Judicial Council of California . Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on April 29, 2011

Title
Family and Juvenile Rules: Live Testimony at Hearings and Declarations

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 5.118;
Adopt Cal. Rules of Court, rule 5.119

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Kimberley J. Nystrom-Geist, Cochair
Hon. Dean Stout, Cochair

Elkins Family Law Implementation Task Force
Hon. Laurie Zelon, Chair

Agenda Item Type
Action Required

Effective Date
July 1, 2011

Date of Report
March 1, 2011

Contact
Deborah J. Chase, 415-865-7598, deborah.chase@jud.ca.gov

Executive Summary

Assembly Bill 939 (Assem. Com. on Judiciary; Stats. 2010, ch. 352) added section 217 to the Family Code, which requires that at hearings on requests for orders brought under the Family Code, courts must receive competent live testimony that is relevant and within the scope of the hearing unless the parties have stipulated otherwise, or a finding of good cause is made to refuse to receive the live testimony. Family Code section 217 requires the Judicial Council to adopt a statewide rule of court setting out factors a court must consider in making a finding of good cause to refuse to receive live testimony at hearings on requests for orders filed under the Family Code. Proposed rule 5.119 sets out factors that courts must consider in deciding to refuse live testimony. In addition to new rule 5.119, the proposal would amend rule 5.118(f) to comply with the new legislation.

Recommendation

The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force recommend that the Judicial Council, effective July 1, 2011:

1. Adopt rule 5.119 of the California Rules of Court to set forth the factors a court must consider in making a finding of good cause to refuse live testimony at hearings and on requests for orders filed under the Family Code; and

2. Amend rule 5.118(f) to delete provisions that are inconsistent with Family Code section 217 and to set parameters on the length and format of declarations supporting and responding to requests for orders in family law.

The text of the proposed new and amended rule is attached at pages 8–10.

Previous Council Action

The Judicial Council supported Assembly Bill 939. On April 23, 2010, the Council accepted the Elkins Family Law Task Force *Final Report and Recommendations*, which recommended the changes now incorporated in amended rule 5.118(f).[1] The Judicial Council adopted rule 5.118 (then rule 1225), addressing requests for court orders in family law cases, effective January 1, 1970. Since then, the rule has been amended several times and most relevant here, amended effective January 1, 2004, to add subsection (f).

Rationale for Recommendation

Rule 5.119

In September 2010, the Legislature passed Assembly Bill 939 (Assem. Com. on Judiciary; Stats. 2010, ch. 352), which added Family Code section 217.[2] Section 217 requires the court to receive live testimony from the parties and other witnesses that is competent, relevant, admissible, and within the scope of the hearing. It also requires that notice in the form of a witness list or offer of proof be given by the parties when there is a request for testimony from nonparty witnesses.

Section 217 is based on recommendations made by the Judicial Council's Elkins Family Law Task Force, which was established in response to the Supreme Court's decision in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337. In response to the need to give litigants the opportunity to testify at hearings on requests for substantive relief and to provide judicial officers with the information they need to make an order, the Elkins Family Law Task Force recommended that live testimony be allowed in any hearing brought under the Family Code, absent a stipulation of the parties or a finding of good cause not to allow it. (See *Final Report and Recommendations*, Recommendation 1B.)

[1] http://www.courtinfo.ca.gov/jc/tflists/elkins-work.htm
[2] The text of Family Code Section 217 is appended to this report at Attachment A.

It appears that this will not be a significant change in many jurisdictions. However, there are a number of counties where live testimony is rarely allowed and attorney practice will potentially be significantly changed by this statute.

Family Code section 217 further requires that the Judicial Council adopt a statewide rule of court setting out factors a court must consider in making a finding of good cause to refuse to receive live testimony. While the bill requires that such a rule be adopted by January 1, 2012, the legislation became effective on January 1, 2011. To provide statewide standards and assist courts and litigants, the rules are proposed to be effective July 1, 2011.

Proposed rule 5.119(a) states that absent a stipulation of the parties or a finding of good cause, the court must receive competent and admissible live testimony at hearings on requests for orders in family law matters. Subsection (b) sets out factors that courts must consider when deciding to refuse to receive live testimony. Neither the statute nor the proposed rule eliminates judicial discretion to refuse to receive live testimony. Proposed rule 5.119 simply sets out factors that, in addition to the rules of evidence, the court must consider when making that decision. Subsection (c) of the rule clarifies that the court's findings must be in writing or on the record, but that the court need address only those factors on which the decision was based. Subsection (d) sets out requirements applicable when a request is made to take live testimony from minors. Proposed rule 5.119(e) sets out the mechanism by which notice must be given when the request to take testimony from nonparty witnesses is made by the parties. Subsection (f) provides for a continuance when additional time is required to adequately prepare for questioning proposed witnesses and for temporary orders to be made in the interim. Subsection (g) highlights the authority of judicial officers to question witnesses.

Rule 5.118(f)

Existing rule 5.118(f) states that the court may make decisions on family law requests for orders solely on the basis of the declarations and any memoranda of points and authorities. Because this is inconsistent with Family Code 217, the section needs to be amended.

Proposed amended rule 5.118(f) removes the blanket authority to make decisions on family law requests for orders on the basis of declarations alone. Further, the amended rule implements a recommendation of the Elkins Family Law Task Force regarding the need to set parameters on the length and format of declarations supporting and responding to requests for orders in family law. (See *Final Report and Recommendations*, Recommendation 1D7.)

The *Final Report and Recommendations* addresses concerns raised about family law decisions made solely on the basis of declarations without the admission of live testimony. Based on a survey of attorneys and input from the public, the Elkins Family Law Task Force concluded that while declarations can provide important information to the court and to the opposing side, they often cover issues that are not material to the issues before the court, present long repetitive narratives, are inflammatory, and contain hearsay or other inadmissible matter. Declarations can become extremely lengthy and require the opposing party to respond with written objections to the inadmissible matter. The paperwork on a single motion can become massive and significantly lengthen the time an attorney must spend on preparation of and responses to declarations and the

time judges must spend reviewing the paperwork and ruling on numerous written objections. Consequently, the task force recommended that there be a limit on the length of declarations.

Under Family Code section 217, declarations will no longer be the sole source of information available to judges to make decisions on requests for orders in family law. Given the requirements with respect to live testimony under section 217, the Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force determined that implementation of recommendation 1D7 of the *Final Report and Recommendations* to set boundaries on the length of declarations was a critical component of this proposal.

Based on input from judges, attorneys, and court staff, the committee and the task force determined that the facts necessary to provide adequate notice to the opposing party of the contentions of the writing party could easily be stated in a 10 page declaration. (See proposed rule 5.118(f)(1).) In those cases in which a party believes the complexity or number of the issues requires a declaration of more than 10 pages, that party may seek the court's permission to submit a longer declaration. (*Ibid.*) Proposed rule 5.118(f)(2) and (3) clarify that the format of declarations supporting requests for orders must comply with Cal. Rules of Court, rule 2.100 et seq. and sets out requirements for making objections to declarations.

Comments, Alternatives Considered, and Policy Implications

Comments

The invitation to comment on the proposal was circulated from December 13, 2010, through January 24, 2011, to the standard mailing list for family and juvenile law proposals as well as to the regular rules and forms mailing list. These distribution lists include judges, court administrators, attorneys, mediators, family law facilitators, self-help center attorneys, and other family law professionals and attorney organizations.

During the formal comment period, the committee and task force received 26 written comments. Of these, 3 agreed with both rule 5.119 and amended rule 5.118(f) and 11 agreed with both rules if modified. Five commentators took no formal position, but suggested modifications of the rules; 2 took no position. Five disagreed with the proposal. As discussed further below, all those who disagreed were attorneys who objected to the limitation on the length of the declarations on amended rule 5.118(f). A chart setting out the comments received and the responses is attached at pages 11–123.

Rule 5.118(f)

The majority of comments from attorneys, including attorney organizations such as the Family Law Executive Committee of the State Bar, the Association of Certified Family Law Specialists, and the American Academy of Matrimonial Lawyers, disagreed with the limitation on the length of declarations set forth in rule 5.118(f). The commentators cited concerns that the limitations would violate due process by restricting the amount of information they could provide to judges, potentially increase attorneys' fees, and increase workload for the court.

The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force understand that Family Code section 217 may cause a significant change in the way family law is practiced by some attorneys. The role of declarations is changing in many courts where taking testimony from the parties at hearings is a new process. Limiting the length of declarations is an integral part of this new change. The Superior Court of Los Angeles County submitted a comment agreeing with the limitation and citing it as critical to the transition to live testimony in family law hearings. The Superior Court of San Diego County also submitted a comment agreeing with the limits. The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) Joint Working Group on Rules submitted a comment agreeing with the rule and indicating it will have little or no impact on the court workload.

With respect to the issue of attorneys' fees, in a statewide survey of family law attorneys in California conducted by the Elkins Family Law Task Force, attorneys reported serious concern about the excessive fees related to the preparation of lengthy declarations and objections to much of the content. The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force anticipate that most declarations can easily comply with the page limitations. The need to present lengthy declarations will be significantly reduced by the ability of the parties to present testimony at their hearings. The overall impact of limiting the length of declarations is expected to reduce attorneys' fees in most cases.

Furthermore, the page limitation set out in amended rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not violate due process because attorneys have the ability to petition the court to submit longer declarations and to present live testimony. Therefore, the rule does not impose a restriction on the amount of information that can be provided – just reasonable restrictions on how the information can be provided. Moreover, the page limitation does not include exhibits or memoranda of points and authorities. The committee and the task force contend that it only serves to enhance due process as it forces the party to look at the case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, allowing declarations of any length may have been appropriate. Because courts will no longer be ruling on declarations alone, it is not overreaching to place reasonable limits on declarations.

Several commentators suggested that the ex parte process originally set out in amended rule 5.118(f) for obtaining permission from the court to file a longer declaration was cumbersome. The committee and the task force agree there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained exclusively through an ex parte process.

Several commentators also suggested that the section of amended rule 5.118(f) requiring that objections to declarations be made at the time of the hearing will potentially use an undue amount of courtroom time. The committee and task force agree that this could be a potential

problem and have modified the rule to require that objections be submitted at least two court days before the date of the hearing or, upon a finding of good cause, at the time of the hearing either orally or in writing.

Several commentators suggested that the section of amended rule 5.118(f) requiring that a declaration set out the foundation for the testimony of the declarant be deleted as it is overburdensome and not consistent with Evidence Code section 702. The committee and task force agree with the commentators and have modified the rule to delete that requirement.

Several commentators expressed concern that attorneys or litigants would file multiple motions to get around the limitation on the length of declarations or that declarations would be formatted oddly with extra-wide margins or small type. In response, the committee and task force have added subsection (2) to amended rule 5.118(f) clarifying that declarations must comply with the form and formatting requirements set out in California Rules of Court, rule 2.100 et seq. The committee and task force anticipate that local courts will develop procedures for managing the misuse of the motion process. It seems unlikely, however, that attorneys or litigants will file separate motions on related issues rather than simply request the court's permission to file a declaration that exceeds the page limit.

Rule 5.119

With respect to proposed rule 5.119, several attorney commentators suggested that the required witness lists contain contact information for witnesses. Comments also pointed out the need to provide supplemental or rebuttal witness lists. There is nothing in the rule that would prohibit additional witness lists. The Family and Juvenile Law Advisory Committee currently is in the process of developing a Judicial Council form for witness lists that it anticipates proposing for circulation in spring 2011. The suggestions of the commentators will be considered by the committee as it develops that form.

Judicial commentators, such as the California Judges Association and the Superior Court of Los Angeles County, suggested additional factors to be added to the list in proposed rule 5.119. For example, one commentator wanted to add a factor that requires the court to consider whether a responsive declaration has been filed in the case. The committee and the task force recognize that there will be additional factors that judges will consider in making their decisions. The rule as circulated requires the court to consider five specified factors and any other factor that is just and equitable. As written, judicial officers could consider the additional factors proposed by the commentators (whether a response has been filed and whether the evidence would be cumulative) if such factors were thought to be just and equitable. In some cases, the fact that a responsive declaration has not been filed may not interfere with the moving party's due process rights; the rule allows the court to use its discretion in considering that factor as one among many that may be just and equitable.

Several of the suggestions for additional factors also involve matters currently covered by the California Evidence Code, such as whether testimony is probative, cumulative, or otherwise

relevant. The committee and the task force understand the concerns of the commentators that proposed rule 5.119 make clear that the rules of evidence are also factors to be considered when deciding whether or not to receive testimony and have therefore added language to rule 5.119 to that effect.

One commentator also suggested that judges should be able to exclude testimony based on the court's time constraints. The committee and the task force believe that excluding testimony solely on the basis that the court did not have time to hear it is inconsistent with the legislative intent of Family Code section 217. If immediate orders are necessary and the calendar will not accommodate the testimony, the rule allows for a temporary order and continuance to take the testimony.

Alternatives Considered

Family Code section 217 requires the Judicial Council to adopt a statewide rule of court regarding the factors a court must consider in making a finding of good cause to refuse to receive live testimony at hearings on requests for orders filed under the Family Code. Additionally, the Elkins Family Law Task Force *Final Report and Recommendations*, which was accepted by the Judicial Council on April 23, 2010, recommends that there be a page limitation on the length of declarations in family law. This recommendation from the Elkins Family Law Task Force is a critical piece of the process in which live testimony is taken during family law hearings. Therefore, the Family and Juvenile Law Advisory Committee and Elkins Family Law Implementation Task Force did not believe that it would be appropriate to take no action.

Implementation Requirements, Costs, and Operational Impacts

The committee and task force are not aware of any implementation requirements, increased costs, or operational impacts on the local courts arising out of these proposed rules.

Attachments

1. California Rules of Court, rule 5.119 and rule 5.118(f), at pages 8–10.
2. Chart of comments, at pages 11–123.
3. Attachment A: Family Code section 217, at page 124.

Rule 5.119 of the California Rules of Court is adopted and rule 5.118 is amended, effective July 1, 2011, to read:

Rule 5.118. Application for court order

(a)–(e) ***

(f) ~~**The court may grant or deny the relief solely on the basis of the application and responses and any accompanying memorandum of points and authorities.**~~ **Declarations supporting applications for orders**

(1) Length of declarations

A declaration attached to an order to show cause or notice of motion and responsive declaration must not exceed 10 pages in length, and a reply declaration must not exceed 5 pages in length, unless:

(A) The declaration is of an expert witness, or

(B) The court grants permission to extend the length of a declaration. A party may apply to the court ex parte with written notice of the application to the other parties, at least 24 hours before the papers are due, for permission to file a longer declaration. The application must state reasons why the facts cannot be set forth within the declaration page limit.

(2) Objections to declarations

(A) A declaration must be based on personal knowledge and explain how the person has acquired that knowledge. The statements in the declaration must be admissible in evidence.

(B) If a party thinks that a declaration does not meet the requirements of (A), the party must object to the declaration at the time of the hearing, or any objection will be considered waived, and the declaration may be considered as evidence.

(C) If the court does not specifically rule on the objection raised by a party, the objection is presumed overruled. If an appeal is filed, any presumed overrulings can be challenged.

Rule 5.119 Live testimony

(a) Purpose

Under Family Code section 217, at a hearing on any order to show cause or notice of motion brought under the Family Code, absent a stipulation of the parties or a finding of good cause under (b), the court must receive any live, competent, and admissible testimony that is relevant and within the scope of the hearing.

(b) Factors

A court must consider the following factors in making a finding of good cause to refuse to receive live testimony under Family Code section 217:

(1) Whether a substantive matter is at issue— such as child custody, parenting time (visitation), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties—;

(2) Whether material facts are in controversy;

(3) Whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses;

(4) The right of the parties to question anyone submitting reports or other information to the court;

(5) In testimony from persons other than the parties, whether there has been compliance with Family Code section 217(c); and

(6) Any other factor that is just and equitable.

(c) Findings

If the court makes a finding of good cause to exclude live testimony, it must state its reasons on the record or in writing. The court is required to state only those factors on which the finding of good cause is based.

(d) Minor children

When receiving or excluding testimony from minor children, in addition to fulfilling the requirements of Evidence Code section 765, the court must

follow the procedures in Family Code section 3042 and California Rules of Court governing children's testimony.

(e) Witness lists

Witness lists required by Family Code section 217(c) must be served along with the order to show cause, notice of motion, or responsive papers in the manner required for the service of those documents. If no witness list has been served, the court may require an offer of proof before allowing any nonparty witness to testify.

(f) Continuance

The court must consider whether or not a brief continuance is necessary to allow a litigant adequate opportunity to prepare for questioning any witness for the other parties. When a brief continuance is granted to allow time to prepare for questioning witnesses, the court should make appropriate temporary orders.

(g) Questioning by court

Whenever the court receives live testimony from a party or any witness it may elicit testimony by directing questions to the parties and other witnesses.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	The Academy of Minors' Counsel Stefanie M. Bennett, Nancy Rabin Brucker, John E. Carlson, Charles G. Cohan, L. Ernestine Fields, . Christine D. Gille, Elise Greenberg, Tisha Lene Harman, . Marie S. Koestner, Helen M. Lee, . Guy A. Leemhuis, . Amy L. Neiman, Amir Pichvai, Dara Kay Reiner, William Spiller, Jr.,		Please find comments to Judicial Council Item number W11-06 formulated by the Academy of Minor's Counsel. The Academy of Minor's Counsel is a study group comprised of attorneys who are frequently appointed to represent children in family law and probate matters in Los Angeles and Orange County. We are incredibly concerned about the impact Rule 5.119 will have on our minor clients and the professional and lay adults in their lives. Our specific comments regarding proposed Rule 5.119 are as follows: 1. Rule 5.119 does not set forth a clear mechanism or procedure for requesting the court to hear live testimony. There ought to be a procedure in place for determining whether live testimony is necessary, appropriate or warranted before individuals are actually brought to court. Our concern here is that parties and counsel may bring collateral adults witnesses, i.e., teachers, therapists, coaches, etc., to testify at hearings regardless of whether or not a judicial officer has time to hear live testimony on that day.	1. Family Code section 217 does not require the parties to make a request in order to access their right to testify at their hearings. Proposed rule 5.119 anticipates that the court will rely in large part on the testimony of the parties in the majority of cases involving substantive issues. However, the right to present non-party witnesses does require a request to allow the testimony, either in the form of a witness list or an offer of proof. Procedures for requesting to present testimony from non-party witnesses are set out in Family Code 217 and in the rule. The way in which judges decide to manage their calendars will play a significant role in how testimony is integrated, and this will likely vary from court to court depending on local needs.

