

**The In-House Counsel Interview:  
Rouz Tabaddor of CoreLogic, Inc.  
By Brian C. Berggren**



*Editor's Note: This installment features Rouz Tabaddor, Deputy General Counsel at CoreLogic, Inc., a leading provider of consumer, financial, and property information, analytics, and services to business and government.*

**Q: Can you tell us a bit  
about your career path?**

A: Before attending law school, I was pursuing a career in mechanical engineering. I had no idea that law school was even an option for me. My plan was to work at Goodyear and pursue a masters in mechanical engineering. However, once I learned about intellectual property law, I decided to attend law school.

My career path has been pretty varied since graduating from law school. I started by clerking for a law

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**"Take a Writ": Extraordinary Writs in the  
California Court of Appeal  
By Jason Moberly Caruso**

It's an unenviable position, finding yourself on the wrong side of a trial court ruling that will dictate the future course of the litigation, but which is not directly appealable. Your only option may be the legal equivalent of the "Hail Mary": the extraordinary writ petition. When used judiciously and in good faith, a writ petition can be extraordinarily effective in preserving your client's resources and reducing the impact of erroneous interlocutory rulings.



The writ petition provides a process for appellate review of trial court rulings that are not otherwise appealable. *See* Cal. Civ. Proc. Code § 904.1. Generally, writ petitions must be filed within 60 days after service of notice of entry of the challenged ruling. (It should be noted that shorter, jurisdictional deadlines apply to statutory writ petitions for review of certain trial court rulings, such as those regarding motions to expunge lis pendens, motions for change of venue, and denials of motions for summary judgment/adjudication. Those deadlines are beyond the scope of this article, and failure to meet those deadlines may indeed preclude any other review of those rulings.) The Court of Appeal may summarily deny a meritorious petition that does not satisfactorily explain any delay in filing. *Volkswagen of Am., Inc. v. Superior Court (Adams)*, 94 Cal. App. 4th 695, 701 (2001). Due to the equitable nature of the writ review procedure, the Court of Appeal may even deny a petition filed *within* the 60-day window, if the petitioner has under the circumstances unreasonably delayed in seeking relief. *See H.D. Arnaiz, Ltd. v. Cnty. of San*

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## The President's Message

By Mark A. Finkelstein



It is hard for me to believe that Halloween is behind us, Thanksgiving is right around the corner, and 2018 is coming up fast. I don't know where the time has gone. But my role as President of ABTL Orange County is winding down, and this is my last President's Message.

It has been such an honor to serve as President this year and, with this final message, I am pleased to report that ABTL is as strong as ever. We just concluded a fantastic Annual Seminar in beautiful Carlsbad. The event was entitled "When the Perfect Storm Hits: Managing the Crisis Event." We heard from some of the country's top lawyers and judges, and Orange County showed up strong! Justice O'Leary, Judge Margines, Judge Guilford, John Hueston, Scott Garner, and Daniel Fears gave us valuable tips, insights, and advice for handling the storms that we all have faced, or will face (or, maybe, will face again). I heard from many of you who attended, and—without exception—the feedback was incredibly positive (I'm sure the perfect weather, great food, and golf/tennis/spa activities were contributing factors). If you were not able to attend, I would strongly recommend that you make it a priority to join us next year in Maui. I promise you will not be disappointed.

In addition to the very successful Annual Seminar, we have enjoyed amazing programs this year. Our September dinner program featured Justice Simons, who managed to both educate us regarding some tricky evidentiary issues, as well as entertain us and make us laugh throughout the evening. Not an easy task, but he was up to the challenge. Our final dinner program is November 29<sup>th</sup>, and is entitled "Back to the Future Today: The Legal Innovations and Challenges of AI and Autonomous Vehicles." Our panel includes Jeff Risher (Tesla) and Greg Silberman (Cylance), and I'm sure it will be very interesting (I hear that driver's licenses will soon be obsolete). It's also our annual holiday gift giving opportunity and we're raising money for the children of Illumination Foundation as well as collecting new stuffed animals for the Orange County Superior Court's adoption

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

**abtl**

ORANGE COUNTY

8502 E. Chapman Avenue, #443

Orange, CA 92869

Phone: 714.516.8106 Fax: 714.602.2505

E-mail: [abtloc@abtl.org](mailto:abtloc@abtl.org)

[www.abtl.org](http://www.abtl.org)

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## Proposition 66 and *Briggs v. Brown*: Will Death Penalty Reform Affect Our Courts' Expedient Handling of Civil Cases?

By Kimberly A. Knill



While death penalty reform is a deeply divisive issue in California, access to the courts and justice is not. The judicial branch is an integral part of our constitutional system of checks and balances. Nobody deserves to be shut out of court.

The Proposition 66 initiative narrowly approved by voters in November 2016 sought to “mend not end” capital punishment in California. But Proposition 66 is an unfunded mandate through the date of this article, meaning the Legislature has not allocated funds for additional court resources needed to speed up the death penalty process. As a result, Proposition 66 threatens to slow the pace of *civil litigation* at the superior and appellate courts.

Some background. The Death Penalty Reform and Savings Act of 2016 sought to expedite the time between a death penalty sentence and execution in part by imposing a five-year deadline on courts in deciding appeals and resolving habeas corpus petitions filed by condemned inmates. It also changed the procedure for seeking habeas corpus review by shifting the initial petition review process from the Supreme Court—which previously exercised sole jurisdiction over the subject—to the *superior court* (specifically the *trial judge*) where the death sentence was originally imposed. And it gave defendants the right to appeal to the *courts of appeal* denials of habeas corpus relief. This is a major shift in responsibility for the California judiciary.

Within days of the Proposition’s passage, former El Dorado County supervisor Ron Briggs filed a petition for writ of mandate against Governor Edmund G. Brown, Jr. in the California Supreme Court facially challenging the constitutionality of certain aspects of Proposition 66. In August 2017, a divided court upheld Proposition 66 in *Briggs v. Brown*, 3 Cal. 5th 808 (2017).<sup>1</sup> Of particular concern to civil practitioners is the new method for deciding capital habeas corpus petitions.

