

S230899

SUPREME COURT COPY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

BARRY S. JAMESON,
Plaintiff and Petitioner,

v.

TADDESE DESTA,
Defendant and Respondent.

SUPREME COURT
FILED

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California Court of Appeal
Fourth Appellate District, Division One
Case No. D066793
San Diego County Superior Court
Case No. GIS9465
Hon. Joel M. Pressman

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND *AMICUS CURIAE* BRIEF OF
THE AMERICAN BAR ASSOCIATION IN SUPPORT OF
PLAINTIFF AND PETITIONER BARRY S. JAMESON

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**APPLICATION FOR LEAVE
TO FILE *AMICUS CURIAE* BRIEF**

TO THE HONORABLE CHIEF JUSTICE:

Under rule 8.520(f) of the California Rules of Court, the American Bar Association (ABA) requests permission to file the attached *amicus curiae* brief in support of Plaintiff and Petitioner Barry S. Jameson.

INTEREST OF *AMICUS CURIAE*; HOW THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT

The ABA is one of the largest voluntary professional membership organizations and the leading association of legal professionals in the United States. Its more than 400,000 members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.¹

Since its founding in 1878, the ABA has worked to improve the justice system, with a particular emphasis on issues related to access to justice. The ABA has opposed legislation that would increase barriers to our civil justice system. (Civil Justice System Access <http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/civiljustice.html> [as of July 5, 2016].) And the ABA has developed a number of standards and policies directed towards these issues. These policies and

¹ Neither this brief nor the decision to file it reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

standards include the ABA Model Code of Judicial Conduct, the ABA Standards Relating to Trial Courts, and the ABA Principles of a State System for the Delivery of Civil Legal Aid, among others. (ABA Model Code of Judicial Conduct (2007) <http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf>; ABA Standards Relating to Trial Courts (1992) <<http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf>>; ABA Principles of a State System for the Delivery of Civil Legal Aid (Aug. 2006) [ABA Principles] http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112B.authcheckdam.pdf [as of July 5, 2016].) The ABA standards reflect years of study by leaders in the profession. Although those standards do not purport to define constitutional requirements, they reflect the judgment of a great body of legal professionals about the requirements for the proper administration of justice and fairness in the justice system.

The past few decades have seen the rapid expansion of state Access to Justice Commissions, the formation of which the ABA has encouraged since the 1990s. These commissions bring

the highest levels of the state courts and state bar together with civil legal aid providers and other key players to promote and support the expansion of civil legal assistance. (ABA Principles, *supra*, at p. 7.) The California Commission on Access to Justice, a 26-member body of lawyers, judges, academic, business, and community leaders committed to long-term improvements in access to the civil justice system for Californians living on low and moderate incomes, was established in 1997. (The Path to Equal Justice: A Five-Year Status Report on Access to Justice in California (October 2002) <<http://www.calbar.ca.gov/LinkClick.aspx?fileticket=QhMjgCPh4gg%3D&tabid=224&mid=1534>> [as of July 5, 2016]; see also Chief Justice Tani G. Cantil-Sakauye, State of the Judiciary Address to a Joint Session of the California Legislature (Mar. 8, 2016) [discussing the Commission and its commitment to improving access to the courts for those of low income and modest means].)

The questions presented in this case squarely implicate many of these access to justice policies and standards. The ABA's proposed brief discusses the ABA's policies and standards, and the guidance they provide in deciding the issues before this Court in this case. These arguments are complementary to, not

duplicative of, the briefing submitted by Jameson and the letter
briefs submitted by amici in support of the petition for review.

**NO PARTY OR COUNSEL FOR A PARTY AUTHORED OR
CONTRIBUTED TO THIS BRIEF**

The ABA provides the following disclosures required by
rule 8.520(f)(4) of the California Rules of Court: (1) no party or
counsel for a party in this appeal authored or contributed to the
funding of this brief, and (2) no one other than *amicus curiae* or
its counsel in this case made a monetary contribution intended to
fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, the ABA requests that the Court
permit the filing of the attached *amicus curiae* brief in support of
Plaintiff and Petitioner Barry S. Jameson.