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			2. Subsection (b) does not make it clear that the court can refuse live testimony if any of the proposed factors apply. We propose that subsection (b) read: "Any of the following factors can be the basis for the court to make a finding that good cause exists to refuse to receive live testimony under Family Code section 217."	2. Proposed rule 5.119 provides that the court consider multiple factors in deciding whether to refuse live testimony. For example, there may be a situation in which only procedural issues are involved so that factor (b)(1) might weigh in favor of refusing testimony; however, if there are also material issues in controversy that necessitate assessing the credibility of the declarants, the situation would be different. This would require consideration of factors (b)(2) and (b)(3) and weigh in favor of allowing testimony. The judge would then need to make findings explaining how these factors were weighed to support his or her decision.
			3. Subsection (b)(3) does not permit the court to exclude live testimony that is, essentially, irrelevant to the issues before the court. We propose that subsection (b)(3) read: "Whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses or is probative as to the ultimate question of fact or law."	3. The Family and Juvenile Law Advisory Committee (advisory committee) and the Elkins Family Law Implementation Task Force (task force) agree that the testimony of witnesses needs to be probative as to the ultimate question of law or fact, but decided not to recite previously established rules of evidence in this rule.
			4. Rule 5.119 may encourage parents to bring their children to court to testify before a judicial	4. This provision of proposed rule 5.119 is not intended to encourage or discourage the

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			determination under subsection (b) as to whether or not such testimony is necessary or appropriate. We propose that existing subsection (d) be moved up and included under the "Factors" listed in subsection (b). Further, subsection (b)(7) should be expanded to include the following language: "When receiving or excluding testimony from minor children, in addition to fulfilling the requirements of Evidence Code section 765, the court must follow the procedures in Family Code section 3042 and California Rules of Court governing children's testimony and shall include the following additional factors when determining whether to take live testimony from a minor child of the parties: (i) The impact on the minor child of testifying; (ii) The probative value of the minor's testimony; (iii) The detriment to the minor's relationship to either parent; and (iv) Whether the evidence can be obtained from another source." 5. Subsection (c) does not make it clear that any one of the factors listed is sufficient for the court to refuse to take live testimony. We propose that (C) read: "If the court makes a finding of good cause to exclude live	participation of minors in a family law case. It simply sets out the parameters of receiving the testimony. Evidence Code section 765 and Family Code section 3042 each address the concerns expressed by the commentator related to the best interests of the children. A rule regarding minor's counsel will be circulated for comment in April through June. 5. The rule requires judicial officers to consider multiple factors. Refusing to receive testimony on one factor alone when other factors might weigh in favor of allowing the testimony would not comply with the rule. Section (c) of the rule simply clarifies that

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			testimony, it must state its reasons on the record or in writing. The court is required to state only those factors on which the finding of good cause is based; any one of which is sufficient to exclude the live testimony."	judicial officers need only address in their findings those factors that constitute the basis of their decision.
			6. Subsection (e) regarding witness lists does not expressly state that the court can deny live testimony based upon an inadequate offer of proof. We propose that subsection (e) read: "Witness lists required by Family Code section 217(c) must be served along with the order to show cause, notice of motion, or responsive papers in the manner required for service of those documents. If no witness list has been served, the court may require an offer of proof before allowing any nonparty witness to testify and, upon request, may deny the party the right to call non party witnesses."	6. Judicial officers always have the ability to ask for further offers of proof before making the decision whether or not to allow the live testimony. The advisory committee and task force did not want judges to refuse live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available.
			7. We propose that another subsection be added to set forth a procedure for determining whether live testimony will be heard at a given hearing. We propose the following: "Live testimony management conference. So as to eliminate a waste of witness time, fees, and judicial resources, the court shall make a ruling at a	7. The advisory committee and the task force understand that effective calendar management is central to any hearing process. There is nothing in the rule that would prevent the court from implementing such management conferences.

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			hearing or via minute order 10 days before the live testimony hearing as to which witnesses will be permitted to testify and which witnesses, if any, may be placed on-call." Our comments regarding proposed amendment to rule 5.118 are as follows: 1. There are due process implications of limiting the length of declarations and reply declarations under 5.118 1 (f)(1)(A). Our concern is that the 10-page limit on declarations may impact the due process rights of our minor clients should there be a situation requiring a lengthier declaration. In addition, the rule lacks specificity as to the line spacing or font size requirements and the consequences to any party who exceeds the set limitation. For example, will the bench officer discount a declaration that is clearly manipulated to fit within a 10-page limit? Will the judicial officer stop reading the declaration at the end of page 10? If there is no consequence when a party does not adhere to the rule, it will simply punish those who follow it with an unfair benefit to those who do not. 2. The procedure delineated for requesting permission to extend the length of declarations under 5.118 1 (f)(1)(A)(ii) is unworkable and unnecessarily labor intensive. Our concern here	1. The advisory committee and the task force disagree that it is a denial of due process to limit the length of declarations. Due process means notice and an opportunity to be heard, which requires moving and responsive papers to be sufficient to put the other party on reasonable notice as to the contentions of the writing party. Under Family Code section 217, each party has the right to produce evidence at a hearing; therefore, limiting the length of declarations has no impact on either party's due process rights. The advisory committee and the task force recognize that there will be circumstances that necessitate longer declarations. Longer declarations can be submitted with the permission of the court. Rule 2.100 et.seq. sets forth formatting requirements for documents filed with the court and addresses such issues as size of paper, margins, size of fonts, etc. 2. The advisory committee and the task force recognizes that there may be other effective and efficient processes by which a litigant can

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			is that the procedure outlined (which is essentially the same procedure required for an emergency ex parte application regarding the safety and well-being of our clients) is quite labor intensive and will unnecessarily increase the costs of litigation for both self-represented litigants, parties represented by counsel, and the County on those cases in which minors' counsel may be paid by the county and need a lengthier declaration. Moreover, such a process will likely create a calendar management problem for our family law judicial officers if attorneys are filing emergency applications on the sole issue of whether or not a declaration can exceed a set page limit.	obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process.
			3. Proposed Rule 5.118 (1)(f)(2)(B) & (C) make it difficult to preserve an accurate record without understanding what evidence was, in fact, considered by a judicial officer. Our concern is that subsection (2)(B) does not provide adequate specificity as to how objections should be made. Should objections be made in writing or orally? Must the objections be made line by line regarding the declaration? In addition, subsection (2)(C) does not lay out the process for preserving a clear record for subsequent hearings or appeal. How will parties and attorneys know, several hearings later, which evidence was considered	The advisory committee and the task force has modified the rule to require that absent a showing of good cause, objections must be submitted at least 2 days prior to the date of the hearing. .

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			by the judicial officer?	
2.	Dennis P. Handis Interim Chief Probation Officer Alameda County Probation Department		Chief Handis, Assistant Chief Fenton, and our Deputy Chiefs have review and have no comments. Thank you for the opportunity.	No Response Required
3.	Diane Wasznicky, President Association of Certified Family Law Specialists	5.118(f): N 5.119: AM	Proposed Rule 5.118(1)(1): *Marriage of Elkins* (2007) 41 Cal. 4th 1337 stands for the proposition that all individuals have equal access to justice. Mr. Elkins was not heard in his family law trial because of local rules mandating that all evidence be submitted in writing in advance. The Elkins Task Force was established, in part, to make recommendations to improve access to justice, not limit it further. This Rule, if adopted is directly contra to the spirit of the Supreme Court's ruling in Elkins. Practitioners throughout the state indicate that routine declarations which are excessive and unnecessarily long are not a problem in their jurisdictions. Apparently, it is an issue in Los Angeles County and even there, a small percentage. It is not appropriate or fair to penalize or limit the due process rights of family law parties state-wide due to the actions of a	The advisory committee and the task force agree with the commentator that the intent of the *Elkins* case was to provide family law litigants with the opportunity to have an effective voice in their cases. The Elkins Task Force received significant input from family law judicial officers that excessive and unnecessarily long declarations were a problem as were declarations containing significant objectionable content. From the perspective of judicial workload this was identified as a serious problem. Further, both the advisory committee and the task force concluded

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			few litigants or their attorneys.	that a fair adjudication of a request for relief was not served by decisions based on which attorney or litigant could write the best declaration. Due process means notice and an opportunity to be heard, which requires moving and responsive papers to be sufficient to put the other party on reasonable notice as to the contentions of the writing party. Under Family Code section 217, each party has the right to produce evidence at a hearing; therefore, limiting the length of declarations has no impact on either party's due process rights nor would it deny the opportunity to present critical information.
			This proposed rule, if enacted, would deny due process to parties. Parties should not have to limit or choose the information to which he or she believes a court should be aware. The imposition of this rule could result in the court not being provided critical information which would assist the court in making the best decision in any given circumstance or ruling. Declarations are commonly used to provide the court with back ground information which the court will not necessarily hear via live testimony, but which is nevertheless important when determining important issues. As ACFLS indicated in its comments to the Elkins Task Force Recommendations in December 2009, "Page limitations for declarations are inconsistent with due process and fail to take	The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is in rule 3.113(d), which limits the length of a memorandum in support of a summary judgment motion to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			into account the complexity of cases and the parties' burden of proof." Family law courts are faced with thousands of unique cases every day and the amount of information that anyone party desires to convey to the court cannot be arbitrarily limited without impacting fairness and due process rights.	produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at his or her case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations.
			It is important to note that this proposed rule is NOT implementing, nor is it authorized in any statute or legislation. There is no reference to limitations of declarations in AB 939 or Family Code section 217. There is no other Rule of Court or Statute in existence in this state which limits the written testimony of an individual in any type of proceeding.	This rule implements Elkins Task Force Recommendation ID7, Streamlining Family law Forms and Procedures. The Elkins Family Law Task Force *Final Report and Recommendations*, which was accepted by the Judicial Council on April 23, 2010.
			It is still unclear how Family Code section 217 will be implemented. Live testimony is not a given in all cases, and even if live testimony is allowed, the live testimony will most likely occur sometime after the law and motion hearing. Courts will undoubtedly need to consider whether to make temporary orders and if temporary orders are to be made pending a hearing, the court will need sufficient	It is impossible to generalize how family law calendars statewide will implement Family Code section 217. For many courts, Family Code 217 will not result in any change in their calendar management. Brief testimony is taken regularly from the litigants on short cause calendars without the necessity of a continuance. The advisory committee and the task force plan to provide judicial education and technical assistance to

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	Commentator	Position	Comment	Committee Response
			information to make such orders. Given the shortage of resources currently allocated to family law courts, it could be several months before the motion is actually heard. Thus, the orders made pending the hearing need to be based upon all the pertinent information available, but this rule could prevent the courts from having all the pertinent information in front of it at the time of the ruling.	courts on the type of calendar management that is effective in avoiding continuances, or minimizing the length of continuances, when testimony is required. The rule was drafted to provided for a brief continuance when necessary.
			In addition to the above concerns, we have the following issues with the proposed rule:	
			A. It is unclear whether exhibits and points and authorities are intended to be inclusive in this limit on declarations. We assume that these documents are not included in the limit, however, clarity is required on this issue.	The page limit on declarations should not be applied to exhibits or points and authorities. The issue of what is included in the page limit is part of a project on new rules of court to be effective January 1, 2012
			B. This rule, if adopted as written, may cause individuals to file multiple motions in order to avoid the page limit. As the Judicial Council is aware, many issues in family law are inter-related and must or should be heard together. This practice could cause a repetition of issues to be addressed and a duplication of efforts, not only by the court, but the parties and attorneys as well. It could also cause contradictory orders in some circumstances.	Local courts can develop procedures for managing the misuse of the motion process in this way. It seems unlikely, however, that it would be easier for attorneys or litigants to file separate motions on related issues than to simply request the court for permission to file a declaration that exceeds the page limits.
			C. If a party fails to address an issue either at all or sufficiently in a declaration due to the	While it is undoubtedly true that a party would not be allowed to testify on an issue that was not

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			limitation imposed by this rule, it could impact the live testimony hearing in several ways. Courts will undoubtedly limit individuals to the issues addressed in the pleadings, but if not addressed adequately or at all, because of the page limitation, will the party be barred from providing testimony on that issue?	raised in the pleadings, there is nothing that would strictly exclude testimony on facts not set out in a declaration. Due process does not require restricting testimony to a simple repetition of what is in a declaration. However, in the case where a new contention is raised in testimony, the judge could either prohibit testimony on the new contention or provide the opposing party the option of a brief continuance to adequately prepare.
			D. The *ex parte* process delineated in this rule is not acceptable on many levels. Not only is it vague as to what types of circumstances the court may grant relief, but courts will be unreceptive to utilizing a process that is reserved for only emergency situations as is required in the Family Code. This process, if adopted, would cause additional stress and work for the courts, in an already overburdened system. This proposal involves a costly process that involves filing motions, declarations and appearing in court. Parties should not be forced to expend additional funds on attorneys or his or her own time in order to seek an order to present evidence to the court. If limits on declarations are to be imposed, the process for relief from the rule, needs to be established in a different manner.	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process. The advisory committee and task force expect that most declarations can easily comply with the page limitations. The need to present lengthy declarations will be significantly reduced by the ability of the parties to present testimony at their hearings. The overall impact of this rule would be expected to reduce attorneys' fees in most cases. The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) Joint Working Group on Rules has determined that there will be little or no impact on the workload

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			As an association of family law specialists, we are a body that is committed to improving the family law system. As a body, there are many recommendations of the Elkins Task Force to which we have voiced our support and willingness to assist in implementing. However, this proposed rule cannot be supported by our Board.	for courts from this rule.(See comment no. 24.)
			As stated above, the "problem" to which this proposed rule is directed is not a problem for most of the state. The remedy to this problem is to implement another recommendation of the Elkins Task Force, which is the one that requires each superior court to assign 20% of the existing judicial officers and resources to the family court. This recommendation is especially needed now that Family Code section 217 is in effect. The courts need to have the resources and appropriate staff assigned to family law, not only to conduct live testimony hearings, but to carefully read and consider the written evidence provided to the court in order to determine whether live testimony is required, and if so, what temporary orders, if any should be in place pending the testimony. Proposed Rule 5.119: ACFLS proposes changes to two subsections of	The advisory committee and task force agree with the commentator that sufficient judicial and other court resources should be allocated to family law.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			this rule. If witness lists are to be exchanged, they should also contain the contact information for the witnesses unless there is good cause not to reveal the information. In addition, the moving party should be allowed to augment his or her witness list at the time of the reply as the response may provide the need for rebuttal.	
			ACFLS proposes that subsection (e) be modified as follows: "Witness lists required by Family Code Section 217(c) must be served along with the order to show cause, notice of motion, or responsive papers in the manner required for the service of those documents. The moving party may supplement a witness list with rebuttal witnesses in reply to the opposition to the motion. This supplemental witness list must be served along with reply. Except for good cause, the witness list shall include all available contact information of the listed witnesses who are not parties to the case or such information shall be served on the other party without filing it with the court. The Witness list must include a brief description as to the anticipated testimony. If no witness list is has been served, the court may require an offer or proof before allowing any nonparty witness to testify."	The advisory committee is currently drafting a Judicial Council form to use for a witness list. The issue of what content and instructions should be included on the witness list is part of a project on new rules of court to be effective January 1, 2012
			Discretion of the court should be preserved as every situation and fact pattern before the court is unique. The language as currently	Use of the word "should" merely states a preference that temporary orders be made, it does make them mandatory. The word "must" would

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			drafted mandates that the court make appropriate orders by using the word, "should." "May" allows the court to consider whether temporary orders are necessary, instead of being compelled to make an order when the situation may not require such orders. ACFLS proposes that subsection (f) be modified as follows: "The court must consider whether or not a brief continuance is necessary to allow a litigant adequate opportunity to prepare for questioning the witnesses. When a brief continuance is granted to allow time to prepare for questioning witnesses, the court may make appropriate temporary orders.	have made it mandatory,
4.	Joseph J. Bell The Association of Certified Family Law Specialist (ACFLS) Grass Valley, CA Not commenting on behalf of an organization	N	I am the past president of the Association of Certified Family Law Specialists and I have served on the [Family and Juvenile Law] Advisory Committee. I make this comment as an individual. I have been a certified specialist for more than 15 years. I have spoken to my colleagues about W11-06. Most practitioners I have spoken to are opposed to section 5.118(f)(1) in its entirety. I am actually appalled that this rule is even being considered. It is contrary to the concepts of access to justice and the positions taken by ACFLS in our comments to the Elkins Task Force as well as the Task Force recommendations. The idea that a 10 page limit on declarations will somehow increase	The Elkins Task Force received significant input from family law attorneys and judicial officers that excessive and unnecessarily long declarations were a problem as were declarations containing significant objectionable content. From the perspective of judicial workload this was identified as a serious problem. Further, both the advisory committee and task force concluded that a fair adjudication of a request for relief was not well served by decisions based on which attorney or litigant could write the best declaration. The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			efficiency and fairness is, at best, speculative. It will overwhelm the factor analysis for live testimony in Rule 5.119. This limit and the ex parte escape from it are unworkable and are likely to spur more motions rather than less paper. Most importantly, in the rare (often pro per) case where a declaration is too long, it is because improper hearsay is included, in the body or by attachment. Such improper matter is easily susceptible to a motion to strike. Finally, there is NOTHING in AB 939 that authorizes the Council to implement a rule that will affect the due process right of litigants to properly support an application with relevant facts, whatever the number of pages required to do so. This is misplaced overreaching that must be reconsidered. Section (f)(2)is fine as is.	permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process. Local courts can develop procedures for managing the misuse of the motion process. It seems unlikely, however, that it would be easier for attorneys or litigants to file separate motions on related issues than to simply make an exparte request to file a declaration that exceeds the page limit This rule implements Elkins Task Force Recommendation ID7, Streamlining Family law Forms and Procedures. The Elkins Family Law Task Force *Final Report and Recommendations*, which was accepted by the Judicial Council on April 23, 2010. The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is Rule 3.113(d) which limits the length of a memorandum in support of a summary judgment motion to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks

All comments are verbatim unless indicated by an asterisk (*).

