or repeals Rule] While restrictions have loosened, remote trials and appearances remain available. Except as provided below,

upon its own motion or the motion of any party, the court may conduct a trial or evidentiary hearing, in whole or in part, through the use of remote technology, absent a showing by the opposing party as to why a remote appearance or testimony should not be allowed. Even if the court does not order the trial or evidentiary hearing to be conducted remotely, any party may choose to appear by remote technology so long as the party provides notice to the court and all other parties that it intends to appear remotely. [CCP §367.75(a)(1), (d)(1), (m) ("sunset" date 7/1/26; subd. amended Stats. 2023, Ch. 34); see CCP §367.75(j) – "party" includes nonparty subject to CCP §2020.010 et seq. (deposition subpoenas); CRC 3.672 (re remote proceedings); see also CCP §367.75(a)(2) (subd. added Stats. 2022, Ch. 34) – exempting certain proceedings under CCP §367.76(a)(1) and juvenile justice proceedings under Welf. & Inst.C. §679.5]

Additionally, for civil actions filed on or before April 6, 2020:

- The 5-year deadline in which to bring the action to trial (CCP §583.310) is extended by six months;

- If a new trial is granted, the 3-year deadline in which the action must again be brought to trial (CCP §583.320) is extended by six months (CRC Appendix I, Emergency Rules Related to COVID-19, Emergency rule 10(a), (b), (c) (6/30/22 "sunset" date));

- The six-month deadline for presenting a claim to a public entity (under Gov.C. §911 et seq.) is extended by 60 days (Governor's Executive Order N-35-20); however, the extension does not apply to the one-year deadline for filing an application to present a late claim (under Gov.C. §911.4) (*Coble v. Ventura County Health Care Agency* (2021) 73 CA5th 417, 422, 425, 288 CR3d 431, 421-422, 437).

It is vital that you keep track of the judiciary's various COVID rules, which existed and which could return. It is also essential that you check with the judicial assistant in the department where your trial is assigned to learn the judge's particular policies related to, e.g., wearing masks, social distancing, and approaching the bench.

COVID-19-related circumstances *may* indicate good cause warranting a continuance (e.g., attorney, client, or a witness tested positive for COVID-19 or who is in quarantine after exposure to a person who has tested positive for COVID-19). In these circumstances, a physician's declaration or other documentation may be required.

Depending on "spikes" or "waves" in the future, clients and witnesses may be required or encouraged to wear face masks. Indeed, as in 2020–2021, a

mask may be required to enter the courthouse. Counsel should warn their clients/witnesses to arrive early and be prepared for the possibility of temperature checks on entering the courthouse. While wearing masks is currently a personal decision, some potential jurors may hold it against a person who wears a mask, or who doesn't wear a mask. Be prepared to raise these topics with the attorneys you work with.

1.3 TRIAL PREPARATION CHECKLIST

1.3.1 CASE MANAGEMENT CONFERENCE

A Case Management Conference (CMC) is a conference at which counsel appear before the court to review the case, discuss private alternative dispute resolution, schedule a Mandatory Settlement Conference, (MSC) Final Status Conference (FSC) and trial. The court schedules the CMC no later than 180 days after the filing of the initial complaint. [CRC 3.721] The parties are required to file a Case Management Statement (Judicial Council Form CM-110) no later than 15 calendar days before the date set for the Case Management Conference. [CRC 3.725] Use of the form is mandatory. The form is available on the California Courts website (*www.courts.ca.gov*). A sample CMC Statement is shown in the attached Form "A." The Case Management Statement requires the parties to estimate how many days the trial will take and list any dates counsel are unavailable to appear at trial. Don't assume that because both sides provide lengthy time estimates, the court will concur. Courts commonly reduce the trial time compared to the estimates of counsel. Also, in some courts, cases which are estimated to take more than 20 days to try, may be referred out from the IC (Independent Calendar) court to a "long cause" court where the Judge handles only lengthy trials.

Additionally, the parties must indicate whether they are requesting or waiving a jury trial. If no timely demand is made, your client's right to a jury trial may be waived! Make the demand in the Case Management Statement (Item 5). On or before the CMC, each party demanding a jury trial shall deposit at least $150 with the clerk or the judge. [CCP §631(b) and (c)] This step is just as vital as filing a jury demand on time. The failure to deposit the advance jury fees by the due date waives the right to a jury trial. [CCP §631(f)(5)] The parties must meet and confer in person or by telephone no later than 30 calendar days before the date set for the Case Management Conference and must determine, among other things, whether settlement is possible. [CRC 3.724] The court will also set the case for trial and for a Final Status Conference at which the court will verify that all pre-trial documents have been filed and that the case is ready for trial.

As a result of emergency budget measures, courts by local rule may exempt specified types or categories of general civil cases filed before January 1, 2016, from the case management rules. [CRC 3.720(b)] For example, in Los Angeles County, most noncomplex personal injury cases are tracked through a

Master Calendar system and are not assigned to Independent Calendar courts to be monitored by a designated Judge.

1.3.2 SETTLEMENT PROCEDURES

If at the CMC, the parties may agree to use one of the alternative dispute resolution (ADR) procedures and the court will encourage the parties to judicial arbitration or other alternative dispute resolution process. There are several options available for ADR, including private mediators (JAMS, ADR Services, ARC). If the parties chose to mediate, the mediator should be supplied with a mediation brief outlining the facts and legal theories of the case at least 5 court days before the scheduled mediation. The clients should be briefed as to what to expect at mediation, and they should discuss what their settlement posture should be. Everyone should come prepared to be flexible in their position. Mediation is a process which, if successful, results in a certain outcome – settlement. The results at trial are by nature uncertain. If the case is referred to arbitration, you should treat the matter as if the parties were proceeding to trial. Arbitration briefs, exhibit lists, witness lists and exhibit binders should be prepared well in advance and provided to the arbitrator and opposing counsel.

If the matter does not settle during the ADR process, a party may request or the court may set one or more Mandatory Settlement Conferences. [CRC 3.1380(a)] Many courts such as Los Angeles Superior Court now have dedicated MSC Judges. Counsel are typically ordered to an MSC at the CMC. If ordered, trial counsel, parties and persons with full authority to settle the case must personally attend the MSC unless excused by the court for good cause. If a party has an insurance policy under which the party's consent to settle is required for any reason, the party with that consensual authority must be personally present at the conference. [CRC 3.1380(b)] No later than 5 court days before the initial date set for the settlement conference, each party must submit to the court and serve on all parties a Mandatory Settlement Conference statement containing: 1) a good faith settlement demand; 2) an itemization of economic and non-economic damages by each plaintiff; 3) a good faith offer of settlement by each defendant; and 4) a statement identifying and discussing all facts and law pertinent to the issues of liability and damages involved in the case as to that party. [CRC 3.1380(c)]

1.3.3 NOTICE OF TRIAL

Trial dates are usually assigned at the time of the Case Management Conference. Make sure that the date is placed on the firm calendar and that all dates dependent on the trial date are calendared, e.g., the discovery cut-off, motion cut-off, expert designation, expert deposition cut-off and any other relevant dates. If the case is assigned to a master calendar court instead of an IC court, the court clerk will usually mail all parties a Notice of Trial following trial

setting. If not, any party may serve such notice on the opposing parties. [See CCP §594(b)]

The court clerk is required to serve a Notice of Trial by mail on all parties at least 20 days before the date set for trial (10 days in unlawful detainer actions). [CCP §594(b)] If the court clerk fails to do so, either party may serve a Notice of Trial on all other parties at least 15 days before trial (again 10 days in unlawful detainer actions). [CCP §594(b)] Proof of such service must be introduced into evidence before trial may proceed in a party's absence. [CCP §594(b)]

The Notice of Trial is important if a party fails to appear. CCP § 594 is designed to ensure that the parties receive adequate time to make those trial preparations that can only occur once the trial date is set and to prevent the possibility of a default being entered against a party "who has by reason of insufficient notice or no notice of the time of trial, been unable to appear." [See *Au-Yang v. Barton* (1999) 21 C4th 958, 963, 90 CR2d 227, 229] Compliance with CCP § 594 (a) is mandatory and jurisdictional. The court lacks authority to proceed if the absent party did not receive the proper notice. [*Au-Yang v. Barton*, supra, 21 C4th at 963, 90 CR2d at 230] In any case involving an issue of fact, the court may not proceed in the absence of a party without proof that the party received a formal Notice of Trial. [CCP §594(a); *Au Yang v. Barton,* supra, 21 C4th at 962-963, 90 CR2d at 229; see *Colony Bancorp of Malibu, Inc. v. Patel* (2012) 204 CA4th 410, 411-412, 138 CR3d 839, 840 authorizes judge to proceed with trial even in party's absence following lunch break, provided adequate notice is given to return at specific time] If both parties appear for trial however, the lack of notice is waived. [*Cohen v. Hughes Markets, Inc.* (1995) 36 CA4th 1693, 1696, 43 CR2d 66, 68] This is true even where one of the parties appears to contest the lack of formal notice. [*Elliano v. Assurance Co. of America* (1975) 45 CA3d 170, 175, 119 CR 653, 657]

As long as both parties appear for trial, further notice is not required for further hearing on a later date. [*Parker v. Dingman* (1975) 48 CA3d 1011, 1018, 122 CR 309, 314]

