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November 10, 2017

Chief Justice Tani G. Cantil-Sakauye and
Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, California 94102

SUPREME COURT
FILED

NOV 14 2017

Jorge Navarrete Clerk

Deputy

Re: **Jameson v. Desta**, Cal. Supreme Court No. S230899
Supplemental Letter Brief of Amici Curiae
California Academy of Appellate Lawyers et al.

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amici curiae California Academy of Appellate Lawyers and others signing below submit this supplemental letter brief to address the question set forth in the Court's order of October 11, 2017: What effect, if any, does the 2015 amendment to California Rules of Court, rule 3.55(7) and the accompanying Advisory Committee Comment have on the resolution of the issue presented by this case?

Introduction

Our view is that rule 3.55(7) and the accompanying Advisory Committee Comment address only appearance fees of *official* court reporters—that is, reporters provided by the court. Rule 3.55(7) mandates the inclusion of such fees in an initial fee waiver. Rule 3.55(7) and the accompanying Advisory Committee Comment have no effect on appearance fees of *private* court reporters—that is, reporters provided by the parties. Rule 3.56 of the California Rules of Court makes the inclusion of such fees of private court reporters in an initial fee waiver *discretionary* with the court.

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As more fully explained in the brief of amici curiae California Academy of Appellate Lawyers et al., where a litigant has obtained a fee waiver, it is an abuse of discretion for a superior court to categorically refuse either to provide an official court reporter or to extend the fee waiver to a private court reporter's appearance fee if doing so will preclude meaningful appellate review for want of a reporter's transcript. Neither rule 3.55(7) nor its Advisory Committee Comment could reasonably be read to approve such a practice. For more than a century, this Court has made clear that any rule that "has the practical effect of restricting an indigent's access to the courts because of his poverty ... contravenes the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis." (*Isrin v. Superior Court* (1965) 63 Cal.2d 153, 165, citing *Martin v. Superior Court* (1917) 176 Cal. 289, 293–297.) Rule 3.55(7) was not intended to and does not achieve such a pernicious result.

Rule 3.55(7)

Rule 3.55(7) states that an initial fee waiver includes "[r]eporter's fees for attendance at hearings and trials, *if the reporter is provided by the court.*" (Cal. Rules of Court, rule 3.55(7), emphasis added.) The Advisory Committee Comment explains: "The inclusion of court reporter's fees in the fees waived upon granting an application for an initial fee waiver is not intended to mandate that a court reporter be provided for all fee waiver recipients. Rather, it is intended to include within a waiver of all fees mandated under the Government Code for the cost of court reporting services *provided by a court.*" (Advisory Com. com, 23 pt. 1 West's Ann. Codes, Rules (2017 ed.) foll. rule 3.55, p. 303, emphasis added.)

Thus, rule 3.55(7) and the accompanying Advisory Committee Comment address only the waiver of appearance fees charged by *official* court reporters—that is, reporters provided by the court. They are silent with regard to appearance fees of *private* court reporters—that is, reporters provided by the parties.

The Judicial Council's silence as to waiver of fees charged by private court reporters is not the equivalent of a positive rule governing such fees and does not preclude this Court's common law pronouncement on the issue presented. (Cf. *County Sanitation Dist. v. Los Angeles County Employees Ass'n* (1985) 38 Cal.3d 564, 584–585 ["Legislative silence is not the equivalent of positive

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legislation and does not preclude judicial reevaluation of common law doctrine”; “it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development” (internal quotation marks omitted).)

The Intent of Rule 3.55(7)

Rule 3.55(7)’s limited reach to fees of official court reporters is evident from its text, which expressly restricts its application to appearance fees when “the reporter is provided by the court.” (Cal. Rules of Court, rule 3.55(7).)

In addition, the intent of the rule and accompanying Advisory Committee Comment is explained in the Report to the Judicial Council by the Civil and Small Claims Advisory Committee and the Appellate Advisory Committee. (Judicial Council of Cal., Civil and Small Claims Advisory Com. & App. Advisory Com. Rep., Fee Waivers: Change in Federal Poverty Guidelines, Revisions to Application Form, and Specific Fees Included in Waivers (2015) <<http://www.courts.ca.gov/documents/jc-20150219-itemA2.pdf>> [as of Nov. 3, 2017] (hereafter Report)). The Report recommended amending rule 3.55(7) to reflect recent amendments to Government Code section 68086, which addresses appearance fees of official court reporters—again, reporters provided by the court rather than privately by the parties.