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				cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at their case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations.
5.	Hon. Jeffrey Burke Superior Court of San Luis Obispo County	AM	**Rule 5.119 Live testimony** **(b) Factors** Add - the court may limit live testimony to material facts concerning disputed substantive issues. A court must consider the following factors ~~in making a finding of good cause~~ to refuse to receive live testimony under Family Code section 217:	 The rule is also intended to apply to procedural matters in which material facts are in dispute and credibility is an issue. The wording suggested to by the commentator is acceptable to the advisory committee and task force and does not change the meaning of the rule and this change has been made.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			Replace with: "before finding good cause exists"	
			(1~~) Whether a substantive matter is at issue, such as child custody, parenting time (visitation), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties~~;	The advisory committee and task force is concerned that itemizing these substantive issues in the manner suggested by the commentator could lead to interpretation that it is an exclusive list.
			Replace with - Whether the disputed issue involves a matter of substance; viz., (A) an initial custody and parenting order or a significant modification of an existing order; (B) an initial order for temporary or post-judgment support or a significant modification of an existing order; (C) a request for the issuance or termination of a restraining order; (D) the characterization, valuation or distribution of community assets and liabilities; or (E) the temporary use, management or control of a community asset or liability	
			(2) ~~Whether material facts are in controversy;~~	This factor needs to remain standing alone as opposed to the suggestion of the commentator

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			Delete.	because it may apply to requests for relief that are of a purely procedural matter, such as discovery disputes.
			(4) The right of the parties to question anyone submitting reports or other information to the court; Add - "other than counsel appointed to represent a child"	The advisory committee and task force generally did not repeat statutory law in the rules. The Family Code already prohibits calling minor's counsel as a witness.
			(5) ~~In testimony from persons other than the parties, whether there has been compliance with Family Code section 217(c)~~; and Replace with - Whether a party offering testimony from a non-party has complied with Family Code section 217 subdivision (c); and	The wording suggested to by the commentator is acceptable to the advisory committee and task force and does not change the meaning of the rule and this change has been made.
			(c) Findings ~~If the court makes a finding of good cause to exclude live testimony, it must state its reasons on the record or in writing. The court is required to state only those factors on which the finding of good cause is based.~~ Replace with - The court must state on	Input from many family law judges indicated that without the existing language in the rule, judicial officers might interpret it to require making findings in writing or on the record as to all the factors, not just those on which the decision is based. Inclusion of this language is intended to facilitate efficient use of judicial time.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			the record or in writing its reasons for finding good cause exists to refuse live testimony at a hearing. **(e) Witness lists** Witness lists required by Family Code section 217(c) must be ~~served along with~~ the order to… Replace with - attached to the OSC or motion or timely served …show cause, notice of motion, or responsive papers ~~in the manner required for the service of those documents~~…. Delete. ~~….If no witness list has been served, the court may require an offer of proof before allowing any nonparty witness to testify~~. Replace second sentence with - "If a witness list and digest of the expected testimony of a non-party witness was not served, the court may prohibit the witness from testifying or fashion another order that serves the interests of justice.	It is intended that the witness list be served along with the moving papers. The determination of an additional different manner or time for service was determined to overcomplicate the procedure. The advisory committee and task force did not want judges to refuse live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			(f) Continuance The court must consider whether or not a brief continuance is necessary to allow a litigant adequate opportunity to prepare for questioning the witnesses. When a brief continuance is granted ~~to allow time to prepare for questioning witnesses~~, the court should make appropriate temporary orders. Replace with - The court may grant a brief continuance, if necessary, to allow a litigant to prepare for questioning an undisclosed non-party witness. **(g) Questioning by court** ~~Whenever the court receives live testimony from a party or any witness, it may elicit testimony by directing questions to the parties and other witnesses.~~ Delete. Is a Rule of Court needed to permit a judge to ask questions?	The advisory committee and task force drafted the rule to provide that judicial officers may grant a brief continuance when a party brings up entirely new and significant contentions that were not adequately noticed in their moving papers and therefore declined to make this change. The commentator is correct that judicial officers may question witnesses absent this rule. However, the advisory committee and task force concluded that it was important to expressly state the authority of judges to question a party or other witness because this ability is particularly critical for family law in which the majority of litigants are unrepresented by counsel.
6.	California Judges Association Jordan Posamentier Legislative Counsel	AM	Proposed Rule 5.119(b) lists several factors a court must consider when making a finding of good cause to refuse to receive live testimony	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			under Family code section 21. CJA respectfully suggests adding several factors under Proposed Rule 5.119(b) as follows: (7) Whether, in cases in which the court does not have the ability to hear the proffered testimony at the time set for hearing, the interests of justice are best served by an immediate resolution of the issue in controversy without such testimony or by a temporary order pending further proceedings. (8) Whether the proffered testimony will duplicate testimony already presented to the court in a previous proceeding. (9) Whether, in a pendente lite proceeding, the proffered testimony will be duplicative of testimony to be offered at the trial of the issue and the delay in waiting until trial would not be significantly prejudicial to the parties. Courts need more time, money, and judicial officers to hear the growing number of contested hearings. This is especially true in light of the fact that such hearings are now open to live testimony. The issue is how the courts	The advisory committee and task force understand that calendar management is critical for the court. Proposed rule 5.119 currently allows for a brief continuance with temporary orders being made in the interim. The rule requires that judges consider multiple factors. If immediate orders are necessary and the calendar will not accommodate testimony, the rule allows for a temporary order and continuance to take testimony unless it can be refused based on the factors in this rule. Judges already have the ability to exclude repetitive or cumulative evidence. Further, the judge may find that refusing the testimony in such circumstances furthers the interests of justice under this rule. Judges currently have the authority to limit the scope of the testimony to that relevant to the pendente lite proceeding. Judges can also bifurcate issues to try early in the case. For many courts, Family Code 217 will not result in any change in their calendar management. Brief testimony is taken regularly from the litigants on short cause calendars. The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) Joint Working Group on Rules has determined that there will be little or no impact on

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	Commentator	Position	Comment	Committee Response
			will handle the potential prospective flood of live testimony while still staying within the proposed rule. On page 2 of the proposal, The Administrative Office of the Courts has pointed out that "[n]either the statue nor the proposed rule eliminates judicial discretion to refuse to receive live testimony." It is true that the discretion is there, but if a judicial officer refuses live testimony, he or she must state the reasons in writing or on the record, and it is questionable as to which reasons would be sufficient. The above language clarifies at least some of those reasons, which would provide guidance to judicial officers, parties, and attorneys alike.	the workload for courts from this rule. The advisory committee and task force plans to develop a program of judicial education with respect to this and other new changes in family law. The suggestions of the commentators will be referred to the group developing the educational content for these presentations.
7.	The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) <u>CONTACTS</u>: <u>FLEXCOM</u>: Jill L. Barr (916) 452-5500 Jill@Barr-Law.com State Bar Legislative Counsel Saul Bercovitch The State Bar of California	5.118(f): N 5.119: AM	BASIS FOR POSITION: Proposed Rule 5.118(f)(1): This proposed Rule, if adopted, will limit the length of declarations attached to Notice of Motions, Orders to Show Cause and Responsive Declarations to 10 pages. The proposed limit for Reply Declarations is 5 pages. As far as FLEXCOM is aware, there are no other Rules of Court or statutes that limit the amount of written testimony that the court may consider. FLEXCOM sees no justification for imposing any such limitation in these particular	The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing.

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
	(415) 538-2306 saul.bercovitch@calbar.ca.gov		circumstances. FLEXCOM believes that the courts need as much relevant information as possible at the law and motion hearing. The more information the court has before it, the better informed the judicial officer will be in making decisions at the law and motion hearing, including whether live testimony is needed. If a court is unable to conduct a live hearing immediately at a law and motion hearing and a continuance is needed, then it will be important for the court to have as much information as possible in front of it, in the event that temporary orders are needed. If declarations are limited, there will be less notice to parties of assertions by one or the other, and it will therefore be more likely that continuances will be needed so that further witnesses or testimony may be submitted. This will ultimately cause an increase in costs and a delay in resolution. In addition, it is imperative for the parties to exchange as much information as possible in advance of the hearing, so that appropriate settlement opportunities can be considered and perhaps litigation avoided. Imposing a limitation on parties as to which facts or information to impart to the court may result in the court not being aware of facts that impact the issue at hand, and thus hamper the ability of the court to render a decision considering all pertinent facts.	An example of another page limit is Rule 3.113(d) which limits the length of a memorandum in support of a summary judgment motion to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at their case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations. In many courts, brief testimony is taken regularly from the litigants on short cause calendars. The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) Joint Working Group on Rules has determined that there will be little or no impact on the workload for courts from this rule.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			It is also common in family law proceedings for several issues to be before the court in one motion, as judicial economy supports this practice. Many issues are often related to each other and thus should be heard together. FLEXCOM believes that an arbitrary page limit, coupled with the costly remedy of having to seek ex parte relief to exceed the page limit, is likely to cause parties to instead file multiple motions in order to avoid the page limit. This will cause further congestion of court calendars, a waste of judicial resources and perhaps, in any given case, disjointed or inconsistent rulings because the issues have been separated.	Local courts can develop procedures for managing the misuse of the motion process in this way. It seems unlikely, however, that it would be easier for attorneys or litigants to file separate motions on related issues than to simply make an exparte request to file a declaration that exceeds the page limit.
			The proposal contained in rule 5.118(f)(1)(A)(ii) for parties to seek ex parte relief from the court to extend the page limits is simply not practical. Ex parte relief usually requires some type of appearance and written motion. Ex parte hearings or relief are not favored unless there is an emergency that warrants some type of immediate attention of the court. (See, e.g., Family Code section 240 and 241, limiting ex parte temporary restraining orders to circumstances where great or irreparable injury would result before the application could be heard on regular notice.) The ex parte provision in this proposal will not only result in additional attorney's fees and costs, but it will also put an extra burden on the	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process.

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			courts. Most parties will not use this remedy, but instead will most likely file more than one motion, as noted above, in order to avoid the page limitations. This proposed rule is also vague. It is unclear what reasons the court may consider in extending the page limit if ex parte relief to extend the page limit is sought.	
			Finally, the Elkins Family Law Task Force and the enactment of AB 939 involved a great deal of discussion about the need for live testimony. There was no intent to replace written declarations with live testimony, or to make live testimony the primary means of presenting evidence to the court. A limitation on the length of declarations could affect the ability of a party to initially present evidence to the court where the court may make interim orders based on the declarations presented. There remains a great deal of uncertainty among judicial officers and practitioners as to how the live testimony requirement will change motion practice. FLEXCOM believes that the impact of the live testimony requirement should be gauged before any limitation on the length of declarations is considered.	The rule simply limits the length of declarations, it does not omit them. The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. If the parties stipulate to a hearing based solely on the declarations, they can also stipulate around the page limitation with the concurrence of the judge who will then know it is not a live testimony hearing.
			In conclusion, FLEXCOM opposes this entire proposed rule as drafted for the reasons stated above. If, however, a page limit is to be implemented despite these objections, then the page limit should be increased, as 10 pages is	The advisory committee and task force determined that 10 pages was sufficient length for declarations and anticipate that parties will be able to comply with this limitation is the vast majority of cases.

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			too onerous. FLEXCOM proposes that if a limit is imposed, that a declaration be limited to 20 pages for the moving and responsive papers, and 10 pages for a reply declaration. FLEXCOM further proposes that if a page limit is imposed, subdivision (f)(1)(A)(ii) be stricken and replaced with a requirement that if a party files a declaration in excess of the page limit, a declaration of necessity must accompany the pleadings. The declaration of necessity will explain why the page limit had to be exceeded.	Please refer to the response above indicating that the requirement to obtain the courts permission to file a longer declaration through an ex parte process has been deleted from the rule. There is nothing in the modified rule that would prohibit obtaining permission to file that exceeds the page limitation through use of a process such as that suggested by the commentator.
			Proposed Rule 5.118(f)(2): FLEXCOM is concerned that subdivision (f)(2)(A) is not consistent with Evidence Code section 702. The Evidence Code does not require that the witness establish how the witness has personal knowledge of each fact, which is what this rule will require, if adopted. If a proper objection is made, then the witness must lay a foundation. Evidence Code section 702(a) states: "Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." There is no requirement in the Evidence Code that personal knowledge be established, unless there is an objection.	The rule has been modified to conform to Evidence Code section 702.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

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	Commentator	Position	Comment	Committee Response
			Requiring that a foundation be laid in advance as to each fact is too time consuming, burdensome, and unnecessary. Declarations will be extremely lengthy if this portion of the rule is adopted. FLEXCOM suggests that the language which requires the declarant to "explain how the person has acquired that knowledge" be stricken. FLEXCOM further suggests that the language in subdivision (f)(2)(C) be changed as follows: "If the court does not specifically rule on the objection raised by a party, the objection is presumed overruled. If an appeal is filed, that decision any presumed overruling can be challenged." Proposed Rule 5.119: 5.119(b)(1):	The rule has been modified to conform to Evidence Code section 702.
			The purpose of this proposed rule is to implement Family Code Section 217. Subdivision (b) lists some of the factors that the court must consider when determining whether there is good cause to refuse to receive live testimony at a hearing. In subdivision (b) (1) there is a list of issues which are described as "substantive" matters. FLEXCOM is concerned that this list of issues will be the only ones described as "substantive" and therefore	Judges are free to include other substantive matters in their consideration of factor 5.119(b)(1). The list in this factor only gives examples of issues that are clearly substantive and is worded so as not to be exclusive. In actuality, attorneys fee motions are frequently heard on the basis of declarations even in the courts that are now taking live testimony on a regular basis.

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			suggests that the issue of attorney's fees be added to the list of "substantive" matters.	
			5.119 (e): FLEXCOM believes that witness lists should contain contact information of all listed witnesses. This will allow the other party to contact those witnesses if necessary to prepare for the hearing. FLEXCOM suggests that this subdivision be amended to add the following language: "Except for good cause, the witness list shall include all available contact information of the listed witnesses who are not parties to the case or such information shall be served on the other party without filing it with the court." The proposed change would allow the proponent the option of either including the contact information in the witness list, or serving it on the other party so that information is not in the court file. There would be a good cause exception for cases, such as domestic violence, where there may be a need to protect the contact information of the witnesses.	There is a Judicial Council form for a witness list currently being drafted. This issue is being referred for consideration to the current project that is drafting new rules and forms to become effective January 1, 2012 to consider adding contact information.
			FLEXCOM proposes that this subdivision be further amended to allow for the moving party to supplement witness list and name any rebuttal witness(es) in reply to the opposition to the motion. This supplement should be due with the reply.	There is a Judicial Council form for a witness list currently being drafted. This issue is being referred for consideration to the current project that is drafting new rules and forms to become effective January 1, 2012 to consider adding information and service requirements for augmented witness lists.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

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			The language in the last sentence is also confusing and the intent of the provision is unclear. That language provides: "If no witness list has been served, the court may require an offer of proof before allowing any nonparty witness to testify." This provision, as drafted, seems to allow for parties to bring witnesses to testify at hearings without the filing of the witness lists in advance, provided an "offer of proof" – and no other showing – is made at the hearing. Family Code section 217 mandates that a witness list be provided in advance of the hearing. The only remedy listed in Family Code section 217(c) for failure to file a witness statement is that the court may order a "brief continuance." FLEXCOM proposes that the last sentence of this section be modified to add a good cause requirement, so it would state: "If no witness list has been served, the court shall exclude all nonparty witnesses absent a finding of good cause, and the court may require an offer of proof before allowing any nonparty witness to testify." If amended as proposed, rule 5.119 (e) would read as follows: "(e) Witness lists required by Family Code section 217(c) must be served along with the order to show cause, notice of motion, or responsive papers in the manner required for the service of those documents. The moving party	The advisory committee and task force did not want judges to refuse live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options are available. An offer of proof is also acceptable, but may in a continuance to allow the other side to prepare.

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			may supplement a witness list with rebuttal witnesses in reply to the opposition to the motion. This supplemental witness list must be served along with reply. Except for good cause, the witness list shall include all available contact information of the listed witnesses who are not parties to the case or such information shall be served on the other party without filing it with the court. If no witness list has been served, the court shall exclude all nonparty witnesses absent a finding of good cause, and the court may require an offer of proof before allowing any nonparty witness to testify." 5.119 (f): The discretion of the court should be preserved. Mandating conduct by the court should be avoided as every case/situation before the court will present different facts. Therefore, FLEXCOM suggests that two words in this section be modified. In the first sentence the word "must" should be stricken and replaced with "may." In the second sentence, FLEXCOM proposes that "should" be replaced with "may." DISCLAIMER: This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall	The rule merely states a preference for making temporary orders. The rule does preserve the discretion of the judge to make or not make temporary orders. No change in the wording is necessary.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

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			membership, and is not to be construed as representing the position of the State Bar of California. Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.	
8.	Seth Goldstein Child Abuse Forensic Institute	AM	I agree that live testimony must be offered in all motions and OSC matters. This is especially true when child abuse or domestic violence are involved in the litigation. Witness lists must be permitted to be supplemented as the responsive and reply pleadings are filed. There should be some deadline before the hearing for the filing of witness lists, with the proviso that a continuance be permitted if at the last minute witnesses are identified by a party. This is often the case when child abuse or domestic violence are involved because witnesses are reluctant to come forward until the last minute. The reasons why a court denies live testimony must be made on the record at the time of the hearing. The court should be allowed to question witnesses only if a party is in pro per and is inarticulate, unable or due to emotion unable to proceed as often happens in DV matters.	Witness lists are to be served along with the moving and responsive papers. This includes reply papers. Supplemental or amended witness list can be served with reply paperwork by the moving party. A Judicial Council form for a witness list is currently under construction and the proposal that there be an amended witness list served with the reply will be referred to the drafters of the form for possible inclusion on the form. The rule is in conformity with existing law allowing judges to question the parties and witnesses.
9.	Mary Anne Devine Family Law Facilitator	AM / N	One general comment: does FC 217 apply to applications for restraining orders under the	Family Code 217 applies to all requests for orders under the Family Code regardless of whether they

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

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	Superior Court of Contra Costa County		DVPA (FC sections 6200 et seq?) Applicants for DV restraining orders are not filing OSC's or Notices of Motion; they file Requests for Hearing as part of the DV packet. What about motions filed by the Department of Child Support Services? Do these rules apply to those also? If the intent is to exempt these types of proceedings, should that be stated in the Rule? 1. 5.118 (f)(1)(A): does "declaration" include photographs, police reports and other attachments that self-represented litigants include in their motions? 2. 5.118 (f)(1)(A)(ii): The time for requesting permission to file a declaration longer than 10 pages should be increased to 3-5 days before the papers are due. Many self-represented litigants wait until the last minute to file and telling them that they have up to 24 hours before the date the declaration should be filed to ask permission to file a longer declaration will cause them to miss the deadline for filing. 3. Rule 5.119(e): this is confusing. The first sentence states that witness lists must be served	are by way of Order to Show Cause, Notice of Motion or Request for Order. 1. The advisory committee and task force are in the process of developing a rule setting out specific exclusions from the page limitations to become effective January 1, 2012. 2. It is anticipated that the majority of declarations will comply with the page limit. Declarations from self-represented litigants are rarely as long as 10 pages. The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process. 3. The advisory committee and task force did not want judges to refuse live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to

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			along with the OSC, etc. Later in the paragraph, the rules provides that if no witness list has been served the litigant can make an offer of proof before allowing any non-party witness to testify. If the party calling the witness makes an offer of proof, then the other side has had no time to prepare for the witness. FC 217 requires a "brief description of the anticipated testimony" to be included in the witness list. FC 217(c) states that the court may grant a continuance, upon request, if the witness list is not served prior to the hearing. Allowing the party to proceed with witnesses at the hearing upon an offer of proof is contradictory to FC 217.	present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available. The parties are free to stipulate to hearing from witnesses based on an offer of proof at the time of the hearing. However, absent a stipulation the rule provides for a brief continuance to allow adequate time to prepare to question the witnesses. FC217(c) states that if no witness list is provided, a brief continuance may be granted before the testimony is given. The rule clarifies that an offer of proof be made so that the opposing party can adequately prepare during the continuance period. .
10.	Christine N. Donovan, CFLS Senior Staff Attorney, Family Law & Probate Divisions Superior Court of Solano County I am **not** responding on behalf of an organization.	AM	Rule 5.118(f) concerns the length of declarations filed in support of and in response to motions in family law. Per the Discussion in the Invitation to Comment, this change is proposed because the current version of Rule 5.118(f) is inconsistent with Family Code section 217.	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			I agree that the current wording of Rule 5.118(f) ("The court may grant or deny the relief solely on the basis of the application and responses and any accompanying memorandum of points and authorities") is inconsistent with new Section 217. However, I believe that Section 217 was not meant to somehow limit the size or length of declarations filed with the court. It was instead meant to require that the court not rely solely on those declarations as the basis for its rulings, but that the court consider live testimony at the hearing as well. Given this, proposed Rule 5.118(f)'s limit on the length of declarations makes little sense.	This rule implements Elkins Task Force Recommendation ID7, Streamlining Family law Forms and Procedures. The Elkins Family Law Task Force *Final Report and Recommendations*, which was accepted by the Judicial Council on April 23, 2010. The page limit set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is Rule 3.113(d) which limits the length of a memorandum in support of a summary judgment motion to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at their case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is

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				not overreaching to place reasonable limits on declarations.
			Furthermore, proposed Rule 5.118(f) does not address what I believe to be a more common issue, namely the extraordinary length of exhibits often attached to declarations. It is not uncommon for the court to receive relatively short declarations to which are attached voluminous exhibits such as photographs, bills, statements, letters written "in support of the declarant" from other persons, and so forth. If the goal of Rule 5.118(f) is in part to reduce the thickness of pleadings filed with the court, then it also seems appropriate to consider reducing the number of exhibit pages that can be attached to the declaration. After all, the goal of Family Code section 217 (and proposed CRC 5.119) is to require that the court receive "competent, relevant" testimony that is "within the scope of the hearing." The requirement that the party present evidence at the hearing – after laying a proper foundation and demonstrating its admissibility – seems to negate (or at least reduce) the need to have those same documents attached to the pleading.	The advisory committee and task force concluded that extending a page limit to include exhibits was too restrictive. The advisory committee and task force agree that the presentation of evidence by live testimony at hearings does serve to negate or reduce the need to present the same evidence in the form of a declaration.
			Furthermore, nothing in this rule prevents a party from getting around the 10-page maximum by filing a separate "supplemental declaration" that is as long as they like. Since the rule concerns only declarations actually attached to the motion or responsive declaration,	The advisory committee and task force anticipate that local courts will develop procedures for the misuse of supplemental declarations as described by the commentator.