1.3.4 MOTION FOR CONTINUANCE OF TRIAL

Remember that trial dates are firm. "All parties and their counsel must regard the date set for trial as certain." [CRC 3.1332(a); see also CRC 3.1332(c) – "continuances of trial are disfavored."] It is the trial court's responsibility to "commence trials on the date scheduled" and "adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation." [Gov.C. §68607(f), (g)]

An affirmative showing of "good cause" is required on a motion for continuance before or during trial. [CRC 3.1332(c); *Reales Investment, LLC v. Johnson* (2020) 55 CA5th 463, 468, 269 CR3d 525, 530]

The continuance motion must be made "as soon as reasonably practical once the necessity for the continuance is discovered." [CRC 3.1332(b)]

The following circumstances may indicate good cause warranting a continuance:

- Unavailability of essential lay or expert witness because of death, illness or other excusable circumstances (CRC 3.1332(c)(1));

- Unavailability of a party because of death, illness or other excusable circumstances (CRC 3.1332(c)(2));

- Unavailability of trial counsel because of death, illness or other excusable circumstances (CRC 3.1332(c)(3));

- Substitution of trial counsel where there is an "affirmative showing that the substitution is required in the interests of justice" (CRC 3.1332(c)(4));

- Addition of a new party if the new party has not had a reasonable opportunity to conduct discovery or the other parties have not had an adequate opportunity to prepare for trial in regard to the new party (CRC 3.1332(c)(5)(A)-(B));

- A party's inability to obtain essential testimony, documents or other material evidence despite diligent efforts (CRC 3.1332(c)(6));

- A significant unanticipated change in the status of the case as a result of which the case is not ready for trial (CRC 3.1332(c)(7)).

A continuance may be sought by way of ex parte application or noticed motion. This is required even if the parties have agreed on the continuance. [See CRC 3.1332(b)] The ex parte application or noticed motion may be granted only upon a showing of "good cause" based upon a declaration establishing "good cause." [CRC 3.1332(b)] If the basis for the continuance is the unavailability of a witness, it must be established that that witness' testimony is material. [CCP §595.4]

If the continuance is sought because of illness of the attorney, party or an essential witness, a physician's declaration should be included stating the nature and period of anticipated incapacity. [CRC 3.1332(c)(1)-(3)]

"A civil litigant has a constitutional right to be represented by counsel at trial." [See *Oliveros v. County of Los Angeles* (2004) 120 CA4th 1389, 1398, 16 CR2d 638, 645 – trial judge abused discretion in denying defendant's request for continuance due to attorney's engagement in another trial without considering all relevant facts; compare *Colony Bancorp of Malibu, Inc. v. Patel* (2012) 204 CA4th 410, 412, 418-419, 138 CR3d 839, 840, 844-845 – *Oliveros* did not apply where judge resumed trial in absence of party and his attorney after lunch break where actual notice was given to return at specific time and attorney made no effort to notify court that he was late (no due process violation)]

If the trial continuance is being sought because you need additional time to obtain discovery and the discovery deadline is looming, remember that the motion to continue the trial should request that the Judge order a continuance of the discovery deadlines provided for in CCP § 2024.050. Otherwise the discovery cut-off is based upon the initial trial date. [CCP §2024.020]

1.3.4.1 MOTION FOR PREFERENCE

CCP section 36 provides that under certain circumstances, a person may obtain an earlier trial date, known as a preference. The most common grounds include the age and the health of a party. In the most recent decision, a party over age 70 met the requisite standard for calendar preference based on CCP § 36 (a), (both a substantial interest in the action, and the party's health is such that preference is necessary to avoid prejudice). The court held that preference *must* be granted. [*Fox v. Sup.Ct. (Metalclad Insulation LLC)* (2018) 21 CA5th 529, 533, 230 CR3d 493, 495-496]

1.3.5 FINAL DISCOVERY

As soon as you know the trial date, review all discovery to determine if you have obtained all necessary evidence or whether you will need any supplemental information. In either event, serve supplemental interrogatories to ensure that any prior interrogatory answers are updated with any newly acquired evidence. [CCP §2030.070] Serve final sets of requests for admissions and requests for inspection in order to nail down any lingering issues with regard to liability and/or damages. [CCP §§2033.010 et seq., 2031.050] In a personal injury case, defendant should notice a Demand for Physical Examination in order to get an opinion as to the nature and extent of the plaintiff's injuries. [CCP §2032.220] Finally, a Demand for Exchange of Experts should be tendered to ensure that all information regarding experts is obtained so that expert depositions can be taken. [CCP §2034.220] It is crucial to note and observe all time limits that are triggered by the trial date, including the following:

- "Cut-off" on depositions of experts (15 days before trial; motions 10 days before trial (CCP §2034.030));

- "Cut-off" on all other discovery (30 days before the initial trial date; motions heard 15 days before that date (CCP §2024.020);

- No discovery after judicial arbitration except for expert witness information (CCP §1141.24);

- Stipulation or court order required for later discovery (CCP §2024.050).

1.3.6 PRETRIAL MOTIONS

Once the trial date is set, a complete review should be done of the pleadings to ensure that the proper parties have been named and served and that the causes of action appropriately reflect the nature of the claims based upon any facts which have been ascertained in discovery. Any causes of action that are not appropriate should be dismissed or amended to make certain that the plaintiffs can obtain the maximum relief. Remember that motions to amend must be made as soon as it is apparent that a new cause of action needs to be alleged. Waiting until just before trial to seek leave to amend can result in denial on the basis that the opposing party would be prejudiced by a late amendment. If errors appear in your pleadings, seek to amend before trial, giving the adverse party as much notice as possible. [*Valerio v. Andrew Youngquist Const.* (2002) 103 CA4th 1264, 1272, 127 CR2d 436, 441-442] Review the opposition's pleadings to determine whether there is a basis to move for judgment on the pleadings, for summary judgment, or for summary adjudication. Remember that summary judgment and summary adjudication motions must be served at least 111 days before trial and require a minimum of 81 days' notice (plus 5 for mail, if mailed to an address within California). [CCP §437c(a)(2), (3) (amended Stats. 2024, Ch. 99; eff. 1/1/25)]. Opposition briefs are due 20 days before the hearing and reply briefs are due 11 days before the hearing. [CCP §437c(b)(2), (4) (amended Stats. 2024, Ch. 99; eff. 1/1/25)]

1.3.7 EVIDENCE

It is often helpful to prepare an evidence "grid," which is a chart showing the elements of each claim or defense and where the proof is expected to come from (i.e., particular witnesses, documents, discovery admissions, etc.). A similar chart should be prepared with respect to the opposing case so that you can easily track whether your opponent(s) are able to establish their claims or defenses.

1.3.8 WITNESSES AND RECORDS NEEDED AT TRIAL

You and your attorneys should devote significant time on witness preparation. Witnesses who have never appeared in court need to be familiarized with courtroom procedure and prepared for cross-examination. While witnesses should never be "coached," their testimony should be reviewed to ensure that their memories are refreshed and they are comfortable with their testimony. It is frequently helpful to perform a "dress rehearsal" in which witnesses are asked the questions they will receive on direct examination and then are subjected to areas anticipated on cross-examination. Since many cross-examination questions are designed to confuse and fluster the witness, the more time spent on anticipated cross-examination, the better prepared the witness will be to withstand what can become a confrontational and anxiety-producing event. Subpoenas should be served on all nonparty witnesses. A subpoena is the procedure to secure attendance of the nonparty witnesses and "is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness." [CCP §1985(a)] The subpoena may also require witnesses to bring with them "books, documents, electronically stored information, or other things under their control for production as evidence" (i.e., a "subpoena duces tecum"). [CCP §1985(a)] In addition, the nonparty witness should be contacted and advised of the anticipated dates of their testimony and should be placed "on call" to avoid having them show up before their testimony is actually needed. If electronically stored information is requested, a subpoena may require that it "be produced and that the party serving the subpoena, or someone acting on the party's request, be permitted to inspect, copy, test, or sample the information." [CCP §1985.8(a)(1)]

Serve nonparty witnesses and records custodians with *subpoena and subpoena duces tecum* far enough in advance to allow "reasonable time to prepare and travel." *Remember the affidavit requirement for a subpoena duces tecum.* [CCP §1987.5]

In limited civil cases, including mandatory expedited jury trials, be sure to request disclosure of witnesses and evidence 30 to 45 days before the trial date (CCP §§96, 97; Request for Statement of Witnesses and Evidence (For Limited Civil Cases under $35,000) (DISC-015), see *www.courts.ca.gov/documents/disc015.pdf*).

In limited civil cases, including mandatory expedited jury trials, respond to any request for disclosure of witnesses and evidence within 20 days after the request is served. [CCP §96]

In voluntary expedited jury trials, not later than 25 days before trial, serve other parties with (except for evidence used solely for impeachment or rebuttal) documentary evidence, witness list, depositions and recordings, jury questionnaires and instructions, verdict forms, glossary of technical or unusual

vocabulary and motions in limine. [CRC 3.1548(b)] No later than 20 days before trial, lodge these items with the court (except for documentary evidence). [CRC 3.1548(d)] The court will address these matters and evidentiary objections at the pretrial conference held no later than 15 days before trial. [CRC 3.1548(f)]

If the opposing party's appearance is needed at trial, the opposing party should be served with a Notice to Appear at Trial at least 10 days before the date set for trial. [CCP §1987(b)] If the opposing party has the originals of documents you need, serve a notice to produce documents at least 20 days before trial. If business records are needed, remember to serve the custodian of records with a subpoena for records requiring the custodian to provide an affidavit suitable for satisfying the foundational requirements for the exception to the hearsay rule. [CCP §1987.5] For more information, see section 1.7, infra.