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## Optimizing E-Discovery with Arbitration

By Daniel Garrie

In the past two years, 90% of the world’s data has been created, coming from a wide variety of sources. From automobile black boxes, cloud storage, and even wearable fitness trackers, data is being collected and processed in ways barely visible to the end user. With the rise of the Internet of Things, technology has and will continue to become more and more integrated, creating even more data. Understandably, the rise of big data has pushed traditional legal discovery practice to its limits. With such an abundance of data to preserve, organize, search, collect, and produce, discovery in litigation has become an extremely costly endeavor. However, there are ways to mitigate the challenges of e-discovery. Arbitration, for instance, when conducted with an eye towards streamlining e-discovery, can save the parties substantial time and money. This article provides recommendations on how to optimize e-discovery practices and procedures in the arbitration context.



The primary objective of arbitration is to resolve legal disputes quickly, efficiently, and privately. Arbitration is particularly useful where parties would otherwise incur substantial discovery costs, such as in cases requiring the production and examination of substantial amounts of electronic information. If properly constituted, an arbitration panel can greatly reduce the inefficiencies associated with the litigation of cases involving e-discovery.

One of the key aspects of arbitration is its flexibility. Arbitration panels are often relieved of judicial formalities and expressly authorized not to follow the strict rules of law or the strict rules of evidence that bind courts. Panels are usually given this leeway, either as part of the underlying arbitration agreement between the parties or as part of the rules of the arbitration institution itself, for two reasons. First, historically, arbitration has been used not solely as a means of enforcing strict legal obligations, but as an honorable engagement intended to effectuate the general purpose of the parties’ agreement in a reasonable manner. Second, the members of the panel are occasionally not legal professionals. Rather, they may be lay people with knowledge or expertise in the relevant

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## Young Lawyers' Division Update

By Adrianne Marshack

With 2017 coming to a close, so is my tenure as the Chair of the Young Lawyers' Division. It is hard for me to believe, but next year I begin my eleventh year practicing law and I therefore "age out" of this Division, though I hardly qualified as a "young lawyer" to begin with. It has been a phenomenal experience to put together events for the Young Lawyers' Division and to get to know so many of my colleagues and esteemed members of the Orange County Bar. Here is what we have been up to in the past few months:

### June-November 2017 Events:

**Brown Bag Lunch**—On June 22, 2017, Justice William Bedsworth of the California Court of Appeal, Fourth District, Division Three hosted a fantastic event. The majority of the lunch attendees also attended oral argument in the morning. The panel, including Justices Bedsworth, Moore, and Ikola, stayed on the bench after oral argument was finished to answer questions. They asked all of the attendees to introduce themselves at the dais. Then Justice Bedsworth gave us a tour of the courthouse, including his chambers and the "Robing Room." It was a fantastic time.

**Member Mixer with the Orange County Bar Association's Corporate Counsel Section**—On July 20, 2017, approximately 70 attorneys from the Young Lawyers' Division and the OCBA Corporate Counsel section gathered for a sold-out event in a private room at AnQi for some delicious food, cocktails, and conversation. A wonderful time was had by all. Thank you to Aptus Court Reporting for helping sponsor the event, as well as all of the law firms who contributed to make this event possible.

**"Charting a Path to Judgeship" Panel**—On September 21, 2017, a tremendous panel of speakers, including Orange County Superior Court Assistant Presiding Judge Kirk Nakamura, Orange County Superior Court Judge Melissa McCormick, Dean Zipser of Umberg Zipser LLP (Orange County Bar Association Judiciary Committee member), and Kimberly Knill, Senior Appellate Court Attorney for the California Court of Appeal, Fourth District, Division Three (former Chair of the JNE Commission) gathered to discuss the process to become a California State Court judge, as well as things that even young lawyers should be thinking about early in their practice if becoming a judge is something they might

want to consider in the future. The discussion was lively and informative. Thank you to all of our panelists, as well as Justice David Thompson for making a special guest appearance.

**Ethics MCLE Presentation: "Lying, Stealing, and Other Bad Ideas in Civil Litigation" (November 1, 2017)**—Certified Appellate Specialist Benjamin Shatz gave an animated and amusing ethics MCLE presentation on conduct to avoid in civil practice, and the unbelievable things that have actually happened in civil litigation. Have you ever thought about bringing a taser to a deposition to try and intimidate opposing counsel? Well, apparently you would not be alone. (Hint: not a good idea.)

Thank you to everyone who has participated in these events!

♦ *Adrianne Marshack is a partner at Manatt, Phelps & Phillips LLP.*

## ABTL Raises \$40,350 for PLC

In June, ABTL-OC held its 18th Robert E. Palmer Wine Tasting Dinner, benefiting Orange County's Public Law Center. At our September dinner, ABTL-OC President Mark Finkelstein presented PLC's Executive Director Ken Babcock with—literally and figuratively—a big check, for an all-time high of \$40,350.



Thanks are owed to our Board members, our law firm contributors, ABTL-OC's sponsors, and the many individuals who planned, attended, and contributed to this event and to PLC.

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***-In-House Counsel Interview: Continued from page 1-***

firm, and shortly after that, I joined the United States Patent & Trademark Office as a patent examiner where I reviewed patent applications and determined whether or not patents could be granted. After that, I joined an intellectual property law firm in Washington, D.C., where I prosecuted and managing patent portfolios for startups to Fortune 10 companies. While I enjoyed the law firm atmosphere, I knew that I wanted to be more involved in the day-to-day development of a product.