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			it would not apply to other pleadings filed separately from the motion or responsive declaration.	
			I also suggest revising the 24-hour requirement in Rule 5.118(f)(1)(A)(ii) so that the standard is phrased in terms of court days. For example: The court grants permission to extend the length of a declaration. A party may apply to the court ex parte with written notice of the application to the other parties, at least one court day before the papers are due, for permission to file a longer declaration. The application must state reasons why the facts cannot be set forth within the declaration page limit. It appears that the phrasing of this proposed rule is taken directly from the California Rules of Court concerning the length of memoranda in civil matters. But the 24-hour requirement does not make much sense there either, as it does not take into account judicial holidays or weekends.	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process.
			If the proposed Rule 5.118(f) is adopted, I suggest that the Judicial Council also revise forms FL-310 and FL-320 to include instructions at items 10 and 9, respectively, that declarations must not exceed 10 pages unless prior permission is obtained from the court in advance of the deadline for filing the pleading. I also suggest including an instruction in both forms that if the declarant wishes to provide non-party testimony at the hearing, they must	The advisory committee and task force agree with the commentator. The committee and task force are developing an amended form for requests for orders that will contain information about the page limitation to become effective January 1, 2012.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			"file and serve a witness list with a brief description of the anticipated testimony" along with the OSC or NOM or the responsive declaration. Because the majority of these motions are filed by self-represented individuals, they need to be aware of these new requirements. Placing the requirements directly in the form itself seems to be the means most likely to put the party on notice of their existence. I also suggest that the Judicial Council consider developing an optional form for use in requesting permission ex parte to extend the length of the party's declaration. Again, this would be designed to assist self-represented litigants in providing the court with what it needs to rule on the request necessitated by the proposed Rule 5.118(f). **Rule 5.119** I have no comment on the text of proposed Rule 5.119. However – and again because of the high number of self-represented litigants in family law – I suggest that the Judicial Council develop an optional form for use in preparing the witness list and description of each witness' anticipated testimony.	Please see previous response about the ex parte process to extend the length of declarations. The committee and task force are developing form for witness lists that will become effective January 1, 2012.
11.	Mark D. Gershenson Attorney		I offer the following comments on several of the proposed new or amended rules of court:	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

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	Palm Springs, CA		1. Item W11-06: Rule 5.118: The page limitations should be deleted. In most cases, motions will still be heard by declaration without live testimony. That is a simple matter of reality. There are not enough family law courtrooms or bench officers to enable courts to conduct live-testimony hearings except where live testimony is really needed. Sometimes more than ten pages are needed to fully convey to the court the relevant facts, especially where multiple issues are raised in a motion or OSC. Further, sometimes an opposition declaration may be of such length or complexity that the moving party requires more than five pages to reply. Finally, if the page limitations are kept, there is no reason to exclude expert declarations from the limits. An expert should be better able than a layperson to state what he has to say briefly, with the arguable exception of a child custody evaluator. CCE reports often run 30 or more pages. If the page limitations are kept, the ex parte procedure for leave to file a declaration in excess of the page limits should specify that the ex parte application will be determined based on the moving papers and any opposition papers without the need for an appearance by counsel or a self-represented party at an ex parte hearing. Otherwise, the ex parte hearing will be	The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) Joint Working Group on Rules has determined that there will be little or no impact on the workload for courts from this rule. The proposed rule provides that the length of declarations of the parties can be extended with the permission of the court. Expert declarations are required to include significant detail about the process used in the evaluation and the basis of the opinions asserted in the declaration. The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process.

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			too costly to pursue in most cases. Objections: The rule should clarify that objections may continue to be submitted in writing prior to the hearing, as is the current widespread practice, or presented orally at the hearing. Witness lists: The rule should specify that the moving party may submit a list of proposed live-testimony witnesses with his or her reply papers regarding witnesses to be called to rebut statements in the opposition papers. Thank you for the opportunity to comment on these proposed changes. For what it's worth, I have been practicing since 1982, and about 90 percent of my practice consists of family law.	The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force has modified the rule to require that objections must be submitted at least 2 days prior to the date of the hearing, or later upon a finding of good cause. This issue is being referred for consideration to the current project that is drafting new rules and forms to become effective January 1, 2012.A Judicial Council form for a witness list is currently being developed.
12.	Ronald Granberg President, Northern California Chapter of the American Academy of Matrimonial Lawyers	N	I write on behalf of the 77 family law attorneys that comprise the Northern California Chapter of the American Academy of Matrimonial Lawyers. The chapter appreciates the tireless work and efforts of the Elkins Task Force, and is grateful for the efforts of so many in implementing the Task Force's suggestions. Proposed California Rule of Court 5.118(f)	

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			would place page limitations on declarations filed in motion and order to show cause proceedings. The chapter believes that only declarations presenting admissible evidence as succinctly as possible should be filed, and supports efforts to exclude improper declarations. Unnecessarily-long declarations are particularly detrimental now that additional live testimony requires further judicial resources. Although the goal of Proposed Rule 5.118(f) is laudable, the Rule may cause a reduction, rather than an increase, in the justice Californians need from their family law courts. Where matters to be decided are complex, page limitations will deny bench officers evidence they need to make fair decisions. The proposed ex parte procedure will likely prove too cumbersome and time-consuming to provide a practical “opt out” safety valve. The unfairness resulting from denying a judicial officer important evidence would be ameliorated if the parties were soon granted a hearing based on live testimony and the bench officer’s temporary decision were, therefore, short-lived. Unfortunately, it seems more likely that evidence-deprived rulings will continue in effect for extended periods of time.	It is agreed that there are circumstances in which longer declarations are necessary and the rule provides for longer declaration with the permission of the court. The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process. The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
				does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is CRC 3.113(d) which limits the length of memorandum in support of summary judgments to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at their case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations.
			A risk exists that some litigants will file multiple motions or orders to show cause in order to avoid the page limitations. Page limitations can be predicted to induce more litigants to hire private judges, thereby exacerbating California's two-tier system of	Local courts can develop procedures for managing the misuse of the motion process in this way. It seems unlikely, however, that it would be easier for attorneys or litigants to file separate motions on related issues than to simply seek permission from the court to file a longer declaration.

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			justice. The chapter recognizes the need to protect increasingly-limited judicial resources from abuse by overlong declarations. Unfortunately, Proposed California Rule of Court 5.118(f) would not further the due process and uniformity goals of the Elkins Task Force.	
13.	Hon. Jack Halpin Supervising Family Law Judge Superior Court of Shasta County	AM	The proposed rules are formatted below in regular type set comments about the rules are formatted below in bold type set. Proposed rule 5.118(f) sets out the parameters for length and content of declarations supporting orders to show cause and motions brought pursuant to the Family Code. This? replaces current subsection (f) which is inconsistent with Family Code 217. Rule 5.119 of the California Rules of Court would be adopted and rule 5.1 18 would be amended, effective July 1, 2011, to read: Rule 5.118. Application for court order (a)-(e) *** (f) Declarations supporting applications for orders (1) Length of declarations Comments	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			(A) A declaration attached to an order to show cause or notice of motion and responsive declaration must not exceed 10 pages in length, and a reply declaration must not exceed 5 pages in length, unless: (i) The declaration is of an expert witness, or (ii) The court grants permission to extend the length of a written notice of the application to the other parties, at least 24 hours before the papers are due, for permission to file a longer declaration. The application must state reasons why the facts cannot be set forth within the declaration page limit. Comments Does this length limitation include Exhibits attached to the declaration? Should there be a limit on the number of declarations? (2) Objections to declarations (A) A declaration must be based on personal knowledge and explain how the person has acquired that knowledge. The statements in the declaration must be admissible in evidence. (B) If a party believes that a declaration does not meet the requirements of (A), the party must object to the declaration at the time of the hearing, or any objection will be considered waived, and the declaration may be considered as evidence. Comment	Supplemental declarations from additional witnesses may be necessary. The advisory committee and task force concluded that limiting exhibits and the number of declarations would be too restrictive.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			What effect will this have on the length of the Law and Motion calendars, if the objections and argument on objections have to be made before submission? (C) lf the court does not specifically rule on the objection raised by a Party, the objection is presumed overruled. If an appeal is filed that declaration can be challenged. If there is not going to be a live testimony hearing pursuant to Rule 5.119, does this Rule require a ruling by the court before submission? Comment (a) Purpose Under Family Code section 217, at a hearing on any order to show cause or notice of motion brought under the Family Code, absent a stipulation of the parties or a finding of good cause under (b), the court must receive any live, competent, and admissible testimony that is relevant and within the scope of the hearing. Comment What if neither party requests live testimony, does the court need to make a finding of good cause? (b) Factors A court must consider the following factors in making II finding of good cause to refuse to receive live testimony under Family Code	The advisory committee and task force has modified the rule to require that objections must be submitted at least 2 days prior to the date of the hearing, or later upon a finding of good cause. If neither party seeks in any way to introduce testimony, there would be no need of a finding not to receive it. Litigants, particularly self-represented litigants, may simply begin to present their facts to the judge without asking permission to testify first.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

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			section 217: 1) Whether a substantive matter is at issue, such as child custody, parenting time (visitation), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties; 2) Whether material fact~ are in controversy; 3) Whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses; 4) The right of the parties to question anyone submitting reports or other information to the court; 5) In testimony from persons other than the parties, whether there has been compliance with Family Code section 217(c); and 6) Any other factor that is just and equitable. (c) Findings If the court makes a finding of good cause to exclude live testimony, it must state its reasons on the record or in writing. The court is required to state only those factors on which the finding of good cause is based Comment . .,. Could this requirement be recast to list the factors that require a hearing. For example, "The court, after considering the following	The judge should make sure that they are properly sworn in such cases. The advisory committee and task force did not want the right of the parties to present testimony to be dependent on a prior request by the parties to testify. However, testimony of non-party witnesses does require a prior request that the testimony be received. A hearing may still be required even if testimony is not taken. The attorneys or litigants are entitled to make arguments in support of their motions.

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			factors, finds that live testimony is not required." (d) Minor children When receiving or excluding testimony from minor children, in addition to fulfilling the requirements of Evidence Code section 765, the Court must follow the procedures in Family Code section 3042 and California Rules of Court governing children's testimony. Comment No comment. (e) Witness lists Comment Witness lists required by Family Code section 217(c) must be served along with the order to show cause, notice of motion, or responsive papers in the manner required for the service of those documents. If no witness list has been served, the court may require an offer of proof before allowing any nonparty witness to testify. Comment Does this rule imply that the court should allow live testimony of a witness in the absence of a witness list upon the making of an offer of proof? May the absence of witness lists be grounds not to hear any witness proffered by the offending party even though the witness made a declaration as to the merits of the motion? If the live hearing is continued pursuant to subparagraph (f) below, would it be acceptable	The advisory committee and task force did not want judges to refuse live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available. An offer of proof is also acceptable, but may result in a continuance to allow the other side to prepare. The requirement of witness lists for trial is being addressed by the committee and the task force in rules currently being developed to be effective January 1, 2012. This rule only applies to hearings.

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	Commentator	Position	Comment	Committee Response
			to provide the witness list at the trial readiness conference? (f) Continuance The court must consider whether or not a brief continuance is necessary to allow a litigant adequate opportunity to prepare for questioning the witnesses. When a brief continuance is granted to allow time to prepare for questioning witnesses, the court should make appropriate temporary orders. Comment This rule would provide for a live witness hearing during or immediately following the Law and Motion calendar. In Shasta County, as well as in many other counties, most of the motions or hearings covered by the proposed rules are heard on a Law and Motion calendar. The logistics of providing for live testimony on this calendar on a regular basis would make efficient management exceedingly difficult. What is meant by a brief continuance? What is meant by "appropriate temporary orders?" The rule should be clarified to permit a continuance of not more than two week or for a longer period by stipulation of the parties. (g) Questioning by court Comment	There is a wide variance in the way that law and motion calendars are organized from county to county – and even from department to department within the same court. It is necessary for this rule to provide a general framework rather than attempt to set out a specific calendar strategy that would apply effectively statewide. Restricting the brief continuance to two weeks is a laudable goal, but may not be possible for some courts to achieve. What constitutes an appropriate temporary order is entirely case specific and should be within the discretion of the judge.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			Whenever the court receives live testimony from a party or any witness it may elicit testimony by directing questions to the parties and other witnesses. Comment Does this require a rule? General comment These rules, as with all other rules, do not distinguish between in pro per cases and attorney cases. These rules further complicate an already complicated set of procedures for in pro per parties.	The commentator is correct that judicial officers may question witnesses absent this rule. However, the advisory committee and task force concluded that it was important to expressly state the authority of judges to question a party or other witness because this ability is particularly critical for family law in which the majority of litigants are unrepresented by counsel. The advisory committee and task force have concluded that there should not be separate rules for attorneys and self-represented litigants.
14.	Superior Court of Los Angeles County	AM	The Los Angeles Superior Court ("LASC") submits the following comments on the proposed Rule 5.118 and Rule 5.119 to the California Rules of Court. These rules are being proposed in connection with newly adopted Family Code Section 217 which in turn resulted from the Elkins Taskforce Recommendations. That taskforce was formed by the Chief Justice to address problems	

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	Commentator	Position	Comment	Committee Response
			identified in the case of Elkins v. Superior Court. The Elkins decision stated the policy that family law proceedings should follow the same procedures as civil proceedings. Our comments set forth below reflect our view that these Rules should reflect that principle and conform more to the rules applicable in civil cases, thus ensuring the efficient administration of justice. Rule 5.118. This Rule should begin with a statement that each order to show cause or motion must provide sufficient facts to support the relief requested. If a party checks only the boxes on the form and does not provide any facts, there is plainly insufficient notice to the other side of what will be presented at the hearing and a continuance would have to be granted. Continuing matters wastes court time and should be discouraged, not encouraged, by these rules, particularly in light of the additional time which presentation of live testimony will consume on already crowded calendars. We strongly support the inclusion of the page limits in this rule. In Los Angeles at the central courthouse we are routinely presented with thirty to fifty page declarations (and longer). The need to read voluminous pleadings before every calendar is an important reason that family law judicial officers cite when they request other assignments. Limiting the length of declarations is appropriate where the parties	

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	Commentator	Position	Comment	Committee Response
			have a right to supplement those declarations with live testimony, as they are afforded by Family Code section 217. If a page limit is not included in this Rule, judicial officers will have the worst of both worlds: extensive declarations to read before hearings and additional time on the bench taking testimony. We also suggest that the rule be expanded to limit the pages of any memorandum of points and authorities that might be submitted or state that Rule 3.1113 governs any memorandum of points and authorities. Specifically we propose the following: Paragraph (1) should state: "Each order to show cause or motion must provide sufficient facts to support the relief requested."	The advisory committee and task force agree that the moving and responsive papers should provide adequate notice as to the contentions of the moving or responding party regarding the issues raised in the motion. It is further agreed that simply checking the boxes on the Application and Declaration (FL-310) would not constitute sufficient notice. As the commentator points out, courts will no longer be ruling on pleadings alone. Therefore, as long as the motion or response is sufficient to put the opposing party on notice of the contentions of the moving or responding party, recitation of all the facts in support of those contentions should not be required. Facts supporting the contentions set out in the moving or responding paperwork can also be obtained through testimony at hearings. The advisory committee and task force are

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
				currentlyworking on revising the Family Law rules, to become effective January 1, 2012. The advisory committee and task force agrees that language about the sufficiency of information in moving/responsive papers should be included and is referring this matter to the drafting group.
			Paragraph should be re-numbered as (2). That section should not have an (A) without a (B). We suggest clarifying (f)(1) (A) as follows "Each declaration in support of an order to show cause or notice of motion and each responsive declaration must not exceed 10 pages in length."	The advisory committee and task force believe the rule is clear as written
			We suggest changing (f)(2)(B) as follows: "If a party believes that a declaration does not meet the requirements of (A) [or (1)], the party shall object to the declaration in writing at least two court days in advance of the hearing, or any objection will be considered waived, and the declaration may be considered as evidence."	The advisory committee and task force has modified the rule to require that objections must be submitted at least 2 days prior to the date of the hearing, or later upon a finding of good cause.
			Rule 5.119 With respect to Rule 5.119(b), we urge the inclusion of additional factors in this list in order to assist courts in making the determination of good cause, particularly where appellate guidance will not be available for a considerable period of time. Other factors we would strongly suggest be added are:	The advisory committee and task force did not want judges to refuse live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available. Granting a brief continuance to allow for preparation can remedy this situation.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			"(7) Whether the witness was identified sufficiently in advance of the hearing to allow the other party to prepare; "(8) Whether the testimony would be cumulative, collateral or otherwise inadmissible under Evidence Code section 352; "(9) Whether a responsive declaration has been filed by the party seeking to present evidence." Item 9 is suggested because we have already experienced a party appearing at a hearing without having filed any responsive declaration and asking to present live testimony. This should not be permitted on due process grounds.	The rule as circulated requires the court to take into consideration five specified factors and any other factor that is just and equitable. As written, judicial officers could consider the additional factors proposed by the commentators (whether a response has been filed and whether the evidence would be cumulative) if such factors were thought to be just and equitable. In some cases, the fact that a response has not been filed may not be interfere with the moving party's due process rights; the rule allows the court to use its discretion in considering that factor as one among many that may be just and equitable.
			With respect to Rule 5.119(e) we suggest the addition of the word "timely" to this section as follows: "Witness lists required by Family Code section 217(c) must be served along with the order to show cause, notice of motion, or responsive papers in the manner required for the service of those documents. If no witness list has been timely served, the court may require an offer of proof before allowing any nonparty witness."	The advisory committee and task force believe the rule is clear as written.
			With respect to Rule 5.119(f) we suggest the addition of language to clarify as follows: "The court must consider whether or not a brief continuance is necessary to allow a litigant	The advisory committee and task force agree with the commentator's modified language in this section