If any witness or party is not an English speaker, be sure that arrangements are made for an interpreter to be present. A Certified Court Interpreter (CCI) will have a certification number and an identification card issued by the Judicial Council. CCI services can be used at court, medical or administrative proceedings. Plan ahead and reserve a CCI's services for depositions and at trial.

A form is available: REQUEST FOR INTERPRETER (CIVIL) (INT-300), see *www.courts.ca.gov/documents/int300.pdf.*

Witnesses should be made familiar with courtroom demeanor. "Persons in the courtroom must not talk, read papers, chew gum, eat or use a cell phone, while court is in session." [L.A. Sup.Ct. Rule 3.42]

Witnesses should know the importance of telling the truth and listening carefully to questions. Also, witnesses should know not to bring any documents or notes to the witness stand unless the lawyer asks them to do so. Also, the witness should know that if they do not understand a question, they should ask for clarification.

1.3.9 EXHIBITS

Exhibits should be copied and numbered sequentially in the order of planned introduction. Paralegals for all parties should meet to coordinate the allocation of exhibit numbers, e.g., 1–500 for plaintiff, 501–1000 for defendant #1, 1001–1500 for defendant #2, etc. The exhibits should be placed in binders with numeric tabs for ease of use. Copies should be made for each party, the witness stand and the court. It is also a good idea to keep on hand two or three extra copies of each exhibit, especially the key documents.

Witnesses should be shown any documents or exhibits that they may be shown while testifying. They must take the time to read and study documents

carefully *before trial* so that they will know precisely what the records contain and can refer to them without hesitation at trial. If witnesses will be asked to authenticate records, they should be able to testify to how the records were prepared and have been maintained.

◈ ***Caution:*** Documents shown to the witness to refresh the witness' recollection may have to be shown to opposing counsel.

1.3.10 DEMONSTRATIVE EVIDENCE

"Demonstrative evidence" is something that helps the trier of fact understand the events, such as photographs, models, blueprints, models, x-rays, charts, videos, samples or computer-assisted depictions. The more complex the case, the more helpful these items can be. Damages and chronology can be visually charted. Key passages of depositions can be enlarged and displayed to the jury. Helpful admissions from discovery can be projected on the screen. Expert opinions become more understandable when accompanied by exhibits, charts and pictures. Crucial exhibits such as contracts in a breach of contract case, photographs, charts or diagrams can be particularly effective if you present them in "blow-up" form (e.g., an enlarged photocopy suitable for display on an easel). An Elmo, which displays exhibits on a screen, is also useful. (With an Elmo, you place a hard copy of an exhibit on a device that projects an image of the document on a screen.) Perhaps the best form of visual aid is having all exhibits available in electronic form so that they can be projected from a monitor directly from a laptop computer. This allows you to enlarge text on the screen and highlight the key portions. The paralegal should become intimately familiar with all this technology in order to be able to transition seamlessly from exhibit to exhibit and highlight or blow up text upon request. Jurors are far more attentive to testimony when you use visual aids to emphasize the important points that they should consider. During cross-examination, PowerPoint displays are often helpful in summarizing key testimony.

Most judges insist that you show proposed demonstrative evidence to opposing counsel unless the item has previously been admitted into evidence. [L.A. Sup.Ct. Rule 3.180]

There are several crucial things to remember when using demonstrative evidence:

- *Professional appearance* – Have charts or blow-ups professionally prepared so that they create a good impression and can be easily seen by jurors from their seats in the jury box.

- *Accuracy* – Make sure that information portrayed in the demonstrative evidence is accurate.

- *Simplicity* – Visual aids should help simplify concepts so that the jury can more easily understand what your client is trying to portray.

- *Use the best medium* – Make sure that the medium is a proper vehicle for the message you're attempting to convey. For example, certain exhibits are better displayed on a screen as opposed to a chart.

- *Use technology to your benefit* – Even if you are on a budget, you can still provide a high quality presentation by leveraging technology already in your possession or at your disposal. For example, exhibits preloaded onto an iPad or tablet can easily be displayed on court monitors and highlighted, marked or expanded with standard software.

1.3.11 NOTEBOOK FOR FINAL STATUS CONFERENCE

It is often useful to have all the materials you need for the Final Status Conference in one binder. The binder should include the following documents: trial brief, witness lists, exhibit lists, pleadings, motions in limine along with oppositions and replies, statement of the case, jury instructions, and verdict forms. At least 5 days before the Final Status Conference, counsel must exchange and file lists of pre-marked exhibits to be used at trial, jury instruction requests, trial witness lists, and a proposed short statement of the case to be read to the jury panel explaining the case. [L.A. Sup.Ct. Rule 3.25(f)(1)] Most courts hear motions in limine at the Final Status Conference, so the attorney should have all pleadings relevant to each motion in limine in the notebook and be prepared to argue the motions at that time. Some courts defer argument on the motions in limine until the first day of trial; regardless, the motions must be filed with timely statutory notice to be heard on the day of the Final Status Conference. Some counties, such as Los Angeles, may require an "in person" meeting of counsel before the Final Status Conference to prepare joint trial documents, including a joint witness list, joint statement of the case, joint exhibit list, and a set of agreed-upon jury instructions and special verdict forms. [L.A. Sup.Ct. Rule 3.25(g)] Properly assembled, the notebook you prepare for the Final Status Conference will become the backbone for your trial notebook.

1.3.12 WITNESS FOLDER

It is useful to put all documents related to each witness in a folder dedicated to that witness. The folder should contain a summary of the witness' deposition, discovery responses or witness statements, and any exhibits counsel intends to have that witness authenticate or discuss. Additionally, you should include a script or outline of the intended questions for direct or cross-examination, along with the answers you expect.

This helps you avoid asking questions for which you don't know the answer.

- *Include cross-references:* After each anticipated answer, list appropriate cross-references to where the answer comes from (e.g., deposition extracts, witness statements, etc.).

- *Attach copies of deposition transcripts or other documents* containing impeachment material immediately behind the relevant section of the cross-examination outline. Ideally, you will have a paper copy of the deposition excerpts with brackets around the questions and answers that you expect to use for impeachment, with corresponding citations to the page/line in your deposition outline; the ability to move seamlessly to impeachment material is essential to quality presentation during a cross-examination.

- *Remember necessary "props":* If you plan to use any documentary or demonstrative evidence in the course of questioning the witness, list it in your script (e.g., deposition transcripts, interrogatory answers, chalk for witness to write on blackboard, etc.).

1.4 STATEWIDE AND LOCAL RULES OF COURT

The California Rules of Court have been adopted by the Judicial Council for use in all trials, including both unlimited and limited civil cases. They have the force and effect of law, so long as they are not inconsistent with statutes. [*Cantillon v. Superior Court* (1957) 150 CA2d 184, 187, 309 P2d 890, 893] A Judicial Council Rule may not change statutory requirements. [*California Court Reporters Ass'n, Inc. v. Judicial Council of Calif.* (1995) 39 CA4th 15, 33-34, 46 CR2d 44, 56]

A rule of court may go beyond the provisions of a related statute so long as it furthers the statutory purpose. [See *Mann v. Cracchiolo* (1985) 38 C3d 18, 29, 210 CR 762, 767 (overruled on other grounds by *Perry v. Bakewell Hawthorne, LLC* (2017) 2 C5th 536, 543, 213 CR3d 764, 768) – rule limiting time to file opposition to summary judgment motion]

1.4.1 EXPEDITED JURY TRIALS ACT

California has passed the Expedited Jury Trials Act (CCP §630.01 et seq.; see also CRC 3.545–3.1532). Initially the procedure was voluntary, but for certain cases, it became mandatory starting in 2016. This new legislation modifies and streamlines the civil jury trial procedures. As examples, parties who voluntarily participate may waive any motions for directed verdicts, motions to set

aside the verdict or any judgment rendered by the jury, or motions for a new trial on the basis of inadequate or excessive damages. [CCP §630.08(a)] The Act also allows parties to agree to 8 or fewer jurors as well as to dispense with alternates. [CCP §§630.03(e)(2)(C), 630.04(a)]

An Expedited Jury Trial Information Sheet (EJT-001-INFO) is available on the California Courts website (*www.courts.ca.gov*). (See Form "B" – Expedited Jury Trial Information Sheet and Juror Questionnaire for Expedited Jury Trials.)

1.5 IMPORTANCE OF DEVELOPING A "CASE THEME"

From the moment you accept a case, the lawyer should start developing a case "theme." The paralegal can assist in this process by putting himself in the role of a juror and assessing whether the theme helps to persuade the juror to accept your client's version of the evidence and to ignore adverse evidence from the other side. For example, in defending a fraud case, to drive home the point that plaintiff was not misled, the theme might be "greedy people get what they deserve." Keep the theme simple in order to give the jurors an explanation that they can grasp quickly and easily. The theme can be tested on a "mock jury," which although expensive, can be very useful. Alternatively, your office staff, family, and friends can be useful in providing commentary on the case and assistance in determining whether the theme is persuasive.