My interest in moving in-house stemmed from my desire to be in a more business-oriented role, where I could shape the strategy decisions as well as be involved in the creation of a product. I ended up joining First American Financial Corporation as the company's first intellectual property counsel in late-2006. I was responsible for developing First American's intellectual property program at the time, and within three to four years, I helped monetize their patent portfolio to the point where it was generating more than \$20 million in revenue.

**Q: Describe a typical day as Deputy General Counsel for CoreLogic, Inc.**

A: I currently oversee half of the business units at CoreLogic, including those within the Property Intelligence Group. I also work closely with the attorneys in the employment, litigation, and intellectual property departments.

Although there is no typical day, I generally split my time between meetings with the business units and attorneys. I regularly speak with CoreLogic's business leaders to discuss issues that the business unit may be facing as well as coverage to ensure that the business needs are met. I also interface with attorneys monitoring CoreLogic's patents, trademarks, copyrights, and other intellectual property rights. Because CoreLogic engages in a high-volume of licensing deals, I usually meet with CoreLogic's licensing team on a bi-weekly basis to address our licensing strategy and contract management efforts. Finally, I serve on a number of committees at CoreLogic, where I'm asked to provide guidance on intellectual property and privacy issues for new products in the data and analytics space.

**Q: What do you enjoy most about your role as a Deputy General Counsel?**

A: I enjoy dealing with complex issues that have a large impact on the company, working with the business units on new products that could be the next "big thing," and getting insight into the direction of the business unit. I also enjoy the strategic nature of my job, which requires me to look through a business lens to evaluate the true impact to a business unit. From an intellectual property perspective, I enjoy ensuring that CoreLogic's assets are being protected and that our products actually capture the intellectual property we own. It's a way for me to be involved in product development—something that was missing during my time at the law firm.

**Q: What do you look for when you need to hire outside litigation counsel?**

A: For me, two of the most important factors when selecting outside counsel are cost and the level of specialization in the subject matter. I want outside counsel that is highly-skilled and experienced in the particular area at rates commensurate for the type and complexity of the case. It is important that we hire an attorney that has experience with the type of case and claims at issue and well as a track record of success in that particular area.

For certain litigation matters and other complex cases, we require outside counsel to participate in a request for proposal process. Outside counsel provide detail on their relevant experience, past successes with similar cases and claims, and an initial case strategy along with various cost estimates. Such detailed proposals help me evaluate the substantive differences in experience among outside counsel when selecting a firm for a specific matter.

**Q: What sets apart those outside counsel with whom you have been most impressed?**

A: It comes down to running cases efficiently and utilizing their subject matter expertise. The most impressive outside counsel are ones that are experts about the case and key issues, provide clear guidance on a regular basis, and understand the nuances of the overall strategy, whether it be motion practice, trial, or settlement. For me, it is very important that outside counsel have an efficient process and workflow. I prefer that my matters be staffed leanly by outside

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counsel, with usually two to four total attorneys that are actively involved and knowledgeable about the matter. The lead (or first chair) attorney should not “parachute” in at the end of a case or during trial; they should be heavily involved in strategy and key decisions early on in the matter.

**Q: Do you have any advice for outside counsel that you think isn’t heeded often enough?**

A: I find that most attorneys are not strong at marketing their prior experience, their firm’s capabilities, or their specialized expertise. This usually becomes readily apparent during the request for proposal process. Outside counsel rely on generic statements about their firm, department, or practice group being the “best.” Such statements are not helpful. Outside counsel should instead tell me about how their firm offers the best pricing, expertise, or has some other operational advantage.

It is also important to remember that when you pitch a client, the focus should be on your case strategy and analysis. You need to demonstrate how you will address critical issues in the case and identify the important considerations for the business. Clients always remember the outside counsel that outlines a potential strategy for a matter, even if the client chooses to go with a different outside counsel.

**Q: As someone who has spent many years in senior in-house positions, what advice would you give outside counsel, and particularly younger lawyers, about the best way to stand out with clients?**

A: The best way is to know the client’s business and the particular industry. The more vested you are in a client’s operations, and the more knowledgeable you are about the industry in which they operate, the greater insight you can provide to in-house counsel. Young attorneys also should strive to be subject matter experts on key issues. One way to do this is to garner recognition in the industry, whether by attending trade shows, writing articles on industry issues, or speaking at industry conferences. At the end of the day, clients want to hire someone that is well-respected and known within the industry.

♦ *Mr. Tabaddor was interviewed by Brian C. Berggren, a litigation associate with Rutan & Tucker, LLP in Costa Mesa, CA.*

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**-Extraordinary Writ: Continued from page 1-**

*Joaquin*, 96 Cal. App. 4th 1357, 1368

(2002). Writ petitions should therefore be filed as soon as possible after the challenged order.

Writ review is reserved for extraordinary circumstances that simply cannot wait for review from final judgment. *Omaha Indem. Co. v. Superior Court (Greinke)*, 209 Cal. App. 3d 1266, 1268 (1989). Writ relief will generally only be granted where there is no other opportunity for meaningful appellate review. Cal. Civ. Proc. Code §§ 1068, 1086, & 1103. The petitioner must also demonstrate it will suffer irreparable injury absent the writ (*i.e.*, harm or prejudice that cannot be corrected by reversal or modification on appeal from final judgment). *L.A. Gay & Lesbian Ctr. v. Superior Court (Bomersheim)*, 194 Cal. App. 4th 288, 330 (2011).

It is worth considering how your writ petition will be read, processed, and passed upon by the Court of Appeal. Generally, a single research attorney receives and initially reviews all newly-filed petitions. That attorney is the first to assess whether the petition is technically sufficient and has apparent merit and whether the circumstances are truly exigent. If so, the Court of Appeal may issue a temporary immediate stay of the challenged order pending consideration of the petition. *Kernes v. Superior Court (People)*, 77 Cal. App. 4th 525, 531 (2000). Even if the petition is ultimately denied, the imposition of such a stay may itself be a victory, depending on the procedural posture of the case. Thereafter, the court will circulate all recently-filed petitions for review. Remember your petition will be considered alongside at least several others, with each petition claiming exigent circumstances and requesting emergency intervention by the Court of Appeal, in parallel with the court’s consideration of appeals filed in the normal course. Many petitions are summarily denied at this stage, and just a few are selected for further consideration. It is therefore crucial that the merit of your petition be immediately apparent, and that your petition be devoid of diatribes and *ad hominem* comments regarding either the trial court or opposing counsel.