DATED: July 27, 2016

Respectfully submitted,

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AMICUS CURIAE BRIEF

INTRODUCTION

The Petitioner in this case, Barry S. Jameson, is an incarcerated, indigent, self-represented litigant. His case was dismissed after opening statements at trial. Jameson appealed that dismissal. But his appeal was unsuccessful because he did not have any record of the trial. He had no verbatim transcript of the proceedings because of a judicially created San Diego Superior Court-wide policy that official court reporters are no

longer provided in civil cases, and that indigent fee waivers do not apply to the private court reporters that parties would need to hire in lieu of the official reporters. Jameson challenges that court reporter policy, which has the practical effect of precluding indigent litigants from making an adequate record of civil proceedings for appeal.

The court reporter policy at issue, and the trial court's handling of that policy with a self-represented litigant like Jameson, implicate core principles of the American Bar Association (ABA). Among the ABA's foundational principles is a commitment to ensuring that the public has access to the courts. The ABA has promulgated numerous standards and rules that further this purpose, including the ABA Model Code of Judicial Conduct, the ABA Standards Relating to Trial Courts, and the ABA Principles of a State System for the Delivery of Civil Legal Aid, among others. In this brief, we discuss those policies—their background and purpose—and the ways that they inform the issues before the Court. We also briefly discuss the constitutional implications of the San Diego Superior Court's policy.

BACKGROUND

Since 2013, the San Diego Superior Court has had an official court policy that the court does not provide court reporters in civil, family, or probate matters, including civil trials. (See OBOM Ex. A.) The policy makes no exception for indigent litigants, even those who have qualified for a fee waiver and have no other way to pay for a record. (*Id.* at Ex. B, p. 2 [“[I]ndigent litigants are not entitled to have the court provide or pay for a court reporter based on a fee waiver.”].) If a litigant wants to make a record of trial court proceedings, he or she must make arrangements for a private court reporter and pay for the reporter to attend and transcribe a trial or hearing. (*Ibid.* [“Privately retained court reporters are independent from the court, and are allowed to charge indigent litigants for their services.”].)

Jameson—an indigent prisoner appearing pro se before the San Diego Superior Court—was notified of this policy just ten days before the commencement of his civil jury trial. (RA 231-232.) The trial in his case had been more than a decade in the making. In 2002, Jameson brought claims of medical negligence and breach of fiduciary duty against his doctor, Taddese Desta,

who allegedly mismanaged his course of treatment for Hepatitis and left his vision permanently impaired. (RA 232.) In the years that followed the trial court dismissed Jameson's case three times, and each time the Court of Appeal reversed the trial court's decision.²

With this twelve-year history as a backdrop, in 2014 the trial court informed the parties at a hearing ten days before commencement of trial that "the Court no longer provides a court reporter for civil trials, and that parties have to provide their own reporters for trial." (RA 231-232.) There is no indication in the record that the trial court explained to Jameson how this

² The trial court dismissed Jameson's complaint for lack of diligent service in 2005. (*Jameson v. Desta* (July 2, 2007, D047824), 2007 WL 1885104 at *2 opn. mod. July 26, 2007 [non-pub. Opn.] (*Jameson I*.) The Court of Appeal reversed that dismissal in an unpublished opinion because Desta had signed a "notice and acknowledgement of receipt indicating that he had been served with a summons and a complaint." (*Id.* at p. *6.) In 2008 the trial court again dismissed Jameson's complaint when he failed to appear telephonically at a case management conference. (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 677 (*Jameson II*.) The Court of Appeal reversed because Jameson's non-appearance was the result of prison officials denying him access to the telephone. (*Id.* at p. 683-684.) Finally, in 2011 the trial court entered judgment in favor of Desta following a motion for summary judgment. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1161-1162 (*Jameson III*.) That opinion was also overturned by the Court of Appeal, which held that the trial court improperly ruled that no triable issue of fact existed as to Jameson's claims against Desta. (*Id.* at pp. 1164-1174.)

announcement could impact his case going forward, or apprised Jameson of alternative resources for transcribing the upcoming proceedings. Without the money to pay for a private court reporter as required under the San Diego Superior Court's policy, Jameson proceeded to trial without any means of recording the proceedings. (OBOM at p. 8.)