The jury is more likely to understand if the lawyer can get a good story. Often, this requires simplifying what are often complex concepts into everyday scenarios likely to make sense to the jurors. Your story should have a beginning, middle and an end. It is important to captivate the jurors so that they are anxious to hear the evidence supporting the story.

You can help the lawyer develop the story and be an audience for the rehearsal.

1.6 GATHERING EVIDENCE

Determining how to gather evidence begins with identifying what is necessary to prove the elements of each cause of action and each affirmative defense. This process should start with a review of the jury instructions found in CACI (California Approved Civil Instructions) prepared by the California Judicial Council and published by LexisNexis and Matthew Bender and available online.

Once you know the elements of every cause of action and defense, identify each fact obtained through discovery that may be relevant to prove or disprove them. Next, ascertain whether the evidence is admissible and if not, whether a further foundation needs to be laid, e.g., who can testify that a photograph accurately reflects what it portrays [e.g., *Ashford v. Culver City Unified School Dist.* (2005) 130 CA4th 344, 349, 29 CR3d 728, 731, fn. 5 –

(disapproved on other grounds by *Voices of the Wetlands v. State Water Resources Control Bd*. (2011) 52 C4th 499, 534-535, 128 CR3d 658, 684-685) – "testimony was required from someone who had personal knowledge of the matters and circumstances depicted on the videotapes"], whether a letter actually was mailed, who can lay a foundation to satisfy the business records exception to the hearsay rule (e.g., made in the regular course of business at or near the time of the event, with assurance that the method and time of preparation are such as to indicate its trustworthiness. [Ev.C. §1271])

Exhibit lists should be organized by either subject matter or chronological order and numbered according to the exhibit numbers allocated to the plaintiff and to the defense. Make at least 5 copies of each exhibit, for the court, the witness, the attorneys, and the clerk. If documents are going to be displayed for the jury, they should be loaded onto a laptop for visual display on the screen, or an Elmo should be obtained in order to project the image from a hard copy onto the screen.

Each deposition should be summarized to easily locate statements necessary to support or defeat an element of a claim or defense. Evaluate each statement to determine if it will be admissible. Remember that deposition testimony is admissible against any party who had notice of the deposition to the same extent the deponent's live testimony would be admissible under the rules. The deposition of an adverse party can be used for either impeachment or substantive evidence. [CCP §2025.620(a), (b)] In addition, the deposition of any witness may be admissible if that witness is "unavailable," defined as a witness who resides more than 150 miles from the courthouse or where other "exceptional circumstances" make it so that the witness cannot appear. [CCP §2025.620(c)]

The party offering deposition testimony must take steps to make the original deposition transcript available in court. If the original is in another party's possession, it should be obtained by stipulation or Notice to Produce. If changes have been made in the transcript, the deponent's attorney (or the attorney who noticed the deposition) should furnish a copy of the changes before the trial. [L.A. Sup.Ct. Rule 3.55]

If depositions were videotaped, make sure that the necessary equipment is available to play the videotape and that a person able to operate the equipment is present at trial. If a videotaped deposition is being offered in lieu of live testimony, you may not need to play the entire deposition, but only those parts which are relevant. Accordingly, the paralegal may be required to prepare a written designation of the portions your side intends to offer at trial. Remember, whether you are offering deposition testimony by videotape or by reading from the transcript, many courts require the parties to obtain the court's permission to do so, by providing the designation of page and line number or

other identifier for the videotaped portions being offered. [L.A. Sup.Ct. Rule 3.158]

Since reading depositions into the record can often be a tedious task, it helps to have someone sit in the witness box and read the answers to the attorney's questions. This is another way that paralegals help at trial. If you are asked to do this, make sure to speak slowly and audibly and to give your voice the proper inflection so as to avoid a monotonous reading. Practice reading the testimony out loud several times before you do so at the trial.

Review responses to interrogatories to determine whether they contain information that should be offered as substantive evidence against the responding party. Interrogatory responses may be used even if the responding party is available to testify, has testified, or will testify at trial. [CCP §2030.410] It is also useful to prepare extracts of the interrogatories and the responses which you intend to use in order to avoid having to look through a lengthy set of interrogatories for the answers you need. [L.A. Sup.Ct. Rules 8.70]

Admissions made in response to Requests for Admissions may be received into evidence at trial under the same rules and procedures discussed above. [L.A. Sup.Ct. Rules 8.70] These admissions are particularly valuable, because unlike interrogatories and deposition testimony, no one may offer evidence that is contrary to the admission. The matters admitted are deemed conclusively established. [CCP §2033.410(a)]

1.7 COMPELLING ATTENDANCE OF WITNESSES

Nonparty witnesses must be subpoenaed by the use of a civil subpoena. The subpoena is a "writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness." [CCP §1985(a)] A subpoena is not necessary for parties. Parties who are residents of California may be compelled to appear by a simple "Notice to Attend Trial." [CCP §1987(b)] (A Sample "Notice to Attend Trial" is attached as Form "C.") The Judicial Council has adopted a "mandatory use" civil subpoena form for compelling personal appearance at trial. (A Sample Form Subpoena is attached as Form "D.") Most recently, there is also a form titled Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and Declaration (SUBP-002), available on the California Courts website (*www.courts.ca.gov*).

Any attorney of record in the action may fill in the subpoena form and then sign and issue it. [CCP §1985(c)] Only a person who is a resident of California may be subpoenaed to appear and testify. [CCP §1989] Residents of California may be subpoenaed to appear at any court in the state; there is no mileage limit. Mileage fees are based on the distance from the witness' residence to the court. [CCP §1986.5]

The only way to obtain the testimony of a non-California resident is by way of a deposition near where he or she lives or by convincing the person to come to California for a voluntary appearance at the trial.

A subpoena must be personally served on the person whose attendance is required. [CCP §1987(a)] Only a natural person can be compelled to testify, although a subpoena for records can be served on a custodian of records, even if his or her name is unknown. [CCP §1987.3]

There is no minimum number of days before trial for service of a subpoena. The only requirement is that service must be made "so as to allow the witness a reasonable time for preparation and travel to the place of attendance." [CCP §1987(a)] To effect service, witness fees and mileage to and from the court for one day must be tendered to the witness "at the same time, if demanded by him or her." [CCP §1987(a); Gov.C. §68093] The witness fee currently is $35 per day, plus travel expense of $.20 per mile from the witness' residence to and from the courthouse. [Gov.C. §68093]

A subpoena can be challenged by filing a motion to quash. [CCP §1987.1] The motion can be based upon the subpoena being defective or upon improper or untimely service.

All witnesses necessary to your case should be subpoenaed – even those who are friendly. Subpoenaing witnesses prevents the opposing side from attacking the witness' impartiality by showing that the witness has appeared voluntarily. It is important to advise witnesses in advance of your intent to subpoena them and have the witnesses "on call" so that they do not have to spend needless hours at the courthouse waiting to testify. The paralegal should be designated as the "witness coordinator," and you should prepare a witness list with names and current addresses, e-mail addresses and phone numbers. That witness list can be programmed into a cell phone or Personal Data Assistant ("PDA") so that the information is always "at the ready." It also is a good idea to maintain a folder that contains conformed copies of all proofs of service of all subpoenas.

If you want an opposing party to testify, you must serve a "Notice to Attend" on opposing counsel at least 10 days before trial. The Notice has the same force and effect as a subpoena. [CCP §1987(b)] A Notice to Attend compels the presence of any party to the action, or an officer, director or managing agent of any party that is a business entity. The Notice should specifically identify the particular person whose attendance is required. See Appendix Form "C."

As described in the next section, a "Notice to Attend" may also request that the witness produce documents at trial.

Some courts have rules that require the parties to exchange witness lists before trial and bar the testimony of witnesses who are not listed. [See L.A. Sup.Ct. Rule 3.25(f)(1)]

There is a form: CIVIL SUBPOENA (SUBP-001), see *www.courts.ca.gov/documents/subp001.pdf.* Also see Appendix Forms "D" and "E." There is a separate form for a SUBPOENA DUCES TECUM: (SUBP-002), see *www.courts.ca.gov/documents/subp002.pdf,* which requires the production of documents and records. For details, see section 1.8, which follows.

➢ **Paralegal Pointer:** With respect to electronically stored information (ESI) a subpoenaed person may oppose the production and move to quash the subpoena on the ground that the ESI sought is not reasonably accessible because of "undue burden or expense." [CCP §§1985.8(e), 1987.1; see *Park v. Law Offices of Tracey Buck-Walsh* (2021) 73 CA5th 179, 184, 191-195, 288 CR3d 202, 205, 210-213 – undue burden/expense shown where computer search by responding party (DOJ) identified over 600,000 potentially responsive documents that needed individual review for relevancy and privilege, which could take another year (affirming award to DOJ of 50% of its claimed costs of compliance with subpoena under CCP §1985.8(*l*), noting "the more significant an expense is, the more likely it is to be undue")]

1.8 OBTAINING DOCUMENTS AND RECORDS

Parties should stipulate to the genuineness and admissibility of documentary evidence in advance of trial. The paralegals should meet and confer to work out stipulations where possible. Nothing is more boring than a custodian of records who simply drones on about the authenticity and genuineness of documents.

