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

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

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

My career path has been pretty varied since graduating from law school. I started by clerking for a law firm. I then worked for a law firm in a technology and intellectual property practice. After that, I moved to a corporate in-house role at Dell and then at CoreLogic, where I currently serve as Deputy General Counsel.

“Take a Writ”: Extraordinary Writs in the California Court of Appeal

By Jason Moberly Caruso

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

The writ petition provides a process for appellate review of trial court rulings that are not otherwise appealable. See Cal. Civ. Proc. Code § 904.1. Generally, writ petitions must be filed within 60 days after service of notice of entry of the challenged ruling. (It should be noted that shorter, jurisdictional deadlines apply to statutory writ petitions for review of certain trial court rulings, such as those regarding motions to expunge lis pendens, motions for change of venue, and denials of motions for summary judgment/adjudication. Those deadlines are beyond the scope of this article, and failure to meet those deadlines may indeed preclude any other review of those rulings.) The Court of Appeal may summarily deny a meritorious petition that does not satisfactorily explain any delay in seeking relief. See H.D. Arnaiz, Ltd. v. Cnty. of San

OPTIMIZING E-Discovery with Arbitration

While electronic discovery (e-discovery) is crucial in today’s litigation landscape, the process can be challenging and time-consuming. The use of arbitration as an alternative to mediation and alternative dispute resolution (ADR) has gained traction in e-discovery disputes. Here are some benefits and considerations when utilizing arbitration in e-discovery matters.

1. **Efficiency and Speed**: Arbitration can be a faster process compared to traditional litigation, allowing parties to resolve disputes more quickly.

2. **Confidentiality**: Arbitration proceedings are typically more confidential than court proceedings, offering greater privacy for sensitive e-discovery matters.

3. **Controlled Environment**: Parties can control the e-discovery process in arbitration, ensuring a more focused and efficient workflow.

4. **Expertise**: Arbitrators often have specialized knowledge in e-discovery and technology, which can be beneficial in complex cases.

5. **Settlement Promotions**: Arbitration can be more settlement-oriented, helping parties reach agreements earlier without the pressure of a public trial.

However, there are also considerations to keep in mind:

- **Expertise Requirements**: Finding an arbitrator with the necessary technical expertise can be challenging.

- **Cost**: While arbitration may be more cost-effective in the long run, it may have higher upfront costs compared to mediation.

- **Time Sensitivity**: Parties must be ready to proceed with arbitration, as the timeline can be shorter compared to mediation.

By Jason Moberly Caruso

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

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The President’s Message
By Mark A. Finkelstein

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

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

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

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

By Kimberly A. Knill

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

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

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

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

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Optimizing E-Discovery with Arbitration

By Daniel Garrie

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

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

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

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Young Lawyers’ Division Update  
By Adrianne Marshack

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

June-November 2017 Events:

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

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

“Charting a Path to Judgeship” Panel—On September 21, 2017, a tremendous panel of speakers, including Orange County Superior Court Assistant Presiding Judge Kirk Nakamura, Orange County Superior Court Judge Melissa McCormick, Dean Zipser of Umberg Zipser LLP (Orange County Bar Association Judiciary Committee member), and Kimberly Knill, Senior Appellate Court Attorney for the California Court of Appeal, Fourth District, Division Three (former Chair of the JNE Commission) gathered to discuss the process to become a California State Court judge, as well as things that even young lawyers should be thinking about early in their practice if becoming a judge is something they might want to consider in the future. The discussion was lively and informative. Thank you to all of our panelists, as well as Justice David Thompson for making a special guest appearance.

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

Thank you to everyone who has participated in these events!

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

ABTL Raises $40,350 for PLC

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

Thanks are owed to our Board members, our law firm contributors, ABTL-OC’s sponsors, and the many individuals who planned, attended, and contributed to this event and to PLC.
firm, and shortly after that, I joined the United States Patent & Trademark Office as a patent examiner where I reviewed patent applications and determined whether or not patents could be granted. After that, I joined an intellectual property law firm in Washington, D.C., where I prosecuted and managing patent portfolios for startups to Fortune 10 companies. While I enjoyed the law firm atmosphere, I knew that I wanted to be more involved in the day-to-day development of a product.

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

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

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

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

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

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

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

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

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

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

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

**-Continued on page 6-**
counsel, with usually two to four total attorneys that are actively involved and knowledgeable about the matter. The lead (or first chair) attorney should not “parachute” in at the end of a case or during trial; they should be heavily involved in strategy and key decisions early on in the matter.

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

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

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

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

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

Mr. Tabaddor was interviewed by Brian C. Berggren, a litigation associate with Rutan & Tucker, LLP in Costa Mesa, CA.
-Extraordinary Writs: Continued from page 6-

appropriate:

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

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

- **Is compliance itself the irreparable harm?:** Mere assignments of error are generally an insufficient basis for writ review. Rather, the petitioner must make the case that compliance with the order will itself cause harm that cannot be rectified via later reversal on appeal. Classic situations include the forced production of privileged materials, City of Petaluma v. Superior Court (Waters), 248 Cal. App. 4th 1023, 1030–31 (2016), rulings on motions to disqualify counsel, Apple Computer, Inc. v. Superior Court (Cagney), 126 Cal. App. 4th 1253, 1263–64 (2005), rulings that effectively deprive a party of the ability to plead or defend the case, Angie M. v. Superior Court (Hiemstra), 37 Cal. App. 4th 1217, 1223 (1995), and rulings that will vastly multiply the procedural burden or costs of further proceedings In re Ford Motor Warranty Cases, 11 Cal. App. 5th 626 (2017).

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

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

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

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

— Mark Finkelstein is a partner at Jones Day.