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			adequate opportunity to prepare for questioning any witness for the other parties."	
15.	Barbara K. Hammers, C.F.L.S. Legislation Chair of the Executive Committee Family Law Section Los Angeles County Bar Association		*Family Law: Live Testimony at Hearings and Declarations - Wll-06:* The Committee recognizes the difficulties our family law courts are now faced with due to looming budgetary constraints, the existing lack of resources and the number of citizens in California utilizing the family court's resources. The Committee acknowledges how difficult and time consuming the workload has become on our judicial officers and the need to streamline the process to ensure access for all litigants. In making the following comments on the proposals, the Committee requests the Judicial Council keep the following concerns in mind when promulgating these rules. A. 5.118(0(1) Length of Declarations The Committee members have concerns regarding limitations on the number of pages of a declaration in support of an Order to Show Cause or Notice of Motion (OSC) and responses thereto. This arises mainly from a due process point of view regarding how family law litigants will now be differentiated from litigants in any other area of law by the imposition of page limits. If the Elkins court and the subsequent	. The page limit set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is in rule 3.113(d), which limits the length of a memorandum in support of a summary judgment motion to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law,

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

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			Elkins Task Force report were concerned about disadvantage to family law litigants by restricting live testimony, the blanket page limitation for family law declarations, which are not restricted in any other Rule of Court, including CRC 3.1115 (the only page limits are for points and authorities in CRC 3.1113), works to the family law litigant's unequal treatment, exactly contrary to the Elkins intent.	evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at their case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations.
			It is not yet clear whether Family Code §217 will actually result in every case requiring live testimony and for those litigants who stipulate to having their matter proceed without live testimony, a page limitation may hamper their ability to state their case cogently. This may be particularly true for the self-represented litigant unfamiliar with how live testimony is presented.	The advisory committee and task force consider it highly unlikely that a hearing will be required in every case. For those cases in which a hearing is required, many courts are presently taking brief testimony regularly from the litigants on short cause calendars.
			However, assuming a page limit will be adopted, the Committee recommends the new rules address when a request for an evidentiary	If it appears that a longer evidentiary hearing will be required, the court can set the time frame for exchange of documents, depositions or other

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			hearing should be made. The rule should specify as to whether a request should be filed with the initial OSC and, if that request is made, what the time frame should be regarding the designation of experts, witness lists and the exchange of documents. The Committee feels that a ten day time frame to prepare for the evidentiary hearing is insufficient and may result in unnecessary requests for continuances which will inhibit the goal of streamlining the system. Further, if the parties agree they do not require an evidentiary hearing, a date certain by which they are to notify the court of same should be addressed. There was also a suggestion that perhaps a slightly longer page limit for a declaration be allowed if the matter will not require an evidentiary hearing.	discovery that may be required. Such issues are can be addressed through a family centered case resolution plan. The advisory committee and task force did not want judges to refuse live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available. An offer of proof is also acceptable, but may result in a continuance to allow the other side to prepare. . The rule does not anticipate that lack of a prior express, specific request to present testimony by a party constitutes a stipulation to have the decision based on declarations alone. A judge may ask the parties if they wish to testify at their hearing. Litigants, particularly self-represented litigants, may just start to present their facts to the judge without asking permission to testify first. The judge should make sure that they are properly sworn in such cases. Many courts are currently taking brief testimony from the parties at the time of their hearings without disruption of their calendars. The advisory committee and task force did not want the right of the parties to present testimony to be dependent on a prior request by the parties to testify. However, testimony of non-party witnesses does require a prior request that the testimony be received. The rule sets out the

All comments are verbatim unless indicated by an asterisk (*).

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				process for making the request – either by way of a witness list served with the moving or responding paperwork, or by offer of proof at the time of the hearing. If no witness list has been provided, a continuance can be granted to allow for appropriate preparation. Expert witnesses would be subject to the same request requirements as any other non-party witness for presentation of testimony. It is more likely, however, that if experts are to be involved, a longer hearing will be required. The parties can include in their stipulation to allow a decision on the basis of declarations alone to extend the length of the declarations and the court will likely concur as there will be no hearing required.
			It is also recommended that, as an exception to the page limitation rule, a joint statement by the experts not be considered a declaration subject to the page limitation and that the language of the rule clarify that exhibits are expressly excluded from any page limit that may be imposed (as is the rule with regard to page limits on memoranda and appellate briefs).	Declarations of experts, whether joint or separate are already an exception to the page limitation. Exhibits are not currently included in the page limitation.
			The Committee recommends that there be discussions regarding the necessity for a meaningful meet and confer requirement that could result in the settlement or narrowing of	Meet and confer requirements are addressed in a separate section of the rules.

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			the issues prior to setting an evidentiary hearing. It is further suggested that the rule should include a provision that declarations contain enough information for the court to make temporary orders and that a witness list include the name, address, and phone number of each witness in addition to a summary of the testimony that the witness will proffer. B. 5. 118(f)(2) Objections to Declarations i. 5. 118(f)(2)(A): The Committee **agrees with the proposed changes.** ii. 5. 118(f)(2)(B): The Committee **agrees with the proposed change.** iii. 5.118(f)(2)(C) The Committee **agrees with the proposed changes if modified.** The Committee has no opposition to this language, but recommends modifying it, for consistency, by substituting the phrase "any presumed overrulings" in place of the words "that decision." **Rule of Court 5.119** The Committee **agrees with proposed language for CRC 5.119** (a) **through (d) and** (g). The Committee **agrees with proposed language for CRC 5.119 (e) and (1)** if modified.	The committee and task force are currently developing rules to become effective on January 1, 2012. This suggestion will be referred to the working group on those rules. The advisory committee and task force agree with the commentator's modified language.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			5 .119(e) Witness List. There is concern about whether the current language should be amended to provide for a "reply" brief and accompanying witness list in the event the responsive papers raise an issue not contemplated with the initial papers. Also, there is general consensus that the rule needs clarification to provide for any *amendments to* existing witness lists.	The suggestion about a supplemental or amended witness lists that can be served with a reply declaration is being referred to the advisory committee and task force working group on drafting the form for witness lists.
			There is a need to ensure that self-represented litigants are aware of the witness list requirement. The Committee's consensus is that the Judicial Council form regarding CRC 5.119(b) factors (scheduled for issuance in 2012) would be a good vehicle for informing self-represented litigants about witness list procedural requirements.	The advisory committee and task force agree that this is excellent information for self-represented litigants. An information sheet is currently under construction. This suggestion will be referred to that project for inclusion on that or another instruction form.
			There is a need for clarification on the use of the term "offer of proof in subdivision (e). There is no description of whether "offers of proof shall be made orally, or in writing. The term "offer of proof should be defined, since use of the term generally, and especially in the context of this proposed rule, is confusing. Is it meant to refer to a statement on the record that preserves the record for appellate review, or a statement offered by a party in lieu of evidence, or, the basis upon which the court relies to excuse a party from not having provided (or listed) a proposed witness? It should be made clear that	The advisory committee and task force anticipate that offers of proof may be made orally or in writing at the time of the hearing. Parties are allowed to request the receipt of testimony of non-party witnesses by either serving a witness list or making an offer of proof at the time of the hearing. Since an offer of proof may result in a continuance, the other party may request fees from the court if a hearing could otherwise have gone forward. However, these matters of calendar management are left to the local level to organize. This rule is not intended to

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			"offer of proof in this Rule pertains to a showing of good cause being required for failure to timely disclose, in order to present an omitted witness.	require any particular showing of good cause for not providing a witness list.
			The Committee agrees that a Judicial Council "witness list" form would be useful. This form should include sections for the witness name, anticipated content of testimony, and contact information. (See civil requirements for witness list.) This blank judicial council form should be required to be provided with the blank responsive declaration, especially for the benefit of self represented litigants.	The Judicial Council form for a witness list is currently under construction. The advisory committee and task force decided that serving a blank witness list with the moving papers would tend to mislead self-represented litigants to believe they had to bring witnesses to the hearing. It makes more sense to include information about the witness list on an information sheet as stated above.
			5.119(f) Continuance. Although the Committee has no objection to this subdivision and agrees with the proposal, it is recommended that the word "may" instead of "should" would be a better choice with regard to the court's discretion regarding temporary orders during the continuance period.	The word "should" merely states a preference that judicial officers make temporary orders.
			Once again, the Los Angeles County Bar Association, Family Law Section, appreciates the opportunity to comment on the proposed rules, amendments and forms currently under consideration by the Judicial Council and is pleased to provide its assistance. Should you have any further questions or concerns, please do not hesitate to contact me.	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
16.	John Hueston, President Orange County Bar Association	AM	A. 5.118(f)(1) Length of Declarations i. Page Limits -the problems. Opposed to limitations on number of pages of a declaration in support of an OSC (and responses thereto) due, in part, to the fact that OSC's often raise multiple issues. The first critical point to note is that recently enacted FC 217 does not require or make reference to declaration page limits. Therefore, the adoption of the proposed rules implementing 217 is well beyond the scope required by the Legislature and at the expense of due process rights, as discussed below. Limiting declarations will only ensure that live testimony is required when it may not be necessary, and resolution of issues that might otherwise be adjudicated by declarations, via stipulation of the parties, as provided in 217. Further, an arbitrary limitation on the amount of evidence a litigant may present that is relevant to an issue may deny due process, especially if the Court concludes (for good cause) there is no live testimony required. Therefore, if page limitations on declarations are deemed a necessity, notwithstanding our strong opposition thereto, the committee recommends page limits that relate to each issue, e.g. custody (x pages),	This rule implements Elkins Task Force Recommendation ID7, Streamlining Family law Forms and Procedures. The Elkins Family Law Task Force *Final Report and Recommendations*, which was accepted by the Judicial Council on April 23, 2010. The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is CRC 3.113(d) which limits the length of memorandum in support of summary judgments to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at their case and set forth the facts in an

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

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			visitation (x pages), spousal support (x pages), child support (x pages), attorney fees & costs (x pages), etc. The committee recommends that "x" be no less than 20 pages, and prefers that there be no limitation at all. The committee notes that really lengthy declarations are currently the exception and not the rule, so there will not be a great saving of judicial time by imposing limits that will be prejudicial to litigants' due process rights and the needs of justice.	admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations.
			If an unreasonable limitation is made to page limits, such rules will most certainly result in multiple motions being brought, broken down by issue, in order to avail oneself of the full page limits available. This, of course, will result in unnecessary filing fees, multiple court appearances, a waste of judicial resources and largely redundant filings.	Local courts can develop procedures for managing the misuse of the motion process in this way. It seems unlikely, however, that it would be easier for attorneys or litigants to file separate motions on related issues than to simply request the court for permission to file a longer declaration.
			If the Elkins court and the Elkins report were concerned about disadvantage to family law litigants by restricting live testimony, the blanket page limitation for family law declarations, which are not restricted in any other Rule of Court, including CRC 3.1115 (only page limits for points and authorities in CRC 3.1113) work to the family law litigant's unequal treatment, exactly contrary to the Elkins' intent.	Please see above for reference and description of rule 3.113 (d). This rule requires that parties set out their whole case in a 20 page memorandum.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			Assuming some page limit is adopted, we question the practical results of these proposed rules with regard to ex parte proceedings to obtain permission to exceed the page limit. Specifically, these 'procedural' ex parte exercises will interfere with and take precious time away from the Courts' ability to conduct hearings with live testimony, which is precisely contrary to Elkins' Task Force recommendations. Additionally, there is concern that the proposed rules requiring an ex parte appearance make it even more difficult to have access and the opportunity to present evidence before a judicial officer for pro per and limited means litigants represented by counsel, by requiring cumbersome, costly and unnecessary 'hoops' to be jumped through. Since "witness lists" will only give a very brief description of the content of a named witness' testimony, the more information that can be derived from declarations, the more effective and efficient the cross-examination will be. Otherwise, opposing parties will be likely 'fishing' for evidence in examining witnesses, as if conducting a deposition rather than trial. Since there is no guarantee the Court will in fact allow live testimony, counsel and pro per litigants will be risking not having crucial evidence considered by a restriction declarations length. ii. Exceeding page limits -Recommendations	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process. Please see above as to why the page limitation does not impact the amount of evidence that can be produced. In response to a survey of California family law attorneys, the Elkins Task Force received numerous reports that attorneys' fees and cost were greatly inflated by the necessity of preparing lengthy declarations, and objections to declarations. Judges would be expected to have the ability to control the questioning of witnesses in a manner that limits the scope of questioning to avoid the situations described by the commentator. Please see previous response to this commentator

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

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			Strongly recommends deleting the proposed procedure re applying for ex parte orders permitting extension of length of declarations as an uneconomic use of attorney time and judicial resources. We recommend that if page limits are adopted, that the "declaration re good cause to exceed page limits," similar in form to civil law "declaration re good cause to exceed thirty-five special interrogatories," be adopted. (CCP 2030.050) If opposition objects to the length of the declaration, the court can determine whether there was good cause, and potentially issue sanctions payable to the court rather than to objecting counsel to avoid "fee seeking" (see 'sanctions', below).	that the ex parte process has been deleted from the rule.
			Sanctions In lieu of strict page limits, recommend that the Rules allow for issuance of sanctions for excessive declarations, as it is a more appropriate control mechanism than an ex parte procedure. The issue then becomes which authorizing statute is better: FC 271, or CCP 177.5. The committee suggests that CCP 177.5 is better, provided there is no language therein that will bar applicability (by assuming violation of a Rule is akin to violation of a court order) because it is a maximum $1,500 fine levied by the court and payable to the county. Notably, CCP 177.5 sanctions payable to the court removes the incentive for opposing counsel/parties to object simply to seek fee	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process.

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	Commentator	Position	Comment	Committee Response
			awards, and further, leaves the imposition of such sanctions to the court's discretion, where it more appropriately belongs.	
			We also note that there is nothing in the proposed rule revision that gives direction to the court or parties for a violation of exceeding the page limit and failing to obtain ex parte permission to do so. For example, are the excess pages not considered? Is the entire declaration deemed stricken? Without guidance, this will result in vastly different application from county to county and court to court.	It is impossible to generalize how family law courts statewide will implement Family Code section 217 and this related rule regarding declarations. advisory committee and task force decided that the decision about how to handle non-compliant declarations should be within the discretion of the judge.
			Whatever rule is adopted regarding declarations that do exceed page limits, should use mandatory language and not permissive language. In other words, if the entire declaration will not be considered, the rule should so state. If only the first pages that do not exceed the length will be considered, the rule should so state, again, in order to avoid inconsistent application of this rule.	
			iii. Exhibits If page limits are adopted, recommend the language of the rule clarify that exhibits are expressly excluded from any page limit that may be imposed (as is the rule with regard to page limits on memoranda and appellate briefs).	The rule does not intend that the page limitations on declarations should be applied to exhibits. This issue is being referred for consideration to the current project that is drafting new rules of court to become effective January 1, 2012.
			B. 5.118(f)(2) Objections to Declarations	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			i. 5.118(f)(2)(A) There is little to no need for this rule since attestation to personal knowledge is already a requirement pursuant to Evidence Code section 702. Further, the second sentence of this proposed rule requires the declarant to state the basis of their personal knowledge, which essentially, is a requirement to lay foundation. This raises two concerns. It is beyond the mandate of 217, and as a practical matter, will cause numerous technical deficiencies by both novice attorneys and pro per litigants, and such deficiencies may cause the declaration to be non-rule compliant on its face, and therefore, inadmissible in its entirety. This differs drastically from existing E.C. 702, which only requires proper foundation if the factual statements are objected to by the opposing side. Therefore, recommend that 5.118(f)(2)(B) merely state that all declarations be made in compliance with the California Evidence Code, including section 702. ii. 5.118(f)(2)(B) This language restates existing law, and appears to permit oral objections due to the language "… must object … at the time of the hearing." This policy is helpful to pro per litigants and	The rule has been modified to conform to Evidence Code section 702. The advisory committee and task force have modified the rule to require that objections must be submitted at least 2 days prior to the date of the hearing, or later upon a finding of good cause.

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	Commentator	Position	Comment	Committee Response
			attorneys who have not prepared written objections, but may be a cumbersome and unnecessarily consume court time, for judges who are deprived of the opportunity to review and rule on objections prior to a hearing. Recommend that formal objections should be required, akin to CRC 3.1352 and 3.1354, which specify the manner and timing of making objections to summary judgment motions. There is some support for relieving pro per litigants from the requirement of making formal, written objections prior to the hearing, while holding attorneys to the more "formal" standard.	.
			However, we believe better practice is to hold pro pers to the same standard and not relieve pro per litigants from the requirement of making formal, written objections prior to the hearing, on at least two separate grounds. First, the long-standing public policy, reiterated in case law over and over, that pro per litigants are responsible for following the rules and procedures just like attorneys for represented litigants are responsible is a sound and important policy and should not be undermined by exempting pro per litigants from following the rules and procedures, since that would give inappropriate advantages to pro per litigants and disadvantage represented litigants. Second, we can foresee game-playing by	It is agreed that there should not be separate standards for attorneys and for self-represented litigants.