Absent such a stipulation, records can be obtained from parties by the service of a "Notice to Produce" or from nonparties by a "Subpoena Duces Tecum." The "Notice to Produce" is sufficient to compel production of records from another party or any person for whose benefit the action is prosecuted or defended and anyone who is an officer, director or managing agent of such party or person. No affidavit or showing of good cause is required. The Notice should state the exact materials or things desired and that they are in the custody of the party to appear. The person to whom it is directed may serve written objections to the document request within 5 days from service. [CCP §1987(c)]

The Notice must be served on the party from whom production is sought at least 20 days before the date attendance is required.

For nonparties, a civil subpoena duces tecum should issue on the Judicial Council Form (see Form "E"). The subpoena must be accompanied by a

declaration specifying the exact matters or things to be produced, their materiality to the issues, facts constituting good cause for their production and that the witness has the items in his or her possession or control. [CCP §1985] There is no deadline for service of a subpoena duces tecum. The only limitation is that service must be made "so as to allow the witness a *reasonable time* for preparation and travel" to court. [CCP §1987(a)] The discovery cutoff does not apply to subpoenaing documents at trial. A good rule of thumb is to serve the subpoena at least 30 days before trial, especially when you are seeking documents from large corporations or governmental agencies.

Except where the subpoena duces tecum specifically requires personal appearance, a nonparty custodian of records may deliver copies of the records subpoenaed in lieu of appearing personally. [See Ev.C. §§1560–1566]

Opposing parties are not entitled to receive notice that documents have been subpoenaed for trial. [See CCP §§1985, 1987, 1987.5; *Taggart v. Super Seer Corp.* (1995) 33 CA4th 1697, 1708, 40 CR2d 56, 63, fn. 8]

There is a split of authority as to whether a party can be compelled through service of a subpoena duces tecum to produce documents under its control located outside California. [Compare *Boal v. Price Waterhouse & Co.* (1985) 165 CA3d 806, 811, 212 CR 42, 44 (yes); and *Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London* (1995) 34 CA4th 554, 560, 40 CR2d 80, 84 (no)]

When personal records of a "consumer" are sought, additional procedures are required to ensure that the consumer has the opportunity to protect his or her right to privacy by filing a motion to quash before having to produce the documents. [CCP §1985.3(g)]

Personal records are defined as any record or electronic data pertaining to a "consumer" maintained by any of the following:

- Physician
- Psychotherapist (as defined in Ev.C. §1010);
- Dentist
- Ophthalmologist or optometrist
- Chiropractor
- Physical therapist
- Acupuncturist
- Podiatrist
- Hospital, medical center, clinic, radiology or MRI center, clinical or diagnosis laboratory
- Pharmacy or pharmacist
- Public or private school
- Attorney

- Accountant
- Bank, savings and loan association
- Credit union or member of Federal Credit System
- Securities brokerage
- Mortgage loan broker
- Escrow agent
- Private or public school or community college
- Title company or insurance company
- Telephone company
- Veterinarian or veterinary hospital. [See CCP §1985.3(a)(1)]

A "consumer" is any non-corporate party; i.e., an individual, partnership of five or fewer persons, association or trust. [CCP §1985.3(a)(2)]

When subpoenaing consumer records, you need to serve the following documents on the "consumer":

- Copy of subpoena duces tecum
- Proof of service
- Notice of privacy rights – The person to whom the records pertain must be notified that:
    - Records about him or her are being sought from the records custodian named in the subpoena;
    - If he or she has any objection to the records custodian furnishing such records, such objection must be filed with the court before the date set for production of the documents; and
    - If not already represented by counsel, legal advice should be sought about protecting his or her right to privacy. [CCP §1985.3(b), (e)]

(See Form "F" – Notice to Consumer or Employee and Objection (SUBP-025) (CCP §§1985.3, 1985.6), also see *www.courts.ca.gov/documents/subp025.pdf*.)

If the "consumer" is a party to the action and represented by counsel, the above documents may be served upon his or her attorney of record. [CCP §1985.3(b)(1)]

Otherwise, the documents must be served on the "consumer":

- By personal delivery; or
- By leaving them with a person of suitable age "at his or her last known address"; or
- In accordance with CCP § 1010 et seq. (service by mail). [See CCP §1985.3(b)(1)]

The documents must be served on the "consumer":

- At least 10 days before the date set for production of the records; and
- At least 5 days before service on the records custodian. [CCP §1985.3(b)(2)]

The Custodian of Records must be served with the following documents:

- Copy of Subpoena Duces Tecum
- Proof that "consumer" has been notified

The records custodian must be served:

- At least 5 days after the consumer was served with a copy of the subpoena and notice of privacy rights; and
- "in sufficient time to allow . . . a reasonable time . . . to locate and produce the records or copies thereof." [CCP §1985.3(d)] "Reasonable time" means the date set for production may be no sooner than 15 days after the subpoena was served or 20 days after it was issued, whichever is later. [See CCP §1985.3(d) (incorporating CCP §2020.410(c) time limit)]

Proof that the consumer was notified can be satisfied by presentation of a written release signed by the "consumer" or his attorney of record authorizing the release of the records, or a proof of service on the "consumer" or attorney of record of a copy of the subpoena and notice of privacy rights. [CCP §1985.3(b)]

In order to challenge the subpoena, a consumer who is a party to the action in which the subpoena is served may file a motion under CCP § 1987.1 to quash or modify the subpoena. A records custodian who is served with the

notice of motion is not required to produce the records unless ordered by the court or by agreement of the parties, witnesses, and the consumer who is affected. [CCP §1985.3(g)] For a nonparty consumer, the subpoena may be challenged before the production date by serving a written objection specifying the grounds on which production of the records should be prohibited. The written objections must be served on both the custodian of records and the requesting party. As with consumers who are parties, the records custodian served with the written objection is not required to produce the records unless otherwise ordered by the court or agreed to by the parties, witnesses, and the consumer who is affected. [CCP §1985.3(g)] The requesting party may bring a motion under CCP § 1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion must be accompanied by a declaration showing a "reasonable and good faith attempt" between the requesting party and consumer to resolve the dispute informally. [CCP §1985.3(g)]

If employment records are being sought, the following documents must be served on the employee:

- Copy of subpoena duces tecum
- "Notice of Privacy Rights" indicating that:
  - Employment records about him or her are being sought from the employer named on the subpoena;
  - Employment records may be protected by a right of privacy;
  - If the employee objects to the employer furnishing such records, he or she must file papers with the court prior to the date specified for production of the records; and
  - If not already represented by counsel, legal advice should be sought about protecting his or her right to privacy. [See CCP §1985.6(b), (e)]

(See Form "F" – Notice to Consumer or Employee and Objection (CCP §§1985.3, 1985.6).)

Service of the Notice to Consumer may be made upon counsel, if the employee party is represented. [CCP §1985.6(b)(1)] Otherwise, the Subpoena and Notice must be served on the employee either:

- Personally; or

- "at his or her last known address"; or

- In accordance with CCP § 1010 et seq. (which includes service by mail, see CCP § 1012). [CCP §1985.6(b)(1)]

Service must be completed:

- At least 10 days before the date set for production of the records; and

- At least 5 days before service on the records custodian. [CCP §1985.6(b)(2) & (3)]

The records custodian must be served:

- At least 5 days after the consumer was served with a copy of the subpoena and notice of privacy rights; and

- "in sufficient time to allow . . . a reasonable time . . . to locate and produce the records or copies thereof." [CCP §1985.6(d)] "Reasonable time" means the date set for production may be no sooner than 15 days after the subpoena was served or 20 days after it was issued, whichever is later. [See CCP §1985.6(d) (incorporating CCP §2020.410(c) time limit)]

Proof that the consumer was notified can be satisfied by presenting a written release signed by the "consumer" or his attorney of record authorizing the release of the records; or a proof of service on the "consumer" or attorney of record of a copy of the subpoena and notice of privacy rights. [CCP §1985.6(c)]

In order to challenge the subpoena, a consumer who is a party to the action in which the subpoena is served may file a motion under CCP § 1987.1 to quash or modify the subpoena. The records custodian is served with the motion to quash and is thereafter not required to produce the records until so ordered by the court or by agreement of the parties, witnesses and the consumer who is affected. The motion must be served on the records custodian and the deposition officer at least 5 days before production. [CCP §1985.6(f)(1)] For a nonparty consumer, the subpoena may be challenged, before the production date, by serving a written objection specifying the grounds on which production of the records should be prohibited. The written objections must be served on both the custodian of records and the requesting party. The records custodian served with the written objection is not required to produce the records unless otherwise ordered by the court or agreed to by the parties, witnesses, and the consumer who is affected. [CCP §1985.6(f)(3)] The requesting party may bring a motion under CCP § 1987.1 to enforce the subpoena within 20 days of service of the

written objection. The motion must be accompanied by a declaration showing a "reasonable and good faith attempt" between the requesting party and the consumer to resolve the dispute informally. [CCP §1985.6(f)(4)]

Unless the subpoena duces tecum requires personal appearance, a nonparty custodian of records may deliver copies of the records in lieu of appearing personally. [See Ev.C. §§1560–1566] If all you want are the records and you do not need the records custodian to appear in person, be sure to check Box 3b on the subpoena duces tecum form rather than 3a, which requires personal attendance.

If the custodian is going to appear in person and you are in charge of determining who that custodian is, make sure that the person Is knowledgeable about the identity of the record and its mode of preparation. The person does not have to be the person who observed or recorded the act or event. [*Grail Semiconductor Inc. v*. *Mitsubishi Elec. & Electronics USA, Inc.* (2014) 225 CA4th 786, 797-798, 170 CR3d 581, 590-591]

➢ **Paralegal Pointer:** Make certain that you know your attorney's wishes in this regard. Decisions not to call a witness must be made by counsel.