In light of the above, keep the following questions in mind when considering whether a writ petition is

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appropriate:

- **How are the optics?**: A common and legitimate concern is that a writ petition—successful or not—will harden your trial judge against you and your client. Also common is the concern that a denial of your petition may strengthen the resolve of opposing counsel, if they had any residual doubt as to their position. However, on close calls or as to issues of first impression, the trial court may indeed welcome interlocutory review and “may indicate [to the Court of Appeal] in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation.” Cal. Civ. Proc. Code § 166.1. Furthermore, a writ petition demonstrates to your opponent that you and your client are willing to take extraordinary steps in the face of adverse trial court rulings.

- **Does the assignment of error involve the (mis)application of clear, mechanical rules?**: Writ petitions may theoretically address any abuse of discretion on the trial court’s part. *State Farm Mut. Auto. Ins. Co. v. Superior Court (Corrick)*, 47 Cal. 2d 428, 432 (1956). However, writ petitions will not lie to “control the exercise of judicial discretion.” *San Diego Gas & Elec. Co. v. Superior Court (Harris)* 146 Cal. App. 4th 1545, 1549 (2007). The petitioner must show that the facts *necessarily* dictate a different decision, or that the trial court failed to perform a *nondiscretionary* duty. *Id.* With the exception of true matters of first impression, the petitioner bears the burden of showing that a different decision is required based on the application of undisputed facts to clearly established legal principles.

- **Is compliance itself the irreparable harm?**: Mere assignments of error are generally an insufficient basis for writ review. Rather, the petitioner must *make* the case that compliance with the order will itself cause harm that cannot be rectified via later reversal on appeal. Classic situations include the forced production of privileged materials, *City of Petaluma v. Superior Court (Waters)*, 248 Cal. App. 4th 1023, 1030–31 (2016), rulings on motions to disqualify counsel, *Apple Computer, Inc. v. Superior Court (Cagney)*, 126 Cal. App. 4th 1253, 1263–64 (2005), rulings that effectively deprive a party of the ability to plead or defend the case, *Angie*

*M. v. Superior Court (Hiemstra)*, 37 Cal. App. 4th 1217, 1223 (1995), and rulings that will vastly multiply the procedural burden or costs of further proceedings *In re Ford Motor Warranty Cases*, 11 Cal. App. 5th 626 (2017).

- **Will you likely appeal the final judgment for the same or different reasons?**: The costs associated with drafting and filing writ petitions are considerable. With minor exception, the filing fee for writ petitions in civil cases is \$775. Cal. Gov. Code §§ 68926 & 68926.1. The time and opportunity cost associated with drafting the petition and assembling the record, which will necessarily divert your attention from ongoing proceedings before the trial court, can also be difficult to justify. However, if the stakes are such that you would likely appeal from the underlying judgment anyway, the writ petition can be justified as preemptive work on the appeal. Even if the petition is unsuccessful, the research and drafting done can give you a head start on appellate briefing, and permit you to intelligently consider the potential for success on appeal from final judgment.

- **Have you satisfied all procedural and formatting rules?**: The requirements attendant to proper petitions for writ relief are spread across the Code of Civil Procedure, the California Rules of Court, and the *Local* Rules for each District Court of Appeal. All present their own pitfalls, which may limit or prohibit the granting of the relief sought by the petition. A prime example is the Fourth District Court of Appeal’s Local Rule 1, which states that if “the respondent or any real party in interest is not served personally or by an expeditious method consented to in advance by the party served, the court will not act on the request for five days, except to deny it summarily, absent a showing of good cause.” The Fourth District Court of Appeal will also not impose an immediate stay or grant any other immediate relief unless the writ is served *in* accordance with Local Rule 1. Intuition alone is insufficient: for even the seasoned practitioner, it is worth reviewing all applicable rules before and during the drafting of the writ. Depending on the gravity of the violation, the Court of Appeal may summarily deny the petition for procedural noncompliance: though the Court of Appeal’s clerks are gracious in answering questions, your first notice of a problem may be the Court of Appeal’s order summarily denying your petition.

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***-Extraordinary Writ: Continued from page 7-***

An extraordinary writ petition is a challenge, but not an insurmountable one. When used in appropriate circumstances and in accordance with the rules, the extraordinary writ is a key part of the litigator's armamentarium.

♦ *Jason Moberly Caruso is an associate in Newmeyer & Dillion's Newport Beach office, where his practice includes appellate briefing, argument, and writ practice, as well as business and construction litigation.*

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***-President's Message: Continued from page 2-***

program. So, if you are so inclined, please consider making a donation to these very worthy causes when you join us at the program.

And, speaking of donations, in my summer message I discussed this group's generosity in connection with our Public Law Center fundraiser. Now that the receipts are in, I can proudly report that we have set a new, all-time fundraising record! We collectively raised over \$40,000 for PLC, which will provide more than \$320,000 of legal services for underprivileged members of our community.

As I reflect on this year, one of the highlights for me was our members-only judicial mixer in July. We enjoyed great food, great wine, and craft beers. The turnout surpassed all expectations and reminded me—yet again—what an amazing legal community we have in Orange County and how fortunate we are to be able to practice here. And one big reason for that is our awesome bench. I continue to be so impressed, and grateful, that our judiciary consistently supports ABTL, attends our functions, and truly helps us fulfill our mission of promoting and enhancing communications between the bar and the federal and state benches.