The trial was a short one. After just 45 minutes of opening arguments, Desta moved for nonsuit and the trial court granted the motion. (RA 257.) Although there is no transcript of the proceedings, a minute order entered by the trial court indicates that the decision to grant a nonsuit was based upon a finding that Jameson "did not establish causation in his opening statement." (*Ibid.*) According to the minute order, "there [was] no basis upon which a jury could find for [Jameson]," because he had not presented any evidence from which a jury could conclude "that Dr. Desta did not meet the standard of care and caus[ed] damage to [Jameson]; nor breached any fiduciary duty." (RA 258.)

Jameson appealed.³ (AA 1207-09.) But the Court of Appeal declined to address the merits of Jameson's arguments for

³ The ABA takes no position on the substantive merits of Jameson's appeal. Rather, the ABA's focus is on the San Diego

reversing the judgment of nonsuit because “none of [them were] cognizable in the absence of a reporter’s transcript.” (Typed opn. at p. 18.) Citing case law that “an appellant who fails to provide a reporter’s transcript on appeal is precluded ‘from raising any evidentiary issues on appeal,’” the Court of Appeal held that it could not render an opinion on the merits of a grant of nonsuit, which depends on an analysis of the evidence and arguments presented at trial. (Typed opn. at p. 17.) In the absence of any record of such evidence, the Court of Appeal was precluded from reaching the merits of Jameson’s claim. (*Ibid.*)

The Court of Appeal then observed that there is no legal mandate that court reporter services be provided in the first instance. (Typed opn. at pp. 14-15 [explaining that the Government Code, the California Rules of Court, and the San Diego Superior Court policy do not obligate the trial court to provide a court reporter to indigent litigants in civil litigation like Jameson].) The Court of Appeal therefore affirmed the decision of the trial court.

Superior Court’s court reporter policy, and the manner in which the policy was implemented in Jameson’s case.

This Court granted Jameson’s petition for review, which presents the issue of the propriety of a superior court policy that has the practical effect of denying the services of an official court reporter and a verbatim transcript on appeal to a civil litigant who has been granted a fee waiver.

LEGAL DISCUSSION

The ABA has long held as a core value equal access to justice. (ABA Mission and Goals <http://www.americanbar.org/about_the_aba/aba-mission-goals.html> [as of July 5, 2016].) Indeed, the ABA has identified as one of its primary objectives the continued effort to “[a]ssure meaningful access to justice for all persons.” (ABA Report to the House of Delegates re the ABA Model Access Act (August 2010) <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf> [as of July 5, 2016].) Accordingly, the ABA has developed a number of policies and guidelines to aid the profession, and the courts, in making that objective a reality.

A. The ABA’s policies and standards are designed to ensure that the justice system remains available to all people, including those of low income and modest means.

The proceedings below implicate three ABA policies and standards, each of which reflects the ABA’s overarching objective of advancing access to justice for all. (ABA Mission and Goals <http://www.americanbar.org/about_the_aba/aba-mission-goals.html> [as of July 5, 2016].)

1. The ABA Model Code of Judicial Conduct calls on the judiciary to safeguard self-represented litigants’ access to justice.

The ABA has long recognized that the judiciary plays a central role in preserving access to justice and the rule of law. (ABA Model Code of Judicial Conduct (2007), Preamble <http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf> [as of July 5, 2016].)

The ABA’s first Canons of Professional Ethics adopted in 1908 included a call for the judiciary to strive for a “free and fair consideration of questions before them,” and for the legal profession as a whole to “always exert [its] best efforts” on behalf of indigent prisoners. (ABA Canons of Professional Ethics (1908),

Preamble, Canons 2 & 4 <<http://www.abanet.org/cpr/1908-code.pdf>> [as of July 5, 2016].)

In 1924, the ABA adopted the first Canons of Judicial Ethics.⁴ (ABA Canons of Judicial Ethics (1924), Preamble <http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/1924_canons_jud_ethicspdf.authcheckdam.pdf> [as of July 5, 2016].) The first Canons recognized that “[c]ourts exist to promote justice, and thus to serve the public interest,” and encouraged judges to “at all times be alert in [their] rulings and in the conduct of the business of the court . . . to make it useful to litigants and to the community.” (ABA Canons of Judicial Ethics (1924), *supra*, Canon 2.) The Canons further emphasized that trial judges should make every effort to enable the litigants before them to “secure the full benefit of the right of review accorded to [them] by law.” (*Id.* at Canon 22.)