The procedure for production of the records (if Box 3b is checked and the custodian of records is not required to appear) is as follows:

- "True, legible and durable" copies of the records shall be placed in an inner envelope upon which is written:
    - Title and number of the action;
    - Name of records custodian; and
    - Date of subpoena duces tecum. [Ev.C. §1560(c)]
- The inner envelope shall be sealed in an outer envelope and delivered by mail or otherwise to the clerk of the court issuing the subpoena. [Ev.C. §1560(c)]
- The records shall be accompanied by the custodian's declaration stating in substance:
    - The declarant is the custodian of the records and has authority to certify the same;
    - The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event;

- The copies enclosed are true copies of all records described in the subpoena duces tecum;

- The identity of the records; and

- A description of the mode of preparation of the records. [Ev.C. §1561]

(If the business has none or only part of the records subpoenaed, the custodian's declaration shall so state; see Ev.C. § 1561 (b).)

➢ **Paralegal Pointer:** It is a good practice to prepare the declaration in blank and include it with the subpoena and a copy of the relevant statutes. [Ev.C. §§1560–1566]

The custodian of records is entitled to "all reasonable costs incurred" in producing the subpoenaed records and may demand payment before delivering the records. [Ev.C. §1563(b)(2)] If a court appearance is required, a records custodian is entitled to the same fees and mileage as any other witness. [Ev.C. §1563(c)]

Only the following items are "reasonable costs":

- Clerical expense in locating the records (computed at $24 per hour per person);

- Actual costs in retrieving and returning the records to storage;

- Copying costs (computed at $.10 per page, $.20 from microfilm); and

- Actual postage. [Ev.C. §1563(b)(1)]

1.9 RETAINING EXPERT WITNESSES

➢ **Paralegal Pointers:** Keep in mind, however, that use of experts dramatically increases the cost of litigation. The skyrocketing cost of experts has an effect on clients who have limited budgets or who are operating on a contingency fee basis with their attorneys. At the same time, early expert review has the potential to save you and the client both time and money if the expert advises that your client's case would ultimately not withstand a motion for summary judgment. Also, early expert retention may be critical to secure a certain expert before the opposition does. Therefore, this matter should be

considered and resolved with the client *early in the litigation* as part of your litigation budget.

Expert testimony may be required as a matter of law when the matter in issue is within the knowledge of specially trained persons as opposed to the common knowledge of laypersons. Lay opinions are inadmissible with respect to such matters. [See *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 702, 106 CR 1, 10]

For example:

- *Construction defects* – whether a contractor used "due care" in building a house. [*Miller v. Los Angeles County Flood Control Dist.*, supra, 8 C3d at 702, 106 CR at 10]

- *Medical malpractice actions* – whether a doctor provided the appropriate "standard of care" under the circumstances. [*Cobbs v. Grant* (1972) 8 C3d 229, 236, 104 CR 505, 509 – whether x-rays indicated the need for surgery; *Landeros v. Flood* (1976) 17 C3d 399, 410, 131 CR 69, 74 – whether failure to diagnose "battered child syndrome" breached the standard of care]

- *Legal malpractice* – expert testimony is required to establish the standard of care owed by the attorney. [*Lysick v. Walcom* (1968) 258 CA2d 136, 155-156, 65 CR 406, 419]

- *Real estate appraisal* – the "fair market value" of real property (e.g., in condemnation action). [See *Redevelopment Agency v. First Christian Church* (1983) 140 CA3d 690, 706-707, 189 CR 749, 760]

- *Certain causation issues* – causation issues that are beyond common experience and thus can be explained only through expert testimony. [See *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 CA3d 396, 403, 209 CR 456, 461 – what caused plaintiff's cancer; *Franklin v. Gibson* (1982) 138 CA3d 340, 344, 188 CR 23, 25 – what injuries could have been avoided had plaintiff used a seatbelt]

- *Reliability of scientific evidence* – when the results of scientific tests are sought to be introduced (e.g., blood tests, etc.), expert testimony may be required to establish that such tests are generally accepted as reliable within the relevant scientific community. [*People v. Kelly* (1976) 17 C3d 24, 30, 130 CR 144, 148 (superseded by statute on other grounds as stated in *People v. Wilkinson* (2004) 33 C4th 821, 845-848, 16 CR3d

420, 436-439 – scientific proof typically assumes a posture of "mystic infallibility" in jury's eyes)]

Expert opinion is not required on matters of common experience and understanding (e.g., speed, sanity, intoxication, genuineness of handwriting where the witness has personal knowledge of the person's penmanship). [See Ev.C. §1416; *People v. Lucas* (2014) 60 C4th 153, 265-267, 177 CR3d 378, 483-485 & fn. 44] These are matters on which laypersons are competent to draw their own conclusions. The test is whether the proffered testimony would be helpful to the trier of fact.

Experts may be retained as consultants early in the litigation, but testifying experts are usually not retained until just before the deadline to demand an exchange of expert witness lists under CCP § 2034.220 (10 days after initial trial setting or 70 days before trial, whichever is closer to the trial date). Because experts are expensive and cases frequently settle without incurring the cost, experts hired long before the trial date may be a waste of money.

There are various sources from which to locate qualified experts. One valuable source is jury verdicts, which are typically reported in *The Los Angeles Daily Journal* "Verdicts and Settlements" or in local bar association publications. These publications provide detailed information, including the nature of the case, the amount of the verdict, names of counsel, and names of expert witnesses along with their fields of expertise. Calling counsel who handled the case and asking for their opinion of the expert can be very helpful. Appellate opinions in similar cases may also provide a valuable source. Again, contacting the lawyer who handled the case is useful. Another valuable tool is to ask other lawyers for referrals. Bar associations and trial lawyer groups frequently maintain lists of experts who have testified (e.g., Consumer Attorneys Association of Los Angeles, Southern California Defense Counsel, Defense Research Institute). Local universities can also be a good source for experts from among their various academic departments (e.g., economics, engineering, physics). Make sure to evaluate whether the individual has "jury appeal." In other words, will the expert be able to communicate on the same level as the jury and adequately explain concepts which might otherwise be esoteric and difficult to understand? You can also check with your client, who may know of potential experts through association with a union, trade or business association.

In considering which of several experts to retain for trial, the lawyer should review the expert's qualifications, availability, objectivity and experience in testifying. While the expert may be someone who has never testified before, he or she should nonetheless be likable and not arrogant or off-putting. The expert should be able to testify and connect with the jurors without appearing to "talk down" to them. The expert should be a good teacher and storyteller, and he or she has to be able to survive cross-examination. Review the expert's published works to ensure that the expert has not expressed an opinion that is inconsistent

with his or her present view on the matter at issue. Expect that opposing counsel will have obtained copies of transcripts of opinion testimony your expert has given in past trials and depositions. Obtain as much information as you can about these earlier opinions to ensure that your expert cannot be impeached by testimony that is inconsistent from one case to another.

There is no limit on how many experts one side may call, although the court does have discretion to limit the number. [Ev.C. §723; see *Horn v. General Motors Corp.* (1976) 17 C3d 359, 371, 131 CR 78, 84] To determine the number of experts you need, you must first be fully familiar with the issues. For example, in a serious auto accident case, plaintiff may need an accident reconstructionist to testify as to causation, a physician to testify about injuries, and an economist to describe the plaintiff's diminished earning capacity. Some judges refuse to allow more than one expert on the same issue. Furthermore, in multiple defendant cases, some judges will limit the number of experts to one per side on the same issue.

Cross-refer – Pretrial designation of expert witnesses is discussed in detail in White, *California Paralegal Manual* (TRG), Ch. 9.

Good experts are expensive. Their rates vary widely depending on their experience, the specialty involved, geographic location, etc. Before retaining an expert, check with other lawyers to determine what comparable experts have charged for their services in other cases. Unless the expert agrees to look solely to the client for payment, counsel employing an expert is responsible for the expert's fees and expenses for attending trial. Be sure to review the expected cost with your client. If your client has limited resources, you may want to mediate the case before incurring the costs of experts. Remember that you are ethically prohibited from retaining experts on a contingency fee basis.

Meeting with experts who will testify is crucial to trial preparation. If the expert's deposition has not been taken, he or she must be prepared for that event. Opposing parties have the right to take your expert's deposition up to 15 days before trial. [CCP §2034.010] A video-recorded deposition of an expert witness may be used in lieu of live testimony when the statutory conditions are satisfied. [See CCP §2025.620(d)]

1.10 PREPARING WITNESSES TO TESTIFY

Once you have assembled a list of the necessary witnesses, it is useful to categorize the witnesses by whether they are "friendly" or potentially "hostile." With friendly witnesses, an in person meeting is crucial to preparation. Arrange the meeting well in advance of the witness' scheduled testimony (several weeks to a month before trial). For important witnesses, one meeting may not be enough. It is better to schedule several shorter meetings than to attempt to cover

everything in a lengthy session. A “brush-up” is also advisable shortly before the witness is called to testify.