In addition to our judiciary, I would be remiss if I didn't thank the rest of the Board, and specifically the other officers for their support—Dan Sasse, Karla Kraft, and Tom McConville. Also, thanks to Will O'Neill (Program Chair), Todd Friedland (Membership Chair), Tom Vincent and John Holcomb (Annual Seminar Co-Chairs), Justin Owens (ABTL Report Editor), Matt Sonne (Sponsorship Chair), Todd Lundell (Social Media Chair), and Adrienne Marshack (Young Lawyers' Division

Chair) for all of their work this year. And finally, last but not least, a huge thanks goes to our Executive Director Linda Sampson, who works tirelessly for this organization.

I hope to see all of you at the final program in November, and I wish you all a safe, and happy, holiday season and a fantastic New Year.

♦ *Mark Finkelstein is a partner at Jones Day.*

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***-Briggs v. Brown: Continued from page 3-***

"Proposition 66 includes a series of findings and declarations to the effect that California's death penalty system is inefficient, wasteful, and subject to protracted delay, denying murder victims and their families justice and due process." *Id.* at 823. The measure enacts a series of statutory reforms, including provisions to expedite review in capital appeals and habeas corpus proceedings. Review of death penalty cases is either by direct review (appeal) or collateral review (petition for writ of habeas corpus). Responsibility for direct review remains with the Supreme Court. But Proposition 66 shifts responsibility for collateral review to the superior and appellate courts.

Proposition 66 amends Penal Code section 190.6 to read, "*Within five years* of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts *shall* complete the state appeal *and the initial state habeas corpus review* in capital cases." Cal. Penal Code § 190.6, subd. (d) (emphasis added). It also provides that failure of a court to comply with the five-year limit "without extraordinary and compelling reasons justifying the delay" authorizes a *party or victim* to seek relief by petition for writ of mandate, which petition shall be acted on within 60 days. *Id.*, subd. (e). Curiously, there is no tribunal with authority to issue a writ of mandate to the Supreme Court. Still, a writ of mandate may be issued by any court *to any inferior tribunal*. *Briggs*, 3 Cal. 5th at 856.

"The initiative measure extensively revamps the procedures governing habeas corpus petitions in capital cases. Under current practice, habeas corpus proceedings are initiated in [the California Supreme Court], which appoints counsel and provides for their compensation. Under the initiative measure, howev-

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er, “[a] petition filed in any court other than the court which imposed the sentence *should be promptly transferred to that court* . . . . A petition filed in or transferred to the court which imposed the sentence *shall be assigned to the original trial judge* unless that judge is unavailable or there is other good cause to assign the case to a different judge.” *Id.* at 824 (emphasis added) (citing Cal. Penal Code § 1509, subd. (a)). As for habeas corpus proceedings currently pending in the Supreme Court, “the court *may* transfer the petition to the court which imposed the sentence.” Cal. Penal Code § 1509, subd. (g) (emphasis added).

Once the superior court decides a habeas corpus petition, the court must issue a statement of decision. *Id.* § 1509, subd. (f). Under preexisting law there was no right to appeal from a superior court’s *denial* of habeas corpus relief. (While death penalty habeas corpus petitions were previously required to be filed in the Supreme Court, the trial court had jurisdiction to hear habeas corpus petitions in other cases.) Instead the petitioner could obtain review by filing a new petition in a higher court. *In re Reed*, 33 Cal. 3d 914, 918, n.2 (1983). Also under preexisting law, the People had a statutory right to appeal a *grant* of relief in a capital case directly to the Supreme Court under Penal Code section 1506. *Briggs*, 3 Cal. 5th at 825.

Proposition 66 alters these procedures by permitting either party to appeal from a trial court’s decision on an initial habeas corpus petition to the court of appeal and by specifying that a successive petition shall not be used as a means of reviewing a denial of habeas relief. Cal. Penal Code § 1509.1, subd. (a). Further, capital habeas corpus proceedings “shall be conducted as expeditiously as possible,” with superior courts required to resolve the initial petition *within one year of filing* and in no instance longer than two years.<sup>2</sup> *Id.*, subd. (f) (emphasis added).

The Judicial Council is tasked with adopting initial rules and standards of administration designed to expedite the processing of death penalty appeals and state habeas corpus review. *Id.* § 190.6, subd. (d). This work remains to be done. Given the uncertainty of how these rules and standards will look, Justice Cuéllar (joined by our very own Justice Raymond Ikola sitting on assignment in the Supreme Court) remarked in his concurring and dissenting opinion: “But any implication that the Judicial Council must also make rules aimed vaguely at accelerating the

process, with no hint as to what such rules might be, brings to mind the guidance a European monarch is envisioned as offering to John Adams—stepping into the shoes of George Washington as our second president—in the Musical ‘Hamilton’: ‘Good luck!’”

*Briggs*, 3 Cal. 5th at 890 (Cuéllar, J., concurring and dissenting) (citing *Miranda*, *Hamilton: An American Musical*, act II, scene 10).

The Judicial Council’s yet-to-be-performed colossal task is not the only obstacle. Unfortunately, Proposition 66 did not include funding measures, and the Legislature has yet to address the subject. As noted by the court, “The Legislature must provide funding sufficient for the superior courts to meet their *greatly expanded responsibilities* under Proposition 66, and for this court and the courts of appeal to expedite review in capital cases without neglecting other matters before them.” *Id.* at 856 (emphasis added). As such, the court also commented it remains to be seen how effective the procedures will be in expediting the capital post-trial review process within the required time limits. *Id.* at 860. “Much depends on the funding made available by the Legislature. *What cannot be permitted is the material impairment of judicial functions* by any statutes. The superior courts must be allowed to exercise their ‘ultimate control or discretion over the order in which cases pending before [them] should be considered’ . . . . The courts of appeal may not be thwarted in the exercise of their original jurisdiction to review superior court judgments in *all* cases brought before them.” *Id.* at 861 (emphasis added) (citation omitted).