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	Commentator	Position	Comment	Committee Response
			litigants who utilize limited scope representation and, when it is to their advantage, will substitute out their attorney long enough to take advantage of the exemption for pro per litigants from following the rules and procedures and then substitute their attorneys back in once they have taken their advantage. iii. 5.118(f)(2)(C) There is no strong opposition to this language, but recommends modifying it, for consistency, by substituting "any presumed overrulings" in place of the word "decision." Rule 5.119 A. 5.119(a) Purpose The Committee recommends adoption. B. 5.119(b) Factors The Committee recommends adoption. C. 5.119(c) Findings The Committee recommends adoption. D. 5.119(d) Minor Children. The Committee recommends adoption. E. 5.119(e) Witness List i. There is great concern about when parties are required to serve their witness lists. There is strong concern with the proposed rules as to: (1) whether the witness list should be required to be served with initial OSC papers, or whether it can be served later; (2) whether CCP	The advisory committee and task force agree with the commentator's modified language. Rule 5.119 states that the witness lists are to be served with and in the same manner as the moving and responding papers. The suggestion about a supplemental or amended witness list that can be served with a reply declaration is being referred to the group working on drafting the form for

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			§1005 notice requirements should apply; and (3) whether the current language should be amended to provide for a "reply" brief and accompanying witness list. Also, there is general consensus that the rule needs clarification to provide for any amendments to existing witness lists. There is an underlying concern with the language of FC§217 omitting specificity of timely notice. Existing 217 language provides only that the witness list 'shall be filed and served prior to the hearing.' The committee recommends including specific time frames in this subdivision of Rule 5.119, and also whether typical service/notice requirements apply. ii. There is concern about how to ensure that pro per litigants are aware of the witness list requirement. The consensus is that the Judicial Council form regarding CRC 5.119(b) factors (scheduled for issuance in 2012) would be a good vehicle for informing pro pers about witness list procedural requirements. There is concern and need for clarification on the use of the terms "offer of proof" in subdivision (e). There is no description of whether "offers of	witness lists. The advisory committee and task force agree that this is excellent information for self-represented litigants. An information sheet is currently under construction by the advisory committee and task force. This suggestion will be referred to that project for inclusion on that or another instruction form. The advisory committee and task force anticipate that offers of proof will be made either in writing or orally at the time of the hearing. Parties are allowed to request the receipt of

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			proof" shall be made orally, or in writing. The committee members were prone to presume "orally." There is also concern that "offer of proof" should be defined, since use of the term generally, and especially in the context of this proposed rule, is confusing. Is it meant to refer to a statement on the record that preserves the record for appellate review, or a statement offered by a party in lieu of evidence, or, the basis upon which the court relies to excuse a party from not having provided (or listed) a proposed witness?	testimony of non-party witnesses by either serving a witness list or making an offer of proof verbally at the time of the hearing. Since an offer of proof may result in a continuance, the other party may t request fees from the court if a hearing could otherwise have gone forward. However, these matters of calendar management are left to the local level to organize. This rule is not intended to require any particular showing of good cause for not providing a witness list.
			As to "offer of proof" there is agreement that adoption of the civil procedure rule that a showing of good cause should be required for failure to timely disclose, in order to present an omitted witness.	There is a Judicial Council form for a witness list currently being drafted. This issue is being referred for consideration to the current project that is drafting new rules and forms to become effective January 1, 2012.
			v. There is the further question, due to lack of any treatment in the language proposed, whether rebuttal witnesses and rebuttal expert witnesses must be disclosed in the witness lists; we assume not but absence of a specification that rebuttal witnesses do not have to be included in witness lists (or vice versa) would be the basis of confusion.	
			vi. Agree that a Judicial Council "witness list" form would be useful. This form should include sections for the witness name, anticipated content of testimony, and contact	The advisory committee and task force decided that serving a blank witness list with the moving papers would tend to mislead self-represented litigants to believe they had to bring witnesses to

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	Commentator	Position	Comment	Committee Response
			information (See civil requirements for witness list.) This blank Judicial Council form should be required to be provided with the blank responsive declaration, especially for the benefit of pro per litigants. F. 5.119(f) Continuance. The committee expressed no objection to this subdivision and recommends its adoption, with the comment that the word "may" instead of "should" would better be used with regard to the court's discretion regarding temporary orders during the continuance period. G. 5.119(g) Questioning by the court. The committee recommends adoption.	the hearing. It makes more sense to include information about the witness list on the information sheet as stated above. The word "should" merely states a preference that judicial officers make temporary orders.
17.	Drorit Bick Raiter Associate Attorney Cooper-Gordon LLP Santa Monica, CA (not on behalf of organization)	A	Comment as to Proposed CRC 5.119: The enumerated factors, as well as the provision that the Court can question either Party seem sufficient as a guide to the basic question of whether and when live testimony is necessary. Although these new provisions [5.119(b) and 5.119(g)] may sound novel, in fact, Family Law Courts already do this to a large extent. If the Court need to ask a question of a Party from the bench, it already does, and our clients are often advised that they may have to testify in Court on the day of the Hearing. The main difference is just that if the Court wants to exclude live	No response required No response required

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			testimony, it must have "good cause" and must state these reasons on the record or in writing [5.119(c)]. This change will likely help ensure that Parties are heard in Court.	
			The provision for Witness Lists for non-Parties [5.119(e)] is a good idea, because there have been times in Court when an opposing Party has brought witnesses to testify. Other than objecting to the Court about the "surprise witness," there was not much we could do about it. This new provisions, in conjunction with the new provision for a short continuance is key to ensuring that the proceedings are fair and equitable and there are no surprise witnesses.	No response required
			However, the provision for a continuance [5.119(f)] is a concern because (a) the definition of "brief continuance" is too vague and (b) this means our client will have to pay for us to appear in Court again. Finally, how will the "offer of proof" be different or prevent the problem of having a surprise witness? It is unclear how this will work.	The brief continuance is to avoid surprise and allow for preparation to question a witness that is identified by an offer of proof at the time of the hearing rather than a previously served witness list. The advisory committee and task force want to indicate that the continuance should not be lengthy, but hesitate to dictate the specific amount of time due to the differences of resources and calendar management strategies in the local courts.
			Also, what if a Party uses this provision as a tool to obtain a continuance if they are not ready for the Hearing? The provision attempts to rectify this problem by providing that the Court "should" make temporary orders. Although this	Family Code section 217 allows the court the discretion not to make temporary orders, therefore it could not be made mandatory in the rule of court.

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			is a good idea, the language does not seem strong enough. Perhaps it should say "the Court must make temporary orders...." Comment as to Proposed CRC 5.118(f): The page limits are a good change, and will help ensure that the declarations are more streamlined and concise. Ten pages for moving papers and five pages for a reply is quite sufficient, especially considering that judges do not always have time to read through the entire declaration. The burden will be on the attorney who drafts a declaration to be more concise and direct. For Parties who are in pro per, their declarations likely rarely reach those page limits. As to the objections, attorneys must still follow the procedures found in the local rules and file and serve "motions to strike." However, the "motion to strike" procedure is quite tedious and time consuming both for the Parties and for the Court who must rule on each and every objection. If the Parties could object orally in Court it would likely streamline the process and make it more efficient.	The advisory committee and task force has modified the rule to require that objections must be submitted at least 2 days prior to the date of the hearing, or later upon a finding of good cause.
18.	Paula Robinson Chair, Family Law Section Monterey County Bar Association		RULE 5.118(f) Length of Declarations We believe this unnecessary and burdensome rule restricting page limits should be scrapped, for the following reasons.	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			This proposed rule is unnecessary. It assumes, without the support of any analysis or findings that a) the length of declarations is a universal problem; b) local courts are unable to address by local rule any actual problems resulting from the use of lengthy declarations.	The Elkins Task Force received input from attorneys and judicial officers concerned about the excessive attorneys' fees related to the preparation of lengthy declarations and objections to much of the content in these declarations. The advisory committee and task force are confident that local courts will be able to use creative calendar management tools to facilitate Family Code section 217. Rule 5.118 (f) is designed to allow help courts to control the proceedings so timely hearings can go forward.
			The proposed rule also fails to take into account the likelihood the length of declarations may decrease with the implementation of Family Code section 217, allowing for live testimony in law and motion matters. In fact, limiting the length of declarations increases the likelihood that parties will seek to present live testimony regarding matters that could be more efficiently presented in sworn declarations. This will increase the court's workload to little appreciable effect.	The advisory committee and task force agrees that the need to present lengthy declarations will be significantly reduced by the ability of the parties to present testimony at their hearings and anticipate that most declarations can easily comply with the page limitations. A goal of Family Code 217 is to increase the opportunity for live testimony at hearings in family law. The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) Joint Working Group on Rules has determined that there will be little or no impact on the workload for courts from this rule.
			Even assuming that a rule regarding the length of declarations might be appropriate, this proposed rule is problematic in several ways:	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			1. It is unrealistic to limit a party's reply declaration to only 5 pages in a family law case involving complex factual issues. The reply declaration should not be restricted beyond any limit placed on the initial declarations.	1. The reply declaration is not intended only to reply to the response, not set out the case. There may be circumstances when a reply declaration needs to be longer than 5 pages, in which case a party can seek permission to exceed the page limit.
			2. Although the proposed rule contemplates that a party can apply to the court for an ex parte order allowing the filing of longer declarations, as a practical matter, the time, effort, and cost to the parties of making and opposing such an ex parte application, makes it impractical to do so.	2. The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process.
			Since the proposed rule requires that the ex parte application set forth the reasons why the page limit needs to be extended, it will require attorneys to prepare additional declarations, without any page limit, setting forth the factual and legal basis for seeking to extend the page limit on declarations. This will then require the court, in a matter of hours, to spend time it already says it doesn't have, to review and rule on these ex parte applications, and any objections. This will necessarily increase the court's workload, which	Should lengthy explanations be required in a case to justify filing a longer declaration, the attorney or litigants can request a family centered case resolution conference at which time this and other issues can be addressed.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			we have already been told is insupportable, to no useful purpose. In addition, it is unrealistic to think that ex parte applications to file longer declarations will be granted or denied at least 24 hours before the papers are due, as contemplated by the proposed rule. Because of already heavy court workloads, and without the allocation of additional resources, it seems likely that the ex parte applications required by the proposed rule would be left undecided by the time the reply declarations would have to be filed. This creates needless uncertainty for both parties and their attorneys,	Please refer to previous response indicating that the ex parte process has been deleted from the rule.
			One option that could be considered is to allow for declarations to exceed the page limits if accompanied by a declaration of counsel (its pages not counted as part of the limitations) stating the reasons for the excess length. This would address the cost and delay concerns cited above but it could create an exception making the page limitation rule honored more in the breach.	The advisory committee and task force considered this option but decided that attorneys' fees would be increased by preparation of lengthy declarations that were then returned for re-drafting to be within the page limits. Additionally, this would result in judges having to review two declarations in cases where it was decided that the initial lengthy declaration was not entitled to the additional length. Local rules for the exparte process to obtain permission for a declaration that exceeds the page limits can be structured as simply as possible.
			3. The proposed rule seems to contemplate that 1) only one declaration will be filed with the OSC or notice of motion, 2) only	3. Most motions only have one supporting declaration. In individual cases, where it appears that multiple declarations are misused

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			one declaration will be filed with the responsive declaration, and 3) only one reply declaration will be filed. In fact, it is often the case that the each party will file more than one declaration in initiating, responding and replying to a law and motion matter, depending on the number and complexity of the issues involved. Moreover, anyone requesting to put on live testimony now must submit a witness list. If a rule limiting pages is adopted, it should explicitly allow for more than one declaration with each filing and provide for the page limits to be separately applied to each declaration and witness list and not cumulatively.	to avoid the page limitation, local courts can develop procedures for handling the problem. Furthermore, if a case is so complex as to require multiple declarations, a family centered case resolution conference can be requested at the earliest possible date to address this and other issues.
			RULE 5.119 Live Testimony RULE 5.119(b) This proposed rule is too broad. While it lists the factors to be considered by the court in order to find good cause for not receiving live testimony, it fails to give the court any direction as to how these factors are to be taken into account in making that determination. Moreover, the list is so broad and all-encompassing that it threatens to swallow the rule allowing live testimony in most cases, thus defeating the clear legislative intent of section 217. The rule would be more useful to both judges and lawyers if it simply stated the following:	How the factors are to be taken into account are completely within the discretion of the judge. The legislative intent of Family Code section 217 was to allow live testimony, particularly by the parties, in broadest manner possible while still maintaining the discretion of the judge to refuse to receive testimony. There are a number of situations in which the factors set out in rule 5.119 might weigh in favor of refusing to allow testimony. Rule 5.119 requires judges to consider all the

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			The court must receive live testimony if, on the basis of the declarations filed by or on behalf of the parties, it finds, ***any*** of the following: 1. There is a substantive matter at issue, etc. 2. Material facts are in controversy; 3. Live testimony is necessary for the court to assess the credibility of the parties or other witnesses, including anyone submitting reports or other information to the court; 4. The party offering the testimony of live witnesses has complied with Family Code section 217(c). 5. There are no other factors, such as irreparable harm or prejudice that would make the receipt of live testimony unjust or inequitable in light of the issues presented by the moving or responsive papers filed in connection with order to show cause or notice of motion to be determined by the court.	factors, although findings are only required on those that are the basis of the decision. The rule requires weighing the factors. For example, a motion may have a substantive issue with no material facts in controversy, or a procedural matter with contested material facts.
			The court's finding that none of these factors have been established shall constitute good cause for refusing to receive live testimony. Not only would this rule give the trial court clear direction as to when it must receive live testimony, it would also give lawyers direction as to what they must do in order to meet their burden of proof with respect to their request for live testimony.	There is nothing in the rule that would prevent a judge from making this finding.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			RULE 5.119(c) Consistent with the above changes to section 5.119(b), the second sentence of this rule should be amended to state that the court is required to state its findings as to all of the factors enumerated in Rule 5.119(b). In addition, language should be added to the first sentence to clarify that a statement of reasons on the record must be at the time of the hearing on the order to show cause, notice of motion, or other proceeding at which such testimony is sought to be introduced.	Findings in writing or on the record are sufficient for appellate purposes. Findings can also be part of a decision made after the matter is taken under submission.
			RULE 5.119(e) We have two objections to this proposed rule. 1. Some of our members believe it conflicts with the clear language of Family Code section 217(c), which contemplates that the required witness list can be served at the time of the hearing on the order to show cause or notice of motion.	The rule states that the witness list should be served prior to the hearing. This is consistent with Family Code 217.
			Section 217(c) provides that "[I]f the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing." This language does not preclude the filing of witness lists at the time of the hearing, and, in fact, makes provision for what the court is required to do if the list is ***not*** served prior to the	Family Code 217 states that if the witness list is not served prior to the hearing, a brief continuance can be ordered, and temporary orders made. The intent underlying the brief continuance is to allow time to prepare for witnesses when no witnesses list has been served. Rule 5.119 requires that when no witness list has been served, an offer of proof be made setting out the same basic information that would be in the witnesses list. This is to ensure that the opposing side has the

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			hearing-i.e. grant a short continuance, and make temporary orders-but only if requested to do so by one or both of the parties. The proposed rule, to the extent that it effectively precludes filing witness lists at the time of the hearing, seems not to reflect the language and intent of Section 217(c). Many of our members believe that clear time limits are a good idea. However, to the extent that the rule seems to conflict with the language of the statute, it is likely to create uncertainty that may lead to further litigation. Since the purpose of the proposed rules is to provide certainty and guidance to both lawyers and judges, there is useful purpose to be served by drafting rules that do not create such ambiguity. Any imposition of time limits should acknowledge the right of a party to file the required witness list up to the time of the hearing, with the proviso that this might result in a continuance as provided in Section 217(c).	information it needs to prepare for questioning the witnesses. It is not the intent of the Legislature or of the advisory committee and task force to exclude live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available. An offer of proof is also acceptable, but may result in a continuance to allow the other side to prepare.
			2. Our second objection to the proposed rule is that it requires that the witness lists be served either 1) with the order to show cause or notice of motion; or 2) with the responsive papers. This rule may unfairly preclude a party filing an OSC or notice of motion from presenting live testimony relevant to issues presented in the other party's responsive papers.	The advisory committee and task force agree that a moving party might need to file a supplemental or amended witness list with the reply. There is currently a Judicial Council form for a witness list being developed to become effective January 1, 2012. This will be referred to this group so that it can also be used for a supplemental or amended witness list to be served with the reply declaration.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			A moving party may not see the necessity for requiring the testimony of witnesses until after the other party has filed their responsive papers raising issues that the moving party needs to address or rebut through the testimony of witnesses. As the proposed rule currently reads, the moving party would be precluded from filing a witness list with the moving party's reply papers. This would directly contravene the intent of Section 217(a), which requires that "[Alt a hearing on any order to show cause or notice of motion ... *the court shall receive any live, competent testimony that* is *relevant and within the scope a/the hearing .. ,,"* If time limits prior to the hearing are determined to be consistent with Section 217, then the moving party should be permitted to file and serve the required witness list (or a supplemental list) with the reply declaration. **RULE 5.119(g)** This rule is unnecessary and as written creates an ambiguity. The court already has the power to address questions to the parties and other witnesses. Adding this rule could be read as going a step further and giving the court the power **to** direct the taking of testimony and limiting the right of counsel or a self-represented party to conduct the examination of	The commentator is correct that judicial officers may question witnesses absent this rule. However, the advisory committee and task force concluded that it was important to expressly state the authority of judges to question a party or other witness because this ability is particularly critical for family law in which the majority of litigants are unrepresented by counsel.

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			witnesses. We believe this part of the rule should be stricken, or if it is retained, it should be revised to state that the rule does not abrogate the right of counsel or a self-represented party to examine witnesses.	
20.	Lynette Berg Rohe Attorney Studio City, CA	AM	The central problems underlying the *Elkins* case were (1) that Mr. Elkins was not represented by an attorney, and (2) that there were not enough family law judicial officers in Contra Costa County to conduct full evidentiary trials, so the court had to resort to a local rule for trials to be done by declaration. Presumably, they believed that reading declarations took less time than having to hear oral testimony. Unfortunately, neither the representation of our huge unrepresented number of family law litigants (reportedly 70% or more of all family law litigants) nor the lack of sufficient family law judicial officers was able to be addressed and resolved by the Elkins Task Force. No measures are going to truly reform the family law court system until those two central issues can be resolved. Looking at the proposed rules 5.118 and 5.l19, I have the following comments: 1. 5.118(f)(1). It is ironic that Mr. Elkins did not get due process because he was not	The advisory committee and task force agree that the issue of resources for family law courts and assistance to self-represented litigants are critical. Rule 5.119 allows parties to stipulate to having their decisions based solely on the basis of the declarations. The advisory committee and task force agree that most decisions will be made on a combination of written declarations and