A paralegal can be useful in preparing witnesses. The paralegal should have assembled all of the exhibits that the witness will need to authenticate and to which the witness’ testimony refers. When interviewing the client, the paralegal can be present to help the witness in the chronology of facts or to refer to prior deposition testimony which the witness will need to review. While it is appropriate to remind a witness of facts or point out discrepancies, it is both unethical and illegal for an attorney or paralegal to instruct a witness to give false testimony. [See Bus. & Prof.C. §§6608(d), 6128(a); CRPC 3.3]

Paralegals should scour the Internet for information that might affect the case and the witness’ credibility. Find out if your witnesses have published damaging information on any websites. This includes personal blogs, postings on Facebook, tweets on Twitter and entries on MySpace.com. If they have, be sure your witnesses are prepared to testify regarding this matter.

While the paralegal should assist, it is crucial for the attorney who will be questioning the witness at trial to be present at the preparation session. After all, if the witness is prepared but the attorney does not know what to ask in order to elicit the right facts, the session is wasted. The paralegal can take notes of the session to help the attorney prepare an outline of the questions to be asked at trial and to help the attorney guide the witness’ testimony through the crucial areas.

The witness should be shown any exhibits that he or she may see while testifying. The witness must take the time to read and study documents carefully before taking the stand so that at trial, he or she will know precisely what they contain and can refer to them without hesitation. If the witness will be asked to authenticate records, he or she should be able to describe how they were prepared and how they have been maintained. Remember that an exhibit is not admissible unless you can establish foundational facts, and if the document is a business record, that the appropriate criteria exist to satisfy the business records exception to the hearsay rule. [Ev.C. §1271]

Paralegals should discuss courtroom attire with the witness. Clients and witnesses should dress conservatively and neatly. Tactfully raise this subject with your clients and witnesses. Discourage jeans, shorts, loud colors, low-cut blouses, unbuttoned shirts, long or unkempt hair, and excessive jewelry.

“Persons in the courtroom or appearing in court by remote video may not dress in an inappropriate manner so as to be distracting to others of usual sensibilities.” [L.A. Sup.Ct. Rule 3.43]

Should a threat of COVID continue or resume, clients and witnesses should (and may be required to) wear face masks. Indeed, a mask may be required to enter the courthouse.

➢ **PARALEGAL POINTER – Zoom Trials:** Some courts have conducted civil jury trials, including jury selection, *remotely* via Zoom. [See *Ocampo v. Aamco Transmissions*, Alameda Sup.Ct., Case No. RG19041182 (verdict returned 9/3/20)]

Note: The U.S. District Court for the Western District of Washington has published "Virtual Trials Bench & Jury A Handbook for Attorneys" and other resources to guide attorneys through the use of the ZoomGov platform for conducting virtual bench and jury trials. See *www.wawd.uscourts.gov* (under Attorneys, then Trial Support & Technology, then Remote Hearing Information for Attorneys).

Paralegals can also review what is expected of clients and witnesses on the day(s) they come to the courthouse. One of the crucial aspects of ensuring that a witness is prepared to testify is making sure that the witness knows how to get to the courthouse and then to the courtroom. Print out the directions from each witness' home or hotel to the court. Include directions from the court entrance to the particular courtroom. Go over when the witness' testimony is expected to occur and whether waiting time will be required. If the court has issued a witness exclusion order that prevents witnesses from waiting in the courtroom while other witnesses testify, make sure that the client understands that the judge does this to ensure that witnesses are not unduly influenced by the testimony of other witnesses. Furthermore, the witness should be warned that behavior outside the courtroom is just as important as testimony in the courtroom itself. For example, if jurors see a witness jaywalking in front of the courthouse, they may view that witness in a negative light. Arriving at court in an ostentatious or expensive car (worse yet, a limousine) can make a witness appear to be a snob. Moreover, witnesses need to be told not to talk to jurors or to the opposing party or attorney about anything, not even the weather.

The following local rules need to be reviewed with the witnesses:

- Avoiding the "well." [See L.A. Sup.Ct. Rule 3.94 – except with court approval, no person may traverse the area between the bench and counsel table ("the well").]

- "Persons in the courtroom or appearing in court by remote video must not talk, read papers, chew gum, eat, smoke, vape, or use a cell phone, or other electronic device not related to the hearing while court is in session." [L.A. Sup.Ct. Rule 3.42]

➢ **Paralegal Pointer:** ***CAUTION:*** As long as coronavirus remains with us, check with the court clerk ahead of trial to determine if there are any COVID-19-related social distancing modifications for the seating of jurors. For example, instead of all twelve jurors being seated in the jury box during voir dire questioning, or during the trial itself, some prospective jurors may be seated in front of the jury box and in the gallery. Jurors may be separated from each other – and from the judge, court clerk, court reporter, witness stand, and counsel's table – by at least six feet, with the additional designated seating throughout the courtroom.

Finally, witnesses and parties should be told to refrain from:

- Reading books, newspapers, etc., while jurors are present;
- Visibly reacting to testimony or arguments; and
- Any conduct that would indicate that they are not taking the proceedings seriously (loud joking or displays of emotion, etc.).

The following instructions are also helpful for witnesses:

- Tell the truth; you will be sworn to do so.
- Do not bring any documents or notes with you to the witness stand unless asked to do so.
- If you are shown a document, read it carefully and completely before answering any questions. Take your time. Be sure you know what's in the document before you start to answer.
- Listen carefully to each question; ask to have it repeated if you don't completely understand it.
- Wait until the question has been completed before you answer. Think about your answer before you start to give it. Answer slowly. Stop after you have answered the question. Don't volunteer anything, particularly on cross-examination.
- If you do not understand the question, ask for clarification. But remember that if you do so too often, you may look evasive.
- If you do not know the answer to a question, say so. But remember that repeated "I don't know" answers will make you look evasive.

- If you are not sure of an answer, qualify it with “approximately” or “as best as I can presently recall.”

- Use care with questions such as, “Did anything else happen?” or “Is that everything?” by answering, “As best as I can recall,” in order to leave room for memory lapses.

- If the question calls for a yes or no answer but you feel such an answer would be misleading and that an explanation is necessary, say so. But again, do not overdo this or it will appear that you are attempting to outsmart the questioner.

- Try to respond in a pleasant, confident manner. Speak loudly and clearly enough that the farthest juror will be able to hear your testimony without problem.

- Don’t try to impress anyone. Use normal conversational words and avoid professional jargon.

- Whenever possible, be definite in your answers. Avoid prefacing answers with, “I think,” “I believe,” or “in my opinion.”

- When answering, look at the questioner, particularly during cross-examination.

- Keep your emotions under control. Never shout, argue or answer sarcastically, even if you feel upset or insulted by the questioning.

- Avoid smug or cocky facial expressions or gestures in responding to questions or while seated in the audience.

- Do not be offended if the judge sustains an objection or grants a motion to strike some portion of your testimony. These are procedural matters and do not reflect on the witness.

- Avoid appearing overly friendly with your lawyer in the jurors’ presence. Doing so could give the impression that your testimony was “orchestrated” by counsel.

- If you realize while still on the stand that an earlier answer was wrong, correct it immediately.

The witness must be prepared for matters that are likely to be covered on cross-examination. Familiarity with the witness' deposition and with any prior sworn statements can help to avoid inconsistencies and explain divergent testimony. The main thing that the witness should avoid is defensiveness. The witness should appear calm, truthful, and confident.

Be ready for certain questions that are frequently asked on cross-examination, for example:

"*Have you talked to anyone regarding the facts of this case before testifying here today?"*

> Always answer truthfully that you have conferred with counsel. Jurors usually realize that lawyers confer with their witnesses before the witness takes the stand.

"Are you being paid to come here and testify in this case?"

> Again, truth is critical. If the witness was paid a witness fee and mileage or travel expenses, this is not out of the ordinary. If you as the paralegal are making the travel arrangements, make sure that the witness is not traveling in the "lap of luxury" as this may cause the jury to believe that the witness' testimony has been influenced. If the witness simply answers "yes" to this question, the jury is left wondering if in fact the witness' testimony was "bought." If however the witness answers that he was paid a $35 witness fee and mileage, the answer is not in the least damaging.

If the witness is "independent," in other words, does not favor either side, but is just a percipient witness, make sure that the witness knows that he or she does not need to talk to either lawyer, but simply needs to comply with the subpoena and testify. Advise the witness that if opposing counsel requests an interview, you would like the opportunity to be present.

1.10.1 HOSTILE OR RELUCTANT WITNESSES

You probably will not have the opportunity to prepare every witness for testimony. Hostile witnesses most likely will refuse to meet with you. Even if they are not hostile, certain nonparty witnesses may be reluctant to discuss anything with you. Sometimes, the only contact you will have with a witness is the service of the subpoena and a phone call to ensure that they will appear. In this case, it is important to have a deposition or signed statement so that if their testimony diverges from what was expected, you can impeach them with it.

1.10.2 PREPARING EXPERTS

Simply because a witness serves as an "expert" does not mean that they do not need to be prepared to testify. All of the above rules should be reviewed with the expert, particularly if the expert has not testified previously. Tell the expert the case theme which you have developed with the lawyer so that he or she will know what you are trying to establish and how the expert testimony will "fit in." In preparing the expert, concentrate on the following:

- The expert's qualifications;
- The materials reviewed in formulating his or her opinion;
- The expert's opinion;
- The factual bases for the expert's opinion.