Still, “grants of priority to certain matters, and directives to conduct proceedings as speedily as possible, are a common feature of procedural statutes.” *Id.* at 848. So what makes Proposition 66 any different?

There are approximately 400 death penalty habeas corpus petitions pending in the California Supreme Court, which is strong motivation to transfer pending petitions to superior courts.<sup>3</sup> From Orange County alone, there are currently 65 death penalty convictions pending appeal in the Supreme Court. While not all current death penalty inmates whose appeals originated in Orange County have accompanying habeas corpus petitions pending, many do. If the Supreme Court decides to transfer pending habeas corpus petitions to the court where death sentence was imposed, the Orange County Superior Court risks being overwhelmed with death penalty petitions, conditions ripe to threaten access to justice for civil litigants.

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Capital habeas corpus petitions typically span hundreds of pages and raise dozens of issues, and supporting documents and transcripts can add thousands of pages to a court's review. The superior court will need more judicial officers to resolve the petitions, and few judges have experience in death penalty cases. Many judges who imposed the original death sentences being appealed are no longer on the bench.<sup>4</sup> Further, having never before been tasked with adjudicating capital habeas corpus petitions, the superior court may lack sufficient legal research resources and expertise to assist the judges in this area. As pointed out in Justice Liu's concurring opinion, "Although transfer of capital habeas corpus petitions to the superior court may expedite the adjudication of those petitions, superior courts asked to help reduce this court's substantial backlog of habeas corpus cases will likely require additional resources to address petitions that are often as lengthy and time consuming as direct appeals." *Briggs*, 3 Cal. 5th at 868 (Liu, J., concurring).

Once the superior court rules on a habeas corpus petition, the decision can be appealed to the court of appeal. Under current law, courts of appeal *never* handle death penalty cases, either on appeal or collateral attack. Proposition 66 represents a "significant departure from the existing procedure." *Id.* at 836. Hence, both the superior and appellate courts will require shifting or hiring of additional research attorneys to ensure death penalty cases are handled with the level of expertise they deserve. Without additional funding, there is no option but to take resources currently devoted to adjudicating civil cases and divert them to adjudicating capital habeas corpus petitions.

The impact on the courts may well be overwhelming. It will start at the superior court and eventually reach the courts of appeal. Our local court of appeal—Fourth District, Division Three—typically handles more civil appeals than criminal appeals, because it has more civil filings. For example, in 2016, there were 554 civil appeals filed but only 331 criminal appeals filed. Civil appeals thus represented almost 63% of filed cases. Once an appeal from the grant or denial of a capital habeas corpus petition is filed, it will go to the top of the stack above all other matters except juvenile dependency cases. Civil cases will lose their place in line.

To place the additional burden in perspective, the Supreme Court currently takes around 15 years to review a death penalty case—and the Supreme Court has a death penalty unit of research attorneys who work exclusively on death penalty cases! The superior and appellate courts are now given only 1/3 of that time—5 years—to complete a capital habeas corpus petition. The only way to comply with the mandate, even if rendered "merely directive," is to prioritize criminal cases to the detriment of civil cases. Court resources are limited. If the California Legislature does not allocate funds to speed up the death penalty review process, there will be less money to pay for timely disposing of other pending cases. The only option is for non-death penalty litigants to wait. And that may jeopardize the fundamental principle of judicial access for a broad swath of litigants.

The law as it currently exists vests with the Supreme Court the exclusive authority to handle any type of death penalty matter—appeals and collateral attacks. The Supreme Court, however, grants discretionary review in only about 100 cases per year (in addition to its death penalty case load). By contrast, *anyone* can come to the superior court seeking justice, and *anyone* can appeal an adverse ruling to the court of appeal. Therefore, for most litigants, the court of appeal is the court of last resort. It is imperative the superior and appellate courts have sufficient resources to handle their respective caseloads. To properly implement Proposition 66, trial and appellate courts will need additional judges, research attorneys, and support staff and the means to train them.

The biggest challenge is making sure no one is shut out of court. Judges are public servants, and the court system owes it to the people it serves to judiciously adjudicate cases in a timely manner. California jurisprudence is best served when matters are fully litigated by competent counsel. Delays caused by unfunded mandates threaten to jeopardize these important principles.

It remains to be seen whether the Legislature will allocate additional funding for the superior and appellate courts (or shift resources from the Supreme Court), whether the Judicial Council will be able to implement workable rules accelerating the death penalty process, whether the Supreme Court will exercise its discretion to transfer pending capital habeas corpus petitions to superior courts, and whether the superior and appellate court civil calendars will be

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adversely affected. Current conditions, however, point to a potential crisis on the horizon.

<sup>1</sup> A petition for rehearing was denied and the opinion became final on October 25, 2017.

<sup>2</sup> The court in *Briggs* upheld Proposition 66, finding the five-year deadline was *not* mandatory. *Briggs*, 3 Cal.5th at 855–58. Noting the law lacks an effective enforcement mechanism, the court concluded the five-year review limit was directive only. *Id.* at 857–58. The court reached the same conclusion regarding the time limits for superior court rulings on initial habeas corpus petitions. *Id.* at 859. The court stated the five-year review limit provision in Penal Code section 190.6, subdivision (d) is “properly construed as an exhortation to the parties and the courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice.” *Id.* at 859.

<sup>3</sup> For the fiscal year 2014-2015 (the most recent fiscal year for which data was available at press time), the Supreme Court received 47 habeas corpus petitions and disposed of 17 such petitions. *2016 Court Statistics Report, Statewide Cases Trends*, Judicial Council of California. At this rate, it appears the court will fall more and more behind each year.

<sup>4</sup> The oldest Orange County case is an appeal by William Payton who was sentenced to death in March 1982 by Judge Donald McCartin, described as “Orange County’s highest-profile, toughest and most quotable judge” who sentenced more killers—nine—to death than any other jurist. Larry Welborn, *O.C.’s ‘hanging judge’ dies at 87*, Orange County Register, September 18, 2012. His son, Michael McCartin is now an Orange County judge.