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			allowed to present oral testimony and, now, a litigant who wishes to present his or her case by written declaration will be similarly limited. It seems to be a Herculean task for each family law judicial officer to cram a full daily calendar of oral evidentiary hearings into the usual 6.5 hour day of most Courts. Common sense would tell us that these hearings are going to have to be a combination of written declarations and oral evidentiary hearings.	testimony, primarily of the parties. Taking testimony of the parties does not necessarily require a long evidentiary hearing. Many courts currently take brief testimony from the litigants on their short-cause calendar without disruption to their calendar management. The more complex cases that do require a lengthy evidentiary hearing may request a family centered case resolution conference early in the case that can address scheduling of witnesses in the most effective manner, or request a long cause hearing.
			Personally, I believe a limitation on the pages of a declaration is a denial of due process similar to what Mr. Elkins experienced. If there has to be a limitation, it should not be arbitrary. Family Law cases can involve a myriad of issues even for temporary orders. There is no explanation for the page limit of 10 pages, particularly if the parties stipulate not to have an oral hearing and proceed by declaration. If the matter is going to be continued because the Court does not have time for an oral evidentiary hearing, the declarations need to be lengthy enough for the court to be able to make temporary orders. (Per proposed 5.119(f).) Because it is anticipated that many cases will be continued in order to have time for a full oral hearing, there must be temporary orders for child custody, child support, spousal support, and property control orders or the parties will be	The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is CRC 3.113(d) which limits the length of memorandum in support of summary judgments to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			left in limbo for long periods of time. Because there are many issues in a family law case, having an arbitrary limitation of 10 pages to provide enough information for the court to make temporary orders on each issue does not seem tenable. Also, sometimes the moving declaration may be very straightforward and short and then various facts are brought up in the responsive declaration. It seems unfair to limit the reply declaration to less pages.	This only makes due process stronger as it forces the party to look at their case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations.
			If there has to be a limitation on the number of pages, it should be per issue. Perhaps it would be 10-20 pages per issue, Otherwise, litigants will simply file multiple motions/cases at the same time, one per issue, so that they can have a separate declaration and get the maximum page limits for each issue.	Local courts can develop procedures for managing the misuse of the motion process in this way. It seems unlikely, however, that it would be easier for attorneys or litigants to file separate motions on related issues than to simply request permission from the court to file a declaration that exceeds the page limit.
			The rule should make it clear that exhibits are not counted in the number of pages for the declaration.	The advisory committee and task force agree and are referring this matter to their group developing additional rules related to applications for orders
			The idea of having to use the ex parte process to extend the length of a declaration beyond the page limitation is an onerous one. First and foremost, the ex parte process should be reserved only for truly exigent circumstances where irreparable harm is going to result unless	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			there is a court order. There are already too many ex parte hearings brought which are not for exigent circumstances. It would be better to have a process such as that used for special interrogatories in discovery. If a party needs to propound more than 35 special interrogatories, they need to make a declaration for good cause to exceed the limits. Then, the other party can object at the hearing, and the court can make a decision then as to whether to exclude the added pages or not. The oral evidentiary hearings are already going to stress the available court time for each courtroom, and the judicial officers should not be burdened by additional ex partes over the number of pages for declarations. It would serve judicial economy better to simply provide a more generous number of pages for the declarations and avoid this additional rancor.	permission to file a declaration that exceeds the page limit be obtained through an ex parte process.
			2. 5.118(f)(2). It is completely understandable that the judicial officers despise the written Objections to declarations. It is one thing to read the declarations, and quite another to have to rule on numerous objections. Usually, these objections are made to preserve the objection for appeal. Sometimes, the harried judicial officers simply don't have time to rule on them. So, it is brilliant to have (2)(C) that the objection will be presumed to be overruled. That way, if the judge does not rule, the objection is preserved for appeal.	The advisory committee and task force have modified the rule to require that objections must be submitted at least 2 days prior to the date of the hearing, or later upon a finding of good cause.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			It is not clear from the proposed (2)(B), if the objections can simply be made orally at the hearing without the necessity of the written objections. This needs to be clarified. If everyone follows (2)(A), and the declarations are done correctly, then objections won't be necessary, or they will be just to larger issues. 3. Proposed Rule 5.119 (a-g). Most of these are good.	The rule has been modified to clarify that written objection should be filed; however, oral objections may be allowed at the time of the hearing upon a finding of good cause.
			Under 5.119(c). the witness lists should provide the name, address, telephone number of the witness and a brief description as to what that person will testify about. The moving party should be able to name additional witnesses in the reply papers. Even if rebuttal witnesses may be called without having been put on the witness list, if they know at the time of the reply, in order not to have trial by ambush, additional witnesses should be set forth with the reply papers.	The advisory committee and task force will refer this matter to their group developing the Judicial Council form for a witness list.
			Under 5.119(t), if there is n continuance, it should read that the court either *"shall"* make temporary orders or *"may"* make temporary orders. Shall is mandatory and may is discretionary. *"Should"* is ambiguous. It would be a great hardship on many people if hearings are continued for long periods of time without	Family Code section 217 makes the issuance of temporary orders discretionary; therefore the rule could not make this mandatory.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

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	Commentator	Position	Comment	Committee Response
			temporary orders. 4. I have heard other ideas expressed in discussions over the proposed rules, and these are some that I agree would help the process: A. Enable the responding party to request affirmative relief in the response rather than having to file a new motion/OSC to obtain affirmative relief. B. Put a box on the motion/OSC forms by which the moving party or the responding party may request an order evidentiary hearing and a time estimate. This will assist the courtrooms in figuring out the calendars for each day. C. If both patties decide not to have an oral hearing but to proceed by declaration, there should be a notice form to be filed with the court within set time period, much as 3 days prior to the hearing. D. There should be rigorous meet and confer requirements prior to the setting of an evidentiary hearing. Thank you for the opportunity to comment on these rules.	A. Allowing the responding party to request affirmative relief in the responsive pleadings would require a statutory change. B. The primary witnesses will be the parties and no special notice or request to present testimony is required. C. The advisory committee and task force agree that providing the court with a written stipulation prior to the hearing date regarding a request that the decision be based on declarations alone would be helpful to the court. Parties may provide such notice in their moving papers. D. The rules related to meet and confer are in a separate section of the family law rules.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
21.	Mike Roddy Executive Officer Superior Court of San Diego County	A	No specific comments.	No response necessary.
22.	Leslie Ellen Shear Certified Family Law Specialist International Academy of Marital Lawyers	N	I write to oppose any restriction on the ability of family law litigants to meet their burdens of proof through written declarations. I share the concerns voiced by the Association of Certified Family Law Specialists. Shortcuts shortchange families. Any given pre- or post-judgment OSC or motion in family court carries enormous stakes for the family. Arbitrary restrictions on family law litigants' opportunities to present evidence cannot survive due process scrutiny, are antithetical to the Supreme Court's holding in *Elkins v. Superior Court (Elkins)* (2007) 41 Cal.4th 1337 and find no support in A.B. 939. If this rule is adopted in any form, it is unlikely to survive the inevitable challenges it will face in appellate courts. *(Any length limitation for court documents must be framed in terms of word counts (see the appellate rules) not page length. Factors that determine page length include use of white space, subheadings, paragraph intents, font choice, margins, charts, etc. We will see a sea of undifferentiated gray type that will be difficult for judges and lawyers to read if the Judicial*	Limiting the length of declarations is not a shortcut in terms of evidence that can be presented in a family law matter. On the contrary, it organizes the presentation of evidence in a way that facilitates the right of the parties testify at their hearings and gain a more effective voice in their case. The format of documents submitted to the court is addressed under rule 2.100 et. seq. Those sections of the rules of court currently addressing page limits in other documents do not employ the more cumbersome process of a word count. The page limitation set out in proposed rule 5.118(f) allows courts to control the proceedings so timely hearings can go forward. The page limit does not impact the amount of evidence that can be produced as there is now the right to a hearing. An example of another page limit is CRC

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			Council frames things in terms of page length. See Matthew Butterick's new book, Typography for Lawyers (http://www.typographyforlawyers.com/), for the relationship between pleading typography and judicial performance. Page limits became obsolete when we began wordprocessing.) In light of the volume of cases faced by trial courts, we understand their efforts to streamline family law procedures. But family law litigants should not be subjected to second-class status or deprived of access to justice. Litigants with other civil claims are entitled to resolve their disputes in the usual adversary trial proceeding governed by the rules of evidence established by statute. It is at least as important that courts employ fair proceedings when the stakes involve a judgment providing for custody in the best interest of a child and governing a parent's future involvement in his or her child's life, dividing all of a family's assets, or determining levels of spousal and child support. The same judicial resources and safeguards should be committed to a family law trial as are committed to other civil proceedings. *Elkins v. Superior Court, supra*, 63 Cal.Rptr.3d 504 The stakes in the average family law Order to Show cause (pre- or postjudgment) are as high or higher than those in the average civil trial.	3.113(d) which limits the length of memorandum in support of summary judgments to 20 pages. The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. Summary judgments seek to dispose of an entire case; therefore placing a limit on the length of declarations in support of family law motions which are only one piece of the evidence to be produced does not seem unreasonable. Additionally, litigants may submit a separate memorandum of points and authorities. This only makes due process stronger as it forces the party to look at their case and set forth the facts in an admissible and understandable format. When courts were permitted to rule only on pleadings on family law motions, it may have been appropriate to allow declarations of any length. Since courts will no longer be ruling on pleadings alone, it is not overreaching to place reasonable limits on declarations. The Public Trust and Confidence study referred to by the commentator reported that family law litigants as a group were less likely to trust the

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			This proposed rule disrespects the people our family courts serves and communicates that they deserve a lesser form of justice than other civil litigants. Only a few years have passed since we received the Report on Public Confidence and Trust. We learned from that report that the public and the bar view family court procedures as unfair, and do not believe that family courts give them an adequate opportunity to tell their stories. In response to those concerns, the AOC now proposes that we further reduce the rights of litigants to present evidence. Their lives remain complicated, and their burdens of proof remain high. Arbitrary restraints on the opportunity to meet one's burden of proof unrelated to the factors in that burden of proof, the complexity of the facts and the importance of the decisions being made cannot survive scrutiny whether we apply due process standards or the Golden Rule. This rule is likely to increase bench officer workloads, clog up family law calendars, result in unwise outcomes in family courts, dramatically increase expense and delay for litigants, and exacerbate the lack of confidence in our family courts. In other words, the rule will not only fail to serve its purpose, it will have the opposite effect. On top of that, a rule measuring by page length rather than word count will result in judicial officers having to	court. The study went on to state that litigants need to feel like they have an effective voice in their case. The advisory committee and task force has concluded that a great part of that perception of the court is due to having decisions based on written declarations alone without the right to testify at their hearings. The advisory committee and task force anticipate that most declarations can easily comply with the page limitations. The need to present lengthy declarations will be significantly reduced by the ability of the parties to present testimony at their hearings. It is true that calendar management will be important to implementation of Family Code section 217. However, judges should benefit from time saving from dealing with lengthy declarations and the objections to them. The commentator is again referred to rule 2.100 for rules related to the format of documents submitted to the court that should negate the issues addressed by requiring a word count. The issue of whether or not a caption page or other Judicial Council form will be included in the page limitation is being referred to the group currently working on rules to become effective January1, 2012 for clarification. See above for a reference to the survey of attorneys conducted by the Elkins Task Force.

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			rule on whether the caption page counts as a page, and understand declarations that are seas of condensed gray type without white space, paragraph indentations, subheadings or other typographical tools that improve intelligibility.	Additionally, the Elkins Task Force received input from a number of judges expressing concern about the time required to review unnecessarily long declarations that were often replete with hearsay and other inadmissible statements, and the time required to rule on multiple motions to strike.
			Moreover, there is no empirical evidence that significant numbers of unnecessarily long declarations are being filed or having any noteworthy impact.	Rule 5.119 is in response to the mandate of Family Code section 217 requiring judges to receive live testimony at motion hearings absent stipulation or good cause. The advisory committee and task force anticipate that taking testimony will expand the quantity and quality of information provided to judges in family law cases. Only the length of the declarations is limited, and that limitation can be waived with the permission of the court.
			We cannot meaningfully address the capacity problem by shrinking the cases to fit the calendars. Quick fixes will only cause more problems. We cannot afford to pretend that major actions, not token ones, are essential. We must be honest with policy makers. If *Elkins v. Superior Court* is to be more than an unfunded mandate, we must:	
			1. Reallocate Superior Court workloads so we increase the number of family law courtrooms (decreasing the number of courtrooms handling other matters) to reflect the caseloads, complexity and social importance of the matters decided on these calendars;	1. The advisory committee and task force agree with the commentator that sufficient court resources should be allocated to family law.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			2. Significantly increase the resources allocated to court-connected consensual dispute resolution so that we reduce the number of matters adjudicated; *(See the ACFLS amicus brief in Rand v. Superior Court (https://public.me.com/lescfls) for a discussion of the impact of "hot spot" interventions to reduce family court caseloads.)*	2. The advisory committee and task force agree that opportunities for settlement of family law cases are important. Currently the advisory committee and task force are developing a rule on family centered case resolution that takes the issue of increased settlement opportunities into consideration.
			3. Devote judicial resources to resolution of matters on their merits, rather than on refereeing procedural "hoops" for litigants to jump through if they are to have their cases heard on the merits;	3. The advisory committee and task force agrees with this goal for family law cases and anticipates that Family Code 217 will facilitate this objective. Combined with Rule 5.118(f), decisions will more likely be made on the merits than on which attorney or litigant can write the best declaration.
			4. Increase training and experience requirements for family law bench officer assignments.	4. The advisory committee and task force agree with the commentator that training for family law bench officers is critical and are working with CJER to facilitate this goal.
			Almost every week we are reading news accounts about courts freeing innocent prisoners. Even in settings where there are numerous safeguards and many days devoted to fact-finding, the adjudicative process makes many mistakes. Reducing the amount of	The advisory committee and task force agree that judicial officers in family law need the best possible information upon which to base decisions. Rule 5.118(f) is not anticipated to reduce the information available to judges.

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	Commentator	Position	Comment	Committee Response
			information decision makers consider in making important decisions will produce bad decisions. Families and society cannot afford bad decisions in family court. It makes a difference whether an event was an isolated incident or a pattern of conduct. Details matter.	However, it is expected that more information will be provided through testimony in a manner that allows litigants a voice in their proceedings and judges an ability to assess credibility.
			Most family law litigants don't want and can't afford extensive evidentiary hearings. Family courts will continue to struggle to find hearing time, and will make "temporary" and "interim" orders, or decide ex parte applications, based on the declarations. Litigants will exercise the right to an evidentiary hearing on a case-by-case basis. The many litigants obtaining limited scope legal services rely particularly heavily on that help for writing declarations. They will be gravely disadvantaged if they must present that information in a formal evidentiary hearing. Our courtrooms cannot meet the current demand for evidentiary hearings – shifting the ratio for more live testimony will increase, not decrease that challenge.	The advisory committee and task force do not anticipate that full evidentiary hearings will be required in most cases where live testimony is received. Many courts are currently taking testimony from the parties effectively on short cause calendars without disruption of their calendaring structure. Declarations will continue to be prepared through limited-scope representation. Judges will still be reading those declarations. Lengthy declarations prepared by attorneys can be less likely to be understood by the self-represented litigants who often do not even remember what is in the declaration. Judges tend to ask them questions about the declarations that they find difficult to answer making it seem as if the declarations is not actually representative of their own experience. Self-represented litigants often do well at testifying to the facts in the case while having more trouble arguing in support of lengthy declaration prepared by someone else. Handling shorter declarations can be far easier for a self-represented litigant to manage once they get to court and limited-scope

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	Commentator	Position	Comment	Committee Response
				attorneys can help prepare them to present their facts. The attorney is also free to prepare a memorandum of points and authorities that is not limited in length.
			The primary uses of live testimony will be cross-examination, rebuttal, presentation of unaligned third party witnesses, rebuttal and updates about recent events. Parties will need to rely on their declarations. I envision us evolving something that looks like the English model in which affidavits are used for each party's case in chief, and live testimony is used for the purposes I just described. Parties should be required to make a prima facie evidentiary showing in their moving papers, unless key evidence and testimony is only available from third parties by subpena and subpena duces tecum.	It seems too soon to speculate on how the use of live testimony will play out as the courts in different venues implement Family Code 217. The advisory committee and task force agree~~s~~ that a moving/responsive papers should set out information sufficient to put the other party on notice of the basic contentions asserted on each issue. This suggestion is being referred to the group developing new rules related to the content of the declarations.
			One of the serious problems we do have is improper use of ex parte applications where there is no irreparable injury. Adding a new category of application to the ex parte calendar (which, by Judicial Council rules that are ignored in some counties must be decided the same day) will further reduce the time available for the OSC and motion calendars. *(For example, see Ventura where ex parte applications must be calendared by the clerk for hearing at the court's convenience – often days later. Or Santa Clara, where moving and*	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process.

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	Commentator	Position	Comment	Committee Response
			responsive papers are submitted by fax over a several day period.)	
			I began practice in 1976, when the moving papers for OSC's contained few facts and each side was surprised and unprepared for the content of the live testimony. I don't think going back to those days represents progress. If we require declarations to be brief, then we create the need for costly pre-OSC discovery, with all of the costs and delay that entails.	As stated, the advisory committee and task force do not anticipate that costly evidentiary hearings will be required in most family law cases simply because live testimony from the parties is included in the process. Attorneys and litigants are certainly free to stipulate to having hearings based on declarations alone. They can also submit a joint request to extend the length of the declarations in the case. Again, cases with the complexity that would require significant discovery for a motion hearing might best be structured through the family centered case resolution plan for the case.
			The decisions made in family court OSC's and motions shape virtually all aspects of the lives of the family from the dollars they have to put food on the table, to whether they will be safe from violence, to who is a parent and who will raise the children. This proposed rule will leave judges without the facts they need to make wise decisions on the most important issues presented to courts. There is a difference between fact patterns and facts. To meet the family law burden of proof for any single issue presented in an OSC or motion, the declarant must show personal	The advisory committee and task force agree with the commentator that the issues in family law motions address critical issues in the lives of families. However, as stated, it is anticipated that both the quantity and quality of the information made available to judges upon which they can base their decisions will increase as a result of rules 5.118(f) and 5.119.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			knowledge and lay other foundational facts. The declarant must authenticate each exhibit. The parties must meet their burdens of proof through admissible evidence.	
			My practice focuses on custody, parentage and jurisdiction. Each of those issues has complex burdens of proof. So when I envision practicing under this rule, I realize that my initial retainers would double. So would the burden on family law facilitators, and limited legal services nonprofits and private practitioners. This rule is simply unworkable.	The advisory committee and task force hope that in many cases the limit on the length of declarations will actually help to reduce attorneys' fees. In complex custody matters, a family centered case resolution plan can be the best way to manage the case to keep the costs in check. The family law facilitators and self-help centers generally do not prepare declarations for litigants, but simply assist them in preparing their own declarations. Rarely do these declarations exceed, or even reach, 10 pages in length. Additionally, many family law facilitators and self-help centers have implemented educational programs to help litigants present their facts in court. More are being developed. These programs preceded both Family Code section 217 and rules 5.118(f) and 5.119.
			It has taken our Supreme Court and courts of appeal many pages to even flag the factors that make up the parents' burden of proof in a custody case. One would be hard pressed to fully list the factors developed in case law within ten pages, much less set forth evidentiary facts to meet that burden of proof. And that custody case isn't about just choosing between the parents, it is about all of the details of the	The advisory committee and task force agree there are cases in which longer declarations are going to be required. The cases identified by the commentator are complex cases of critical import to the parents and children involved. These cases should be structured through a family centered case resolution plan under Family Code section 2451 that allows for the procedures necessary to reach the best possible decision in the case.