Be sure to have a copy of the expert's most current curriculum vitae. Several copies should be available to provide to the court and opposing counsel at trial. Reexamine the documents and source materials the expert used to arrive at his or her opinion. Review any demonstrative evidence you intend to go over with the expert to ensure that the expert is comfortable explaining the contents of the exhibits in a way that will educate the jury. Go over the opposing experts' depositions and/or reports and use your expert to help prepare your attorney to cross-examine the opposing expert. Think about using an electronic notebook. Today's electronic tablets provide an excellent way to store large quantities of information. They typically allow you to create topical and witness files, store actual documents and access everything quickly by use of key words and topics. Prepare your expert to be questioned about his fees and expenses; this is a proper subject of inquiry on cross. The questions are relevant to the expert's credibility and the weight to be given to his or her opinion. [See Ev.C. §722(b)] Caution the expert not to use overly technical terms and to testify in plain English. If technical terms are needed, consider preparing a glossary of terms to be given to the jurors for reference (with approval of the court and opposing counsel).

Rehearse the expert's testimony by going through his or her direct and cross-examination. Often a dress rehearsal can be useful with members of your firm in attendance to critique the witness' testimony and appearance. Even videotaping a dress rehearsal can be a useful tool when the tape is played back to point out strengths and weaknesses.

Finally, as with other witnesses, provide the experts with directions to the courthouse and courtroom, the anticipated date and time of their testimony, and establish an "on-call" system to minimize waiting and frustration. The paralegal should serve as the "witness coordinator," keeping track of the phone numbers

and contact persons for witnesses who are on-call. Remember that the person calling the witness is responsible for having "the witness present in court when needed." [L.A. Sup.Ct. Rule 3.106]

1.10.3 WITNESS FOLDER

Once you have your list of witnesses, be sure to prepare a separate file folder for each one. Include within the file the following:

- Discovery documents, including all depositions and any written discovery verified by that witness.

- Other statements or declarations by that witness, including statements given to investigators, statements contained in a police report, and testimony given in other cases.

- A topical index for the applicable discovery and witness statements. This is time-consuming but pays off in locating references to prior testimony and statements for impeachment or rehabilitation.

- A "script" of key questions to be asked assures that the lawyer doesn't forget a key area. Annotate your script with line and page numbers of deposition testimony and discovery documents where each particular topic was discussed. Keep in mind that while scripting ensures that no vital area is overlooked, it can look overly rehearsed and lack spontaneity. Never tell a witness to memorize an answer.

Do not include in the witness folder any material protected by the work product doctrine or attorney–client (or any other) privilege. You do not want to inadvertently have the lawyer use a confidential document which can later be offered in evidence because its use has waived a privilege.

1.11 TRIAL NOTEBOOK

A trial notebook is a useful tool to assemble crucial documents in the case file so that they are available at a moment's notice. Remember the "30-second retrieval test" – it should not take you more than 30 seconds to retrieve any paper or item of evidence. If it does, the lawyer will appear to be either stalling or disorganized. In either event, it does not make a good impression. The paralegal, by serving as the point person for organization, should ensure that the trial notebook contains the relevant pleadings, trial brief, statement of the case to be read to the jury, witness list, exhibit list, jury instructions, and possibly summaries of depositions or key exhibits. Go over this with the lawyer so that he or she will know how you have organized the notebook and ensure that it

contains everything the lawyer needs. Prepare an Index at the beginning of the notebook so that the tabbed contents can easily be located.

The beauty of the notebook is that the lawyer can use it to review for trial and prepare for the opening statement, even if a trial is continued.

The format of the notebook can be in hard copy 8-1/2" by 11" format or in electronic form with a software program that allows for easy retrieval of actual documents, creation of topical and witness files, and rapid access to information stored by key word or topic.

The notebook should also include any pre-trial orders such as rulings on summary adjudications, orders sustaining demurrers to particular claims, and pretrial conference orders. The notebook can also contain a chart of the relevant claims and defenses.

Consider placing all motions in limine, oppositions and replies thereto in the notebook. This facilitates the arguing of the motions at the appropriate time. If there are numerous motions in limine, you may want to consider a separate notebook for them and another notebook for other trial materials such as trial briefs, legal memoranda, and materials for voir dire, such as jury box charts and questions for the prospective jurors.

➢ **Paralegal Pointer:** Some local rules prescribe time limits for service of any opposition to a motion in limine. [See Orange Sup.Ct. Rule 317(B)(12) – then-filed oppositions must be included in joint trial notebook and delivered to clerk by noon of Wednesday before trial]

Other courts may allow opposition to a motion in limine to be served and filed at the time of trial (e.g., Los Angeles Superior Court in "M/C cases" and San Francisco Superior Court).

The court will require a statement of the case to be read to the jury. This is a concise summary that explains the type of case they will hear. More about this in Chapter 4. You should assist the lawyer in developing an outline of the opening statement which covers the case theme and the critical points to cover. The notebook should likewise include witness lists and subpoenas with the names, addresses and contact information for each witness. An evidence grid is also helpful in outlining each cause of action or defense and the evidence which needs to be offered and the witness who will authenticate and discuss each exhibit. Your grid should look something like this:

CLAIM/DEFENSE _____

Prima Facie Case

	Witness Name	Document	Exhibit #	Other Proof
1)				
2)				
3)				

It is also useful to prepare a chronology to easily refer to dates of each key event and a reference to the evidence source. A trial script is also useful to show the order in which you plan to call witnesses and when each exhibit will be offered. If only limited material is available for each witness, keep it in the trial notebook; otherwise, prepare a witness folder to be kept separate from the trial notebook.

Exhibit lists should be kept at the beginning of the exhibit notebook. Remember that you must make enough exhibit notebooks for the witness, the court, opposing counsel and yourself. Check with the court clerk to see if he or she will require a separate notebook in order to keep track of exhibits as they are admitted into evidence. The exhibit list should look like this:

EXHIBIT LIST

No.	Description	Witness for Foundational Requirements	Offered	Admitted
1	Contract	John Smith	10/30/2010	10/30/2010
2	E-mail	John Smith	10/31/2010	10/30/2010

Although you are required to exchange exhibits and an exhibit list before trial, you may reserve any undisclosed documents that you intend to use for impeachment. [See L.A. Sup.Ct. Rule 3.25(f)(1)]

The trial notebook should also include a copy of each proposed jury instruction. More about jury instructions in Chapter 19. It should likewise include the proposed special verdict form. Finally, you should include an outline of key points for your attorney to address in the closing argument.

1.12 TRIAL BRIEF

Every case, whether court or jury trial, warrants a trial brief. Trial briefs should address issues of law likely to arise during the trial that are not already covered by motions in limine. For example, a statute of limitations defense should be addressed fully in a trial brief, referencing the statute, the basis for the claim, and the evidence that will establish the defense. If the trial concerns any area of law with which the judge may not be familiar, e.g., environmental or franchise law, the brief will help the judge understand the statutory framework and how it applies to the case. Present the key facts so that the judge is aware of the context in which to consider the evidentiary issues as they arise.

The trial brief is normally prepared in the same format as a Memorandum of Points and Authorities. The trial brief should be easy to read and should conform to its title, by being brief. Avoid string cites to multiple cases; one cite is usually sufficient.

1.13 TRIAL BRIEFCASE

Make sure that the lawyer's briefcase is adequately supplied with highlighters, notepads, pens, staplers or whatever office supplies that lawyer likes to have at the ready. Remember that the lawyer will be under tremendous pressure. Having what he or she needs available when needed goes a long way to minimizing the stress. Consider the following:

- cassette or digital recorder for note-taking, plus spare batteries
- pocket calculator
- stapler
- laser pointer
- 10-year calendar, for ease of reference to dates
- paperback copies of the Code of Civil Procedure, Evidence Code Rules of Court, and Local Rules
- ruler
- Post-its, highlighters, paper clips, notepads, tape, rubber bands, etc.

With the advent of the lightweight computers and tablet devices, some lawyers are "going paperless" in their trial preparations. There are many applications ("Apps") which exist that are designed to assist in trial management and presentation. The applications perform a variety of functions, from organizing exhibits and deposition testimony for courtroom presentation, to managing examination outlines, opening statement and other work product. Today's technology provides a great way to store lots of data. This can help streamline your presentation.

1.14 COURT REPORTERS

Deep cuts in court funding have forced many counties to close courtrooms and lay off court employees, including court reporters. For example, in the Los Angeles Superior Court, court-employed reporters are no longer available for most civil matters (see *www.lasuperiorcourt.org)*. Likewise, in the San Francisco Superior Court, official court reporters are unavailable for hearings or trials in most civil cases (see *www.sfsuperiorcourt.org)*.

Be sure to check the availability of court reporters for your trial and advise the lawyer to be prepared to provide and pay for the reporter. The expense may be recoverable as a cost of suit. [See CCP §1033.5(a)(11)]

Although a settled statement (CRC 8.137) is a viable alternative to a reporter's transcript on appeal, be aware that a court retains discretion to refuse to settle a statement that is inaccurate if it makes specific findings of deficiencies supported by the record. The court's discretion "is limited and must be exercised in a manner that does not interfere with the litigant's statutory right to appeal." [See *Randall v. Mousseau* (2016) 2 CA5th 929, 934, 206 CR3d 526, 529]

If a litigant is indigent, a superior court must provide a court reporter to avoid unfair treatment. [Gov.C. §68630(a); *Jameson v. Desta* (2018) 5 C5th 594, 599, 234 CR3d 831, 834 (2018 WL 3298042, *2)]