♦ **Kimberly A. Knill (“Kate”)** is a Judicial Attorney for the California Court of Appeal, Fourth District, Division Three, a former Legal Research Attorney for the Orange County Superior Court, and past Chair of the Commission on Judicial Nominees Evaluation (JNE) of the State Bar of California. The views expressed herein are those of the author. They do not necessarily represent the views of the courts or the State Bar of California.

field that forms the backdrop to the dispute. For example, insurance contract arbitration provisions may require that all arbitrators be executive officers or former executive officers of insurance companies, or insurance brokers, not under the control of either party.

While the panel is usually relieved from following the formal judicial rules of evidence, the panel still must provide the parties with an appropriate set of evidentiary and procedural rules that will govern the arbitration proceeding. In arbitrations involving the discovery of electronic information, determining the rules related to digital evidence can be overwhelming to an arbitration panel due to the complexity of information systems and the pervasiveness of digital evidence. However, if used properly, arbitration can be a significantly more efficient tool for streamlining e-discovery than litigation.

An arbitration panel must be able to adequately define the scope of the electronic disclosure and apply an appropriate procedural framework for the controversy considering the parties’ needs and available resources. The problem is, of course, that while the panel is likely to contain experts in the relevant business field—e.g., insurance, manufacturing, or finance—the arbitration panel may not include anyone with any detailed knowledge of the information systems where documentary evidence key to resolving the dispute may be located. In the absence of such information system expertise, the arbitration panel members will be challenged simply to accurately and reasonably define the scope of discovery, let alone properly apply the principle of proportionality to electronic disclosure or set rules related to meta-data. An arbitration panel lacking an electronic discovery expert is destined for lengthier hearings, pointless discovery disputes, and the waste of scarce financial resources.

A panel containing, or consulting with, an electronic discovery expert possessing both legal and technological expertise will be able to save the parties time and money by cutting to the heart of technical e-discovery issues. Accordingly, parties who agree to arbitrate their dispute should consider making arrangements for the inclusion of an e-discovery expert as part of the panel, or for consultation by the

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panel. Even if the underlying dispute is not particularly technologically complex, the e-discovery issues that may arise in connection with the dispute may require technical expertise to be resolved efficiently.

Consider the following example. During discovery in a breach of contract arbitration, the responding party produces what it has deemed to be all the responsive files from the repositories in its possession. The production is smaller than the requesting party anticipated and some emails that the requesting party knows existed are not in the production. The requesting party demands to inspect all repositories of potentially relevant electronically stored information (ESI) the responding party has, thinking that the responding party may have deleted ESI. The responding party argues that no relevant information was deleted, all of the responsive files were produced and that an inspection would expose privileged and confidential information. What may have started as a simple breach of contract case has now turned into a full-blown e-discovery battle, and the business experts on the arbitration panel do not have the technical expertise to manage the situation.

These kinds of scenarios occur frequently, as some lawyers go out of their way to bog down cases in discovery. Parties should consider selecting an arbitrator who is familiar with global legal e-discovery issues, is well-versed in technology systems, and understands the interplay of privacy concerns with electronic disclosure for any case in which e-discovery can potentially blow up.

While some law firms have specialized e-discovery counsel with experience in these matters, many firms lack the technical know-how needed to determine the optimal procedures for preserving, collecting, and producing electronically stored information. This knowledge deficit can substantially increase the cost and time to resolve discovery issues. Using a technically skilled arbitrator with knowledge of the relevant systems can overcome these gaps in experience and ability and make discovery more cost-effective for all parties. Arbitrators with technical expertise are a more efficient alternative to expert consultants hired by the parties for technical issues, as the neutrality and focus of arbitrators allow them to handle technical disputes in way that guides the parties toward the resolution of the matter as a whole, rather than serving the interests of either side. In contrast to the substantive claims, the technical

elements of e-discovery are not grounded in law, advocacy and persuasion, but rather in the ones and zeroes of the relevant computer systems. By using the arbitrator to analyze this technical information, the parties avoid having to engage in lengthy and costly rounds of briefings and submission of expert opinions.

An e-discovery arbitrator's technical expertise can be used in a variety of ways that can save the parties time and money, including properly balancing the cost of discovery against its prospective benefits; assisting the parties in drafting an e-discovery protocol; assisting the parties in selecting search terms; guiding the parties through use of technology assisted review; and determining whether spoliation has taken place. Perhaps most importantly, an arbitration panel containing an electronic discovery expert will be able to work with the parties early in the proceedings to fashion a discovery plan tailored to the parties' information systems:

1. Defines the scope of discovery;
2. Defines the permissible set of accessible electronic data;
3. Defines the sources to be searched in the production;
4. Defines the manner in which parties will preserve electronically stored information;
5. Defines the format of data production;
6. Defines the procedures and protocols for electronic disclosure (e.g., the role of meta-data);
7. Addresses privilege issues (e.g., the scope of any claw-back provision governing inadvertently produced privileged documents); and
8. Defines party obligations and expectations.

It is imperative that an arbitration panel address such issues in detail early in an arbitration proceeding, preferably at the very first organizational meeting between the panel and the parties. Only by clearly defining the obligations of the parties at the outset can costs be kept in check and the arbitration process permitted to proceed quickly and smoothly. If these issues are ignored at this stage of arbitration, these issues will undoubtedly have to be revisited by the tribunal later in the dispute, after the parties already have begun incurring substantial costs due to unexpected e-discovery issues.