⁴ The Conference of California Judges (now the California Judges Association) modified and then adopted the 1924 Canon for application in California in 1949. (California Code of Judicial Ethics (Aug. 2015), Preface <http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf> [as of July 5, 2016].) Since that time the California Code of Judicial Ethics has resembled the ABA’s Model Code of Judicial Conduct, and been updated to match ABA amendments. (*Ibid.*) Where applicable, the current provisions of the California Code of Judicial Ethics will be cited along with corresponding terms in the ABA’s Model Code of Judicial Conduct.

Canon 22 exhorted trial judges to “scrupulously grant to the defeated party [the] opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions⁵ or otherwise,” so as to prevent any wrong that may have been done from becoming “irremediable.” (*Id.* at Canon 22.)

In 1972, the ABA reformulated the Canons as the Model Code of Judicial Conduct under the guidance of the Special Committee on Standards of Judicial Conduct, chaired by California Supreme Court Justice Roger J. Traynor. (Robert McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 Utah L. Rev. 391, 391 (1972).) Unlike the Canons of 1924, the reformulated Code was designed to be enforceable by

⁵ The “bill of exceptions,” or settled statement, “was first used before the day of the court reporter when there was no other means of getting the evidence into the record.” (See Doris Brin Marasse, *Appeal and Error: The Narrative Statement and the Reporter’s Transcript Compared as Methods of Bringing Up Evidence on Appeal*, 30 Cal. L. Rev. 457, 463 (1942).) California adopted the court reporter method of preserving a record on appeal in 1907. (*Id.* at p. 460-461 [citing Code Civ. Proc., § 953, subd. (a)].) Although the settled statement is still in use, it is fraught with difficulties, including getting litigants to agree, at the close of contentious litigation, upon the specifics of the events that transpired before the trial court. (*Ibid.*) Establishing a record via a settled statement requires far more legal acumen than that required to obtain a transcribed record, and is even more challenging for self-represented litigants to navigate. (*Ibid.*)

disciplinary action—a step that the Special Committee and the ABA believed would better preserve the integrity and independence of the judiciary. (ABA Model Code of Judicial Conduct (1990), Preface <http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/2004_CodeofJudicial_Conduct.authcheckdam.pdf> [as of July 5, 2016] [citing E. Wayne Thode, Reporter’s Notes to the Code of Judicial Conduct (1973)].) The tenor of the Code changed to give effect to its new, binding nature, but the animating principles of public service and access to justice remained the same. Accordingly, the 1972 Code required that judges “should accord to every person who is legally interested in a proceeding” the “full right to be heard according to law.” (ABA Model Code of Judicial Conduct (1972), Canon 3, Rule A(4) <<http://fsm-supremecourt.org/pdf/1972codeofjudicialconduct.pdf>> [as of July 5, 2016].)

This language has endured in subsequent versions of the Model Code of Judicial Conduct adopted by the ABA. (See Lisa L. Milord, *The Development of the ABA Judicial Code* (1992) p. 8; ABA Model Code of Judicial Conduct (2007), *supra*, Canon 2, Rule 2.6(A) [“A judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to

law.”]; see also California Code of Judicial Ethics (2015), *supra*, Canon 3, Rule (B)(7).) Indeed, current Rule 2.2 of Canon 2 requires judges to uphold and apply the law in a fair and impartial manner—a rule that has existed in every form of the judicial code of conduct since 1924, but clarifies for the first time in the accompanying commentary that judges may “make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” (ABA Model Code of Judicial Conduct (2007), *supra*, Canon 2, Rule 2.2; see also California Code of Judicial Ethics, *supra*, Canon 3, Rule (B)(8), Commentary [“[W]hen a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard.”].)

Thus, the Model Code of Judicial Conduct has always embodied the ABA’s intent to assist the judiciary in maintaining the highest standards of judicial and personal conduct, particularly with respect to ensuring access to the courts for all, including the self-represented.