Before 2012, Government Code section 68086 imposed official court reporter appearance fees only for proceedings lasting more than an hour, making the appearance of an official court reporter free for the first hour. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 648 (2013–2014 Reg. Sess.) as amended Sept. 6, 2013, pp. 2–3.) In 2012, the Legislature amended the statute to prescribe a \$30 fee for proceedings lasting an hour or less. (Gov. Code, § 68086, subd. (a)(1)(B).) In 2013, the Legislature further amended the statute to, among other things, provide that official court reporter appearance fees “shall be waived for a person who has been granted a fee waiver under [Government Code] Section 68631.” (Gov. Code, § 68086, subd. (b).) Government Code section 68631 prescribes an “initial fee waiver” for eligible low income applicants.

As of 2013, rule 3.55, which *mandates* the inclusion of certain court fees and costs in initial fee waivers, required that an initial fee waiver include “[r]eporter’s daily fees for attendance at hearings and trials held within 60 days of the date of the order granting the application.” (See Report p. 16, quoting

former rule 3.55(7).) Rule 3.56, which states that courts “may”—that is, have *discretion* to—include certain other court fees and costs in initial fee waivers, gave courts discretion to include in an initial fee waiver “[r]eporter’s fees for attendance at hearings and trials held more than 60 days after the date of the order granting the application.” (See Report p. 16, quoting former rule 3.56(4).) Thus, former rule 3.55(7) prescribed a *time restriction* for mandatory waiver of official court reporter appearance fees: the waiver was mandatory only for hearings and trials held within 60 days of the grant of an initial fee waiver. For hearings and trials held more than 60 days later, the fee waiver was discretionary under former rule 3.56(4).

The Report explains that the purpose of the 2015 amendment to rule 3.55(7), along with a simultaneous amendment to rule 3.56, was to “reflect ... the new statutory requirement that court fees for court reporting services be included in *all* fee waivers.” (Report p. 2, emphasis added.) The amendments were required “not only so that the \$30 fee is covered, but also so that the time distinction in the current rules, giving a court the discretion to waive the reporter fees for a hearing more than 60 days after the grant of the fee waiver, is eliminated. As the rules currently read, they are in conflict with statute.” (*Id.* at 5; see also *id.* at 5–6 [“The Civil and Small Claims Advisory Committee recommends amending rule 3.55(7), which currently includes on the list of fees that must be waived only those court reporter fees for hearing held within 60 days of the issuance of the fee waiver order, to eliminate the time restriction in light of the new mandate in Government Code section 68086(b) that all court reporter’s fees otherwise charged by a court are waived for a party who has received a fee waiver”].)

Thus, the purpose of the 2015 amendments to rules 3.55(7) and 3.56 was simply to make them consistent with amended Government Code section 68086 by bringing *all* official court reporters’ appearance fees within the scope of the mandatory fee waiver and eliminating the provision for a discretionary fee waiver. The Advisory Committee Comment simply makes clear that, after the 2015 amendment, courts still are not required to provide *official* court reporters. (Advisory Com. com., 23 p. 1 West’s Ann. Codes, Rules (2017 ed.) foll. rule 3.55, p. 303 [inclusion of court reporter’s fees in initial fee waiver is intended only to mandate waiver of cost of court reporting services “provided by a court”].)

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None of this has *anything* to do with appearance fees charged by *private* court reporters. On that, the Report is silent.

Rule 3.56(5)

Appearance fees of private court reporters are within the scope of *discretionary* waiver of court fees and costs under rule 3.56 of the California Rules of Court. Specifically, rule 3.56(5) states that the court fees and costs that *may* be waived upon granting an application for an initial fee waiver include, in addition to those listed in the first four subsections of rule 3.56, “[o]ther fees or expenses as itemized in the application.” (Cal. Rules of Court, rule 3.56(5).) Rule 3.56 makes clear that these discretionary “[o]ther fees or expenses” (*ibid.*) include fees and expenses *other than those paid to the court itself*—such as to private court reporters. This appears from the fact that the rule expressly authorizes discretionary waiver of fees paid to noncourt personnel such as court-appointed interpreters (Cal. Rules, of Court, rule 3.56(2)), peace officers (Cal. Rules of Court, rule 3.56(3)), and court-appointed experts (Cal. Rules of Court, rule 3.56(4)).