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## *-Optimizing E-Discovery: Continued from page 12-*

Ideally this initial meeting should result in a written document that governs both parties' e-discovery obligations. This can take the form of an e-discovery protocol, search terms, scope of discovery or whatever document is appropriate under the circumstances. The key is that it is written and tailored to the facts of the case and technical systems of the parties. The result should be memorialized for at least two key reasons: (1) it allows the parties to have a written record of their agreed-to obligations; and (2) it provides the parties with a roadmap that helps ensure they continue to comply with their agreed-to obligations. Furthermore, forcing the parties to condense into writing the parameters of the discovery process can help focus the parties and counsel on the precise information and systems they seek to discover and avoid overbroad requests. Setting a tone of reasoned discourse and not tolerating gamesmanship in discovery early on can go a long way towards an effective arbitration.

One of the keys, and at times one of the greatest challenges, of a successful e-discovery arbitration, is cooperation between the parties. While arbitration proceedings are generally adversarial in nature, it is critical attorneys understand that cooperation in discovery is consistent with zealous advocacy. Even if the parties have an experienced technologist as their e-discovery arbitrator, the parties are unlikely to realize the benefits without cooperation between the parties and their counsel. To build a spirit of cooperation, it is important that the parties have confidence that the e-discovery arbitrator is both technically proficient and neutral, and that the arbitrator's presence promotes effective communication and voluntary decision-making between the parties. With a skilled arbitrator both sides trust, the parties will be more likely to voluntarily limit discovery to the elements most likely to maximize benefits and minimize costs, once the arbitrator clarifies and communicates the scope and practicability of the e-discovery elements of the case.

The most effective and useful e-discovery arbitration requires the parties to gather the information necessary for an arbitrator to successfully work with the parties to reach useful resolutions. Examples of this information include: data maps; business use cases for data that is collected; and explanations for why each item of discovery is requested. Additionally, it can be useful to have the parties' IT resources

available throughout the course of the arbitration process in the event technical questions arise. One of the advantages of arbitrating is that the flexibility of the discovery rules and a shorter time frame make it easier to coordinate the necessary resources to resolve technical issues.

Sometimes, however, parties will abuse or misuse the discovery process. E-discovery arbitrators, the parties, and counsel should be mindful of the full panoply of penalties available to enforce good faith compliance with e-discovery procedures. The actions arbitrators take should accord with a party's actions, and whether they amount to negligence, gross negligence, or withholding/bad faith. In alignment with the gamut of actions, there are a range of penalties available to an arbitration panel, including (in increasing order of severity):

1. Granting a party's request for further discovery or motion to compel production;
2. Granting a party's request for shifting the cost of discovery or the cost of making the motion to compel;
3. Imposing fines in an amount appropriate to the violating party's behavior and the impact of the behavior upon the arbitration and its search for the true facts;
4. Granting a party's motion to preclude the testimony of a witness or barring testimony regarding a particular issue;
5. Drawing an adverse evidentiary inference, or
6. Dismissal of the claims or defenses. (see JAMS Comprehensive Arbitration Rules and Procedures, Rule 29; AAA Commercial Arbitration Rules and Mediation Procedures, Rule R-58).

While e-discovery arbitration can take many different forms depending on the scale and complexity of the dispute, there are several key takeaways necessary for a successful arbitration, including: (1) retaining an experienced and technically knowledgeable neutral expert and/or arbitrator; (2) identifying the e-discovery interests at stake and encouraging a meaningful dialogue that recognizes and validates those interests; (3) working with the arbitrator to draft a written e-discovery protocol or plan; (4) cooperating with opposing parties and counsel throughout the e-discovery process; and (5) avoiding gamesmanship, abuse or misuse of the dis-

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covery process. Arbitrations that accomplish these goals are likely to save the parties substantial time and money.

♦ *Daniel Garrie is an arbitrator, forensic neutral, and technical special master at JAMS. He is executive managing partner of Law & Forensics LLC, and head of its computer forensics and cybersecurity practice groups. He can be reached at [dgarrie@jamsadr.com](mailto:dgarrie@jamsadr.com).*

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## **ABTL Building Stability in Santa Ana** **By Jerry Yang**

On July 26, 2017, the ABTL successfully sponsored a Habitat for Humanity Build Day at a site in Santa Ana, California. Twelve attorneys, summer associates, and staff spent the day working with the Habitat teams on a compound of six homes. Volunteers focused on various tasks of foundation construction. Some teams learned to operate saws to cut and prepare wood and break down other materials to be used for the roofing, siding, and framework of the homes. Others used power tools and other equipment to build patio ceilings and indoor framework. Teams also set up the bathrooms by preparing bath and shower units for installation. According to the superintendent, Habitat for Humanity had been planning to build the homes on the current site for over 3 years.



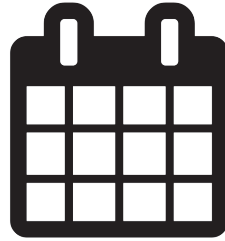
One of Habitat's new tenants, Jacob, stated, "You inspire me. Words cannot do justice to how thankful I am towards the people who've helped this project become a reality. You are building a future . . . my family's future. When you look at the bare foundation of this house, it's easy to see it as a huge slab of concrete and steel rods. But in fact, what you all have built is so much greater than that. You're building a home that will safeguard a family. You're creating stability." All-in-all a wonderful day and Habitat looks forward to the ABTL coming back next year.

Attorneys and staff from Crowell & Moring pictured above: Sahar Naseery, Christy Markos, Stephanie Phan, Youty Sam, Hollie Dae Sison, Tracy Wu, Jerry Yang, Tiffany Chang, Radhika Aggarwal, Deanna Thoi, Cathleen Green, and Deborah Arbabi.

♦ *Jerry Yang is an associate at Crowell & Moring*



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**March 21, 2018**

*Dinner Program*

The Westin South Coast Plaza



**May 23, 2018**

*Dinner Program*

The Westin South Coast Plaza



**September 12, 2018**

*Dinner Program*

The Westin South Coast Plaza



**October 10-14, 2018**

*ABTL 45th Annual Seminar*

Wailea Beach Resort

Maui, Hawaii



**November 7, 2018**

*Dinner Program*

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