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

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

“The initiative measure extensively revamps the procedures governing habeas corpus petitions in capital cases. Under current practice, habeas corpus proceedings are initiated in [the California Supreme Court], which appoints counsel and provides for their compensation. Under the initiative measure, howev—
process, with no hint as to what such rules might be, brings to mind the guidance a European monarch is envisioned as offering to John Adams—stepping into the shoes of George Washington as our second president—in the Musical ‘Hamilton’: ‘Good luck!’” Briggs, 3 Cal. 5th at 890 (CueLLar, J., concurring and dissenting) (citing Miranda, Hamilton: An American Musical, act II, scene 10).

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

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

There are approximately 400 death penalty habeas corpus petitions pending in the California Supreme Court, which is strong motivation to transfer pending petitions to superior courts. From Orange County alone, there are currently 65 death penalty convictions pending appeal in the Supreme Court. While not all current death penalty inmates whose appeals originated in Orange County have accompanying habeas corpus petitions pending, many do. If the Supreme Court decides to transfer pending habeas corpus petitions to the court where death sentence was imposed, the Orange County Superior Court risks being overwhelmed with death penalty petitions, conditions ripe to threaten access to justice for civil litigants.
Capital habeas corpus petitions typically span hundreds of pages and raise dozens of issues, and supporting documents and transcripts can add thousands of pages to a court’s review. The superior court will need more judicial officers to resolve the petitions, and few judges have experience in death penalty cases. Many judges who imposed the original death sentences being appealed are no longer on the bench. Further, having never before been tasked with adjudicating capital habeas corpus petitions, the superior court may lack sufficient legal research resources and expertise to assist the judges in this area. As pointed out in Justice Liu’s concurring opinion, “Although transfer of capital habeas corpus petitions to the superior court may expedite the adjudication of those petitions, superior courts asked to help reduce this court’s substantial backlog of habeas corpus cases will likely require additional resources to address petitions that are often as lengthy and time consuming as direct appeals.” 

Briggs, 3 Cal. 5th at 868 (Liu, J., concurring).

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

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

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

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

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

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

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

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

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

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

Kimberly A. Knill (“Kate”) is a Judicial Attorney for the California Court of Appeal, Fourth District, Division Three, a former Legal Research Attorney for the Orange County Superior Court, and past Chair of the Commission on Judicial Nominees Evaluation (JNE) of the State Bar of California. The views expressed herein are those of the author. They do not necessarily represent the views of the courts or the State Bar of California.
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Consider the following example. During discovery in a breach of contract arbitration, the responding party produces what it has deemed to be all the responsive files from the repositories in its possession. The production is smaller than the requesting party anticipated and some emails that the requesting party knows existed are not in the production. The requesting party demands to inspect all repositories of potentially relevant electronically stored information (ESI) the responding party has, thinking that the responding party may have deleted ESI. The responding party argues that no relevant information was deleted, all of the responsive files were produced and that an inspection would expose privileged and confidential information. What may have started as a simple breach of contract case has now turned into a full-blown e-discovery battle, and the business experts on the arbitration panel do not have the technical expertise to manage the situation.

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

While some law firms have specialized e-discovery counsel with experience in these matters, many firms lack the technical know-how needed to determine the optimal procedures for preserving, collecting, and producing electronically stored information. This knowledge deficit can substantially increase the cost and time to resolve discovery issues. Using a technically skilled arbitrator with knowledge of the relevant systems can overcome these gaps in experience and ability and make discovery more cost-effective for all parties. Arbitrators with technical expertise are a more efficient alternative to expert consultants hired by the parties for technical issues, as the neutrality and focus of arbitrators allow them to handle technical disputes in a way that guides the parties toward the resolution of the matter as a whole, rather than serving the interests of either side. In contrast to the substantive claims, the technical elements of e-discovery are not grounded in law, advocacy and persuasion, but rather in the ones and zeroes of the relevant computer systems. By using the arbitrator to analyze this technical information, the parties avoid having to engage in lengthy and costly rounds of briefings and submission of expert opinions.

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

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

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

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

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

The most effective and useful e-discovery arbitration requires the parties to gather the information necessary for an arbitrator to successfully work with the parties to reach useful resolutions. Examples of this information include: data maps; business use cases for data that is collected; and explanations for why each item of discovery is requested. Additionally, it can be useful to have the parties’ IT resources available throughout the course of the arbitration process in the event technical questions arise. One of the advantages of arbitrating is that the flexibility of the discovery rules and a shorter time frame make it easier to coordinate the necessary resources to resolve technical issues.

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

1. Granting a party’s request for further discovery or motion to compel production;
2. Granting a party’s request for shifting the cost of discovery or the cost of making the motion to compel;
3. Imposing fines in an amount appropriate to the violating party’s behavior and the impact of the behavior upon the arbitration and its search for the true facts;
4. Granting a party’s motion to preclude the testimony of a witness or barring testimony regarding a particular issue;
5. Drawing an adverse evidentiary inference, or

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

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ABTL Building Stability in Santa Ana
By Jerry Yang

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

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

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

Jerry Yang is an associate at Crowell & Moring
MARK YOUR CALENDARS FOR 2018

January 31, 2018
Dinner Program
The Westin South Coast Plaza
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March 21, 2018
Dinner Program
The Westin South Coast Plaza
◊

May 23, 2018
Dinner Program
The Westin South Coast Plaza
◊

September 12, 2018
Dinner Program
The Westin South Coast Plaza
◊

October 10-14, 2018
ABTL 45th Annual Seminar
Wailea Beach Resort
Maui, Hawaii
◊

November 7, 2018
Dinner Program
The Westin South Coast Plaza
Holiday Gift Giving Opportunity
Or Current Occupant