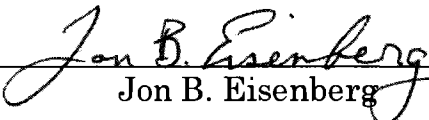
Conclusion

Unlike appearance fees of *official* court reporters, which are subject to mandatory waiver under rule 3.55(7), appearance fees of *private* court reporters are subject to discretionary waiver under rule 3.56(5). As more fully explained in the brief of amici curiae California Academy of Appellate Lawyers et al., it is an abuse of discretion for a superior court to adopt a policy that does not allow persons of modest means to obtain meaningful appellate review by securing the services of a court reporter—if not through the court’s provision of an official court reporter, then through the extension of an initial fee waiver to include the appearance fee of a private court reporter.

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Respectfully submitted,

**CALIFORNIA ACADEMY OF APPELLATE
LAWYERS**

By: 
Jon B. Eisenberg

Attorneys for Amici Curiae
**CALIFORNIA ACADEMY OF APPELLATE
LAWYERS; BEVERLY HILLS BAR
ASSOCIATION; LOS ANGELES CENTER
FOR LAW AND JUSTICE; LOS ANGELES
COUNTY BAR ASSOCIATION; PUBLIC
COUNSEL; WESTERN CENTER ON LAW
AND POVERTY; PROF. LOUIS S. RULLI**

cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On November 10, 2017, I served true copies of the following document(s) described as **SUPPLEMENTAL AMICUS CURIAE LETTER BRIEF** on the interested parties in this action as follows:

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

Executed on November 10, 2017, at Burbank, California.



Millie Cowley

SERVICE LIST
Jameson v. Desta
Case No. S230899

Michael J. Shipley
Sierra Elizabeth
Joseph M. Sanderson
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071

Attorneys for Petitioner
Barry S. Jameson

James J. Wallace, II
Russell M. Mortyn
David Ozeran
La Follette, Johnson, De Haas, Fesler &
Ames
501 West Broadway, Suite 800
San Diego, CA 92101

Attorneys for Respondents
Taddese Desta

Kenneth R. Pedroza
Joshua C. Traver
Cole Pedroza LLP
2670 Mission Street, Suite 200
San Marino, CA 91108

Attorneys for Respondents
Taddese Desta

Anna T. Ferrari
Penelope A. Prevolos
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Attorneys for Amicus Curiae
Family Violence Appellate Project; 30
Organizations and Individuals
Representing Survivors of Family
Violence

Erin C. Smith
Nancy K. D. Lemon
Family Violence Appellate Project
1814 Franklin Street, Suite 805
Oakland, CA 94612

Attorneys for Amicus Curiae
Family Violence Appellate Project; 30
Organizations and Individuals
Representing Survivors of Family
Violence

Mary-Christine Sungaila
Haynes and Boone LLP
600 Anton Blvd., Suite 700
Costa Mesa, CA 92626

Attorneys for Amicus Curiae
American Bar Association

Paulette Brown
American Bar Association
321 North Clark Street
Chicago, IL 60654

Attorneys for Amicus Curiae
American Bar Association
Via U.S. Mail

Michael J. Levy
California Department of Insurance
300 Capitol Mall, Floor 17
Sacramento, CA 95814

Attorneys for Amicus Curiae
Amicus Curiae Committee of the
California Commission on Access to
Justice

Catherine J. Blakemore
Attorney at Law
1831 K Street
Sacramento, CA 95811

Attorneys for Amicus Curiae
Amicus Curiae Committee of the
California Commission on Access to
Justice

California Court of Appeal
Fourth Appellate District, Div. One
750 B Street, Ste. 300
San Diego, CA 92101-8196

Case No. D066793

Hon. Joel M. Pressman
San Diego Superior Court
330 West Broadway, Fourth Floor
Dept. 66
San Diego, CA 92101

Case No. GIS9465
Via U.S. Mail