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	Commentator	Position	Comment	Committee Response
			lives of family members necessary to develop an individualized parent plan. I've attached materials that I have used for AOC training and seminars at State Bar and for Legal Services trainings identifying the factors to be considered in a relocation case, and I have attached the declaration outline I use with my clients to gather information for custody declarations.	
			Not only is this proposed rule unwise and unjust, but it is totally impractical. It increases, not decreases the cost of litigation for the parties and the court. If one walk through the timetable, and mechanics of seeking relief from such a rule, one sees that this is totally unworkable.	Please see responses above related to the issue of attorneys' fees.
			So let's say I am writing an initial OSC in a parentage case involving two states, an infant, one self-employed parent and one unemployed student parent, and a history of domestic violence. I have to write up two sets of declarations for each witness – the one that includes the most important and relevant facts on each issue and a shorter one that can't possibly meet the burden of proof but complies with the rule. Then I have to write a motion for relief from the page limitations and make up the criteria that the rule of court fails to set forth. In support of that motion I write a Memorandum of Points and Authorities to educate the Court about the legal burden of proof for each of the many issues presented by the case. I drag	The commentator has laid out a complicated and technical set of facts in this hypothetical case; however, it is unclear that the case would necessarily require a long declaration. The facts also suggest that the parties may be self-represented and self-represented litigants generally submit relatively short declarations. It might be more useful to order a family centered case resolution plan to ensure that the case proceeds in an accurate and timely fashion. The attorneys for litigants may elect to file a stipulation to extend the page limits for the declarations and a judge may concur with the request. However, a better choice might be to request a family centered case resolution conference at the earliest possible date. This

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	Commentator	Position	Comment	Committee Response
			opposing counsel (at expense to her client) or the opposing party (who is probably missing work or must find child care) and a courtroom of lawyers and litigants wait while the Court first rules on the true ex partes (the ones involving irreparable injury) and then tries to assess the application for longer declarations in a setting devoid of any case context. Next comes the same application for the responsive declaration – but that one is even more of a challenge because the 20-day deadline is now shorter because one has to have one's papers ready for an ex parte application several days before the due date for responsive pleadings. Many, if not most, family law responsive declarations include requests for alternative relief. So that means the moving party must address these new requests in just a few days – and those few days evaporate if one tacks on the time necessary for ex parte notice and an ex parte proceeding. Family law litigants put most aspects of their lives in the hands of the court. The proposed rule capping declaration length disrespects the importance, complexity, and number of the decisions presented by pendente lite and post-judgment motions and orders to show cause.	would be an excellent way in which to address the many issues, including the page limitation on declarations that are involved in this fact pattern. There is no proposed page limit for a memorandum of points and authorities. Please refer to the above response stating that the requirement of an ex parte process to obtain the court's permission for a longer declaration has been omitted from the rule.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			I find myself interrupted. From the moment I first read the proposed rule limiting the opportunity for family law litigants to present facts by declaration to meet their burdens of proof and persuasion, I have been in a battle with my inner Johanna Swift. Johanna insists on sharing a story with you now … The author of this account, Ms. Lemuela Gulliver, is my ancient and intimate friend. When she retired and moved to the countryside, she left many papers relating her travels in my hands. Among them was this account of visiting the Golden State: I spent several days roaming the streets of a port city in the Golden State and marveling at the ways of its denizens. One afternoon, I found myself in front of a hospital. I watched a parade of workers carrying out beds and carrying in cribs. “Are you converting this hospital to a pediatric facility?” I asked one worker who was pushing a crib. “No,” she replied, “we simply don’t have the enough beds to serve all the patients. Cribs are smaller than beds, so the trustees have directed us to use them instead of beds, and amputate the limbs of the patients.” As I reflected on this explanation, a group of surgeons began to arrive bearing electric saws. Thanks, Johanna Swift, I’ll return to my comment now. This proposed rule reminds me	No response required.

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	Commentator	Position	Comment	Committee Response
			of the cribs and saws Ms. Gulliver described. The occasional long declaration is the least of the causes of family court congestion. The failure of the judicial branch to redistribute resources so that family law case loads reflect the number of cases, and complexity and social importance of the issues presented is the primary cause of family court congestion. I strongly oppose any proposal to restrict access to justice for family law litigants. The risks and harm this proposed rule will cause far outweigh the theoretical benefits. This proposal is the ghost of Family Court 2000 – an effort to deny family law litigants the ability to present the evidence necessary for wise decision making. Our family courts cannot make wise decisions about multiple complex and important issues shaping children's relationships (parentage), care and safety (custody and visitation), family finances (child and spousal support; temporary management and control of assets, payment of debts), safety from domestic violence, (DVPA orders), jurisdiction (UCCJEA and Hague Abduction Convention issues), and access to justice (attorneys' fees) based on brief factual summaries. Wise decisions on any of these quests require more information, not less.	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

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			The proposed Rule of Court attempts to address a capacity problem without reducing demand or increasing services. Instead, it reduces the opportunity to present written testimony, while leaving the timing, nature and extent of the opportunity to present live testimony uncertain. **Attachments follow from page 6 forward. and are available on request. Attachments include the following: 1. Instruction Sheet for preparing a declaration 2. A declaration outline 3. Article: *"A Moving Target: Requirement & Rights in Move-Away Cases"* (2008) Legal Aid Association of California 4. Key Excepts" *Elkins v. Superior Court* 5. *Overview:* Best Interests of Children 6. List of important cases 7. Education Material: Move-away Procedural Concerns by Case Stage 8. Handout – 2008 Family Law Conference – "Handling Move-Away Cases in the Public Law Setting."	The advisory committee and task force agree that sufficient court resources should be allocated to family law cases. It seems unlikely that many of the issues mentioned by the commentator would be decided on the basis of the declarations alone under Family Code section 217. The advisory committee and task force anticipate that decisions will be based on a concise and clear set of contentions contained in moving/responsive papers and live testimony. The addition of live testimony will add to the information available to judges. Further, in complex matters attorneys and litigants can submit point and authorities that support their contentions. There is no page limitation on a memorandum of points and authorities in family law. In a sense "demand" is reduced for lengthy declarations by the inclusion of the right to live testimony.
23.	Ed Sherman Individual San Luis Obispo, CA	AM	Speaking only for myself, I agree with the proposed rules if modified. I have a concern about 5.119(b)(3): I believe it should have some "such as" guidelines like those in (b)(1). As it stands, it is wide open and a judge has unfettered discretion to decide that	Family Code section 217 allows the judge discretion to decide whether or not testimony should be received. The purpose of rule 5.119 is not to remove judicial discretion, but to identify

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			testimony is not required to assess credibility. Assessing credibility isn't the entire point—there's also the right to present, examine and cross-examine witnesses. As the rule now stands, it seems entirely subjective on the point of whether the court feels a need for testimony to assess credibility and every judge could decline to hear every witness with impunity. How could one argue against such a determination? So, I would like to see some guiding structure for this aspect of the factors. I had the impression that Elkins and the legislation was saying that because vital matters are decided at motions and OSCs, witnesses can be called at hearing just as one could do at trial, and for this reason, good cause for denying a party's request to call a witness should be very carefully defined in every aspect.	factors judges must consider when exercising their discretion, and that appellate courts can use to assess assertions of abuse of that discretion. It is the intent of the rule that judges consider all of the factors, not just one. For example, there may be circumstances where there are material facts in controversy, but credibility is not an issue because one or the other party has submitted proof by way of properly founded exhibits in their declaration.
24.	Trial Court Presiding Judges and Court Executives Advisory Committee	A	Operational impacts identified by working group: 1. There is a minimal impact to the courts in the following areas: 1) local forms may need to be modified to instruct the public on the change in statute; and 2) limited training may be needed for judicial officers and court staff on the change in statute, and the	No Response Required

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	Commentator	Position	Comment	Committee Response
			factors the court will consider in deciding to refuse live testimony. There may be some impact to the workload of self-help center staff. Since many litigants are pro per, there may be an increased need for self-help facilitators to provide explanation, guidance, and resources to assist the pro per litigant in preparing for live testimony.	
25.	Robert Turner ASO II Finance Division Superior Court of Sacramento County		The Superior Court of California, County of Sacramento has reviewed the proposed rule changes for Family and Juvenile Rules: Live Testimony at Hearings and Declarations (W11-06) but does not have any comments to submit. Thank you for providing us with an opportunity to review the proposed changes and submit comments.	No Response Required
26.	John S. Wieben Law Offices of Wieben & Wieben Monterey, CA		I enclose my comments and suggestions regarding proposed Rules 5.118 and 5.119 promulgated by the Judicial Council in response to the findings of the Elkins Family Law Task Force. I prepared the enclosed comments at the invitation of the Family Law Committee of the Monterey County Bar Association, and it's my understanding that the committee will adopt some version of my comments to be forwarded	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			to the Judicial Council. I've been licensed to practice law in California since 1973. Beginning in 1976, my practice has been limited to family law, specializing in complex family law litigation. I've been a Certified Family Law Specialist since 1985. I've been practicing in Monterey since 1978, and I was the founding chair of the Family Law Committee of the Monterey County Bar Association, which drafted the first set of guidelines and local court rules for child custody mediation before such mediation was required by statute. Notwithstanding the 35 years I've been practicing family law, I'm under no illusions that the comments of a 63-year old lawyer from a small county will have any effect on the rules that will be finally adopted by the Judicial Council. However, in agreeing to take on the job of reviewing and commenting on proposed Rules 5.118 and 5.199, I was reminded of my own admonition to others that unless you're prepared to participate in the process under which these rules are made and adopted, you lose the right to complain about them after they've been finalized.	

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			And these days, particularly in our county, there's much to complain about how family law gets short shrift when it comes to the assignment of judges and the allocation of resources to the family law department - which for the past 5 or 6 years has consisted of one judge who is assigned to handle the entire family law calendar, including the law and motion calendar, special settings, and both long and short cause trials. This has resulted in exactly the kind of situation that the Elkins Task Force intended to address in its final report and recommendation. The Monterey County Superior Court claims that it's unable to implement the recommendations of the Elkins Task Force because of budgetary and personnel constraints. As a result, the court has once again assigned a judge to the family law department who was only appointed to the court in April 2010, and who admits to having no family law experience since 1985, when she was in private practice. The Elkins Task Force generally recommended that in courts with 10 or more judicial officers, judges assigned to the family law calendar should be required to have *a minimum of two years judicial experience prior to assuming a family law assignment.* [Elkins Family Law Task Force Recommendations, Section IV.A.5.d.]	

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	Commentator	Position	Comment	Committee Response
			Moreover, this assignment, which was made by the Monterey Superior Court without consulting the family law bar, creates a familiar dilemma for Monterey County lawyers, who must now decide whether to have their cases determined by an inexperienced judge with no recent family law experience, or agree to private judging. Faced with this choice, many lawyers, myself included, are electing to have their cases heard by private judges with extensive family law experience. Considering the difficulty in having long cause matters heard in consecutive weeks and months, much less consecutive days, many of us have concluded that private judging is both time and cost-effective for our clients. In the longer term, however, private judging is an alternative that does a fundamental disservice to our clients, who are taxpayers that deserve better from their judicial system. In the end, this is not about lawyers. It's about serving the citizenry in a way that reflects the overriding importance of family law in the lives of our clients. It is also worth mentioning that, to a large extent, the problem of finding qualified judges to handle the family law calendar in Monterey County is an inevitable result of the fact that for	

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			the past 25 years, most of the appointments to our bench have been career prosecutors with no civil or family law experience. Finally, as I said at the outset of this letter, I don't expect the Judicial Council to give much weight to the enclosed comments and recommendations. To the extent that the family law bar in Monterey County has been unsuccessful in its continuing efforts to address our concerns, it is quixotic for us-individually or collectively- to expect that our comments will have any effect on the rules that will be finally adopted by the Judicial Council Nonetheless, it is worth trying to make a difference. If nothing else, it may give us a seat at the table when things go awry after the rules are finally adopted. Thank you for your time and attention. If you have any questions concerning this letter, or the enclosed comments, please call me at your convenience. COMMENTS REGARDING PROPOSED RULES 5.118 & 5.1 19 A. RULE 5.1 IS(f) This proposed rule regarding the length of declarations fails to address a number of practical issues, including the following: 1. It is unrealistic to limit a party's reply declaration to only 5 pages in a family law case	The advisory committee and task force anticipate that most declarations, including reply declarations, will be able to work within the page limitations. The reply declaration is not intended to set out the basic contentions of the moving

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			involving complex factual issues.	party. There may be circumstances when a reply declaration needs to be longer than 5 pages, in which case permission to exceed the page limit can be obtained.
			Although the proposed rule contemplates that a party can apply to the court for an ex parte order allowing the filing of longer declarations, as a practical matter, the time, effort, and cost to the parties of making and opposing such an ex parte application, makes it impractical to do so. Since the proposed rule requires that the ex parte application set forth the reasons why the page limit needs to be extended, it will require attorneys to prepare additional declarations, without any page limit, setting forth the factual and legal basis for seeking to extend the page limit on declarations.	The advisory committee and task force recognize that there may be other effective and efficient processes by which a litigant can obtain permission from the court to file a declaration that exceeds the page limitations. Therefore, the rule has been modified to delete the requirement that permission to file a declaration that exceeds the page limit be obtained through an ex parte process. .
			This will then require the court, in a matter of hours, to spend time it already says it doesn't have, to review and rule on these ex parte applications, and any objections. This will necessarily increase the court's workload, which we have already been told is insupportable, to no useful purpose. Since I practice in a county with only a single family law judge, where it takes weeks to get back routine orders sent to the court for filing, it is unrealistic to think that ex parte applications to file longer declarations will be granted or	The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) Joint Working Group on Rules has determined that there will be little or no impact on the workload for courts from this rule. Although it seems impossible to determine at this stage how individual courts will implement rule 5.118(f), the advisory committee and task force anticipate that most declarations will be able to adequately comply with the page limitation. Judicial workload with respect to reviewing lengthy declarations and the objections to them will be alleviated to some degree. This

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			denied at least 24 hours before the papers are due, as contemplated by the proposed rule. Because of the court's workload, and without the allocation of additional resources, which we have been told are unavailable, at least for the foreseeable future, because of budget constraints, it seems likely that the ex parte applications required by the proposed rule would be left undecided by the time the reply declarations would have to be filed. Since this creates needless uncertainty for both parties and their attorneys, either another mechanism has to be found, or the proposed page limits should be scrapped. In addition, it would seem that limiting the length of declarations will increase the likelihood that parties will seek to present live testimony regarding matters that could be more efficiently presented in sworn declarations. Again, increasing the court's workload to little appreciable effect. Finally, the proposed rule seems to contemplate that only one reply declaration will be filed. In fact, it is often the case that the moving party will file more than one reply declaration after reviewing the other party's responsive pleadings.	will create some time savings for judges. Family Code section 217 anticipates that litigants will be testifying at their hearings more frequently than is currently the case. The information available to judges will improve in both quality and quality when the content of moving and responding papers consists of clear contentions and the parties are able to testify to the facts so that judges can assess the credibility of the witnesses. As stated, attorneys or litigants may wish to submit memoranda of points and authorities. Another option is to request a family centered case resolution conference at the earliest possible date so that any uncertainty about the number and length of anticipated declarations can be addressed.

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			However, it is unclear from the proposed rule, whether [1] there is an implied limit on the number of reply declarations that can be filed; and [2] there is a limit of 5 pages on each reply declaration. This ambiguity can be resolved by simply removing the 5-page limit on reply declarations, or, failing that, by more careful drafting of the rule.	
			B. RULE 5. 119(b) My objection to this proposed rule is that although it lists the factors to be considered by the court in order to find good cause for not receiving live testimony, it fails to give the court any direction as to how these factors are to be taken into account in making a determination whether or not to receive live testimony.	How the factors are to be taken into account are completely within the discretion of the judge. The legislative intent of Family Code section 217 was to allow live testimony, particularly by the parties, in broadest manner possible while still maintaining the discretion of the judge to refuse to receive testimony. There are a number of situations in which the factors set out in rule 5.119 would weigh in favor of refusing to allow testimony.
			The rule would be more useful to both judges and lawyers if it simply stated that the court must receive live testimony if, on the basis of the declarations filed by or on behalf of the parties, it finds, any of the following: 1. There is a substantive matter at issue, etc. 2. Material facts are in controversy; 3. Live testimony is necessary for the court to	Rule 5.119 requires judges to consider all the factors, although findings are only required on those that are the basis of the decision. The rule required weighing the factors. For example, a motion may have a substantive issue with no material facts in controversy, or a procedural matter with contested material facts

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			assess the credibility of the parties or other witnesses, including anyone submitting reports or other information to the court; 4. The party offering the testimony of live witnesses has complied with Family Code section 217(c). 5. There are other factors that would make the receipt of live testimony just and equitable in light of the issues presented by the moving or responsive papers filed in connection with order to show cause or notice of motion to be determined by the court.	
			The court's finding that none of these factors have been established shall constitute good cause for refusing to receive live testimony.	There is nothing in the rule that would prevent a judge from making this finding.
			Not only would this rule give the trial court clear direction as to when it must receive live testimony, it would also give lawyers direction as to what they must do in order to meet their burden of proof with respect to their request for live testimony.	
			C. RULE S.119(c) In light of my objection to Rule 5.119(b), this rule should be amended to state that if the court makes a finding of good cause to exclude live testimony based on it's consideration of the factors enumerated in Rule 5.119(b), it must state its reasons on the record at the time of the hearing on the order to show cause, notice of	Findings in writing or on the record are sufficient for appellate purposes. Findings can also be part of a decision made after the matter is taken under submission.

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			motion, or other proceeding at which such testimony is sought to be introduced. **D. RULES.119(e)** I have two objections to this proposed rule. First, it conflicts with the clear language of Family Code section 217(c), which contemplates that the required witness list can be served at the time of the hearing on the order to show cause or notice of motion. Section 217(c) provides that "[I]f the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing." This language does not preclude the filing of witness lists at the time of the hearing, and, in fact, makes provision for what the court is required to do if the list is not served prior to the hearing-i.e. grant a short continuance, and make temporary orders-but only if requested to do so by one or both of the parties. The proposed rule, to the extent that effectively precludes filing witness lists at the time of the hearing, seems not to reflect the language and intent of Section 217(c). This is not to say that the time limits set out in the proposed rule are not a good idea. However, to the extent that the rule seems to conflict with	The rule states that the witness list should be served prior to the hearing. This is consistent with Family Code 217. Family Code 217 states that if the witness list is not served prior to the hearing, a brief continuance can be ordered, and temporary orders made. The intent underlying the brief continuance is to allow time to prepare for witnesses when no witnesses list has been served. Rule 5.119 requires that when no witness list has been served, an offer of proof be made setting out the same basic information that would be in the witnesses list. This is to ensure that the opposing side has the information they need to prepare for questioning the witnesses. It is not the intent of the legislature or of the advisory committee and task force to exclude live testimony from non-party witnesses solely on the basis that no witness list was provided. The right to present testimony should not be lost because of a purely procedural omission when other options for adequate notice are available. An offer of proof is also acceptable, but may result in a continuance to allow the other side to prepare.

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			the language of the statute, it is likely to create uncertainty that may lead to further litigation. Since the purpose of the proposed rules is to provide certainty and guidance to both lawyers and judges, there is useful purpose to be served by drafting rules that do not create such ambiguity. My second objection to the proposed rule is that it requires that the required witness lists be served either [1] with the order to show cause or notice of motion; or [2] with the responsive papers. However, it is not unlikely that the party filing the order to show cause or notice of motion may not see the necessity for requiring the testimony of witnesses until after the other party has filed their responsive papers raising issues that the moving party needs to address or rebut through the testimony of witnesses. As it currently reads, the proposed rule would preclude the filing of witness list with the moving party's reply papers, which could defeat the purpose of allowing the parties to present live testimony, as required by Section 217(a), which requires that "[A]t a hearing on any order to show cause or notice of motion ... *the court shall receive any live, competent testimony that* is *relevant and within the scope of the hearing* . ... "	The advisory committee and task force agree that a moving party might need to file a supplemental or amended witness list with the reply. There is currently a Judicial Council form for a witness list being developed to become effective January 1, 2012. This will be referred to this group so that it can also be used for a supplemental or amended witness list to be served with the reply declaration.

ITC number: W11-06
Family Law: Live testimony at hearings and Declarations
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118

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			To the extent that the proposed rule would preclude a party from presenting live testimony relevant to issues presented in the other party's responsive papers, it should be amended so that it more fully implements the intent and language of the statute by allowing the filing of witness lists up to, and including, the date of the hearing.	

ATTACHMENT A

Family Code section 217

217. (a) At a hearing on any order to show cause or notice of motion brought pursuant to this **code**, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.

(b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause.

(c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing.