

# TENTATIVE ORAL OPINIONS: IMPROVING ORAL ARGUMENT WITHOUT SPENDING A DIME

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## I. INTRODUCTION

This article explores use of the tentative opinion, two types of which were pioneered by California appellate courts. In 1990, the Second Division of California's Fourth District Court of Appeal (which sits in Riverside) began disseminating written draft opinions in advance of oral argument. The measure received acclaim from appellate advocates, but did not beget imitation by other courts. In late 2011, however, an appellate court in Los Angeles (the Eighth Division of the Second District) began issuing tentative opinions orally at the beginning of argument. This approach, referred to here as the "oral tentative," represents an attractive alternative to the written version, which has failed to catch on in other courts.

After an overview of the California appellate system, this article details the history of the tentative opinion in both the Second Division of the Fourth District and the Eighth Division of the Second District. It then outlines the preliminary skepticism with which the oral tentative has been met and explores its advantages. Some of those benefits are shared with its written counterpart, but others are unique to the oral tentative in ways that seem to make it a smart choice for appellate courts

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in California—and perhaps for appellate courts across the country as well.

## II. THE CALIFORNIA APPELLATE SYSTEM

### A. *The Courts*

As is true of many state court systems, “the California state court system is structured something like a pyramid.”<sup>1</sup> The trial courts rest at the foot of the pyramid, while the appellate courts sit in the middle across six districts. The seven-justice California Supreme Court is at the apex.

For over a hundred years, the Courts of Appeal have “assist[ed] the California Supreme Court in administering justice.”<sup>2</sup> They have the final word in ninety-five percent of the cases they hear, as they were established to handle appeals in the “ordinary current of cases,”<sup>3</sup> which includes all Superior Court appeals not specifically within the jurisdiction of the California Supreme Court.<sup>4</sup> Appeals in the “great and important cases were thus left to the Supreme Court.”<sup>5</sup>

As is true in most jurisdictions, outcomes at the appellate level in California are, by and large, *faits accomplis* because “an appellant winning is the old journalistic definition of news: Man bites dog.”<sup>6</sup> But even in California, a rare few appeals remain unresolved after intermediate review, generating further appeals to the California Supreme Court.<sup>7</sup>

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1. Jon B. Eisenberg, Ellis J. Horvitz & Howard B. Wiener, *California Practice Guide: Civil Appeals and Writs*, ch. 1-D at ¶ 1:30 (Rutter Group 2012) [hereinafter “*California Practice Guide*”].

2. Ronald M. George, *Foreword*, in Judicial Council of California, *Striving for Justice Yesterday, Today and Tomorrow: A History of the California Courts of Appeal on the Occasion of Their Centennial Celebration* (Cal. Admin. Off. of the Cts. 2005).

3. *Id.* at 4.

4. Indeed, during 2004, the “105 justices on the state’s six Courts of Appeal disposed of more than 22,000 matters—more than 12,000 by written opinion.” *Id.* at 1.

5. *Id.*

6. *Mix v. Super. Ct.*, 124 Cal. App. 4th 987, 995 (2004).

7. The California Supreme Court boasts a cert-granted rate five times greater than that of the United States Supreme Court: In a recent year, the United States Supreme Court granted only seventy-six petitions for certiorari out of 1558 submitted in paid cases, *see Supreme Court of the United States, October Term 2010—Reference Index*, <http://www.supremecourt.gov/orders/jnl10.pdf> (accessed June 7, 2013; copy on file with

California's appellate courts are divided into six districts, some of which have dockets so busy that they are further separated into divisions. Districts Two<sup>8</sup> and Four,<sup>9</sup> which are the focus of this paper, consist of eight and three divisions, respectively. The divisions in these two districts typically consist of four justices, but only three preside over a given case.

### *B. The California Constitution's Ninety-Day Rule*

California appellate courts have good reason to consider innovating, as they are all constitutionally bound to decide cases within ninety days of the month of submission.<sup>10</sup> This, combined with the fact that the California Constitution gives litigants oral argument by right,<sup>11</sup> forces appellate judges to adhere to a strict schedule. The ninety-day law hits judges in their wallets if they do not follow it, providing that "[i]f a case remains pending and undetermined for 90 days or more after its submission for decision, the justices on the panel to which the case is assigned cannot receive their salaries."<sup>12</sup> The *California Practice Guide* spells out this rule in detail:

The justices are paid at the end of each month. To receive their salaries, they must execute an affidavit, several days before the end of each month, stating that no cause before

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Journal of Appellate Practice and Process), while the California Supreme Court recently granted twenty-four out of 977, see Judicial Council of California, *2012 Court Statistics Report: Statewide Caseload Trends 2001–02 through 2010–11*, at 8 (table 1: "Actions Taken on Petitions for Review" (showing results for fiscal year 2010–11)).

8. The Second Appellate District covers four southern California counties, including Los Angeles. Seven of its eight divisions hear cases arising in LA County. Its Eighth Division, a relatively new court, issues tentative oral opinions in advance of oral argument.

9. The Fourth Appellate District sits over much of the rest of the southland, including San Diego, San Bernardino, and Orange Counties. Its Second Division has long been the *avant garde* of appellate procedure in California. It, unlike any other court in California and indeed, unlike any other court in most of the country, offers tentative written opinions in advance of oral argument.

10. Cal. Const. Art. VI, § 19.

11. *Moles v. Regents of U. of Cal.*, 32 Cal. 3d 867, 872–73 (1982) (reviewing authorities, including Cal. Const. Art. VI § 3).

12. *California Practice Guide*, *supra* n. 1, at ch. 11-C, ¶ 11-36 (citing Cal. Const. Art. VI, § 19) (emphasis in original); cf. *Hassanally v. Firestone*, 51 Cal. App. 4th 1241, 1246 (Cal. App. 2d Dist. 1996) (applying same 90-day rule to trial judges, and noting that "[a]ttorneys have a right to expect judges to honor this public policy, and we expect that judges at all levels will do so").

them remains pending and undetermined for 90 days or more after submission.<sup>13</sup>

The ninety-day rule makes it practically impossible for appellate judges to draft opinions from scratch after hearing oral argument because the argument typically occurs too close to the end of the ninety-day period to allow time for that. In fact, “everything about how all of the California appellate courts prepare their cases for argument and then decision is driven by the ninety-day rule.”<sup>14</sup> Appellate justices in nearly every division in California sit for oral argument with a printed—and nearly final—draft of the opinion in front of them.<sup>15</sup> Of all the divisions in all the districts in California, only one lets the parties catch a glimpse of that draft opinion in advance of oral argument: the Second Division of the Fourth District. And only one lets the parties know on argument day what is likely to be in that opinion when it becomes final: the Eighth Division of the Second District.

### III. THE ADVENT OF WRITTEN AND ORAL TENTATIVES

#### A. *District Four’s Second Division: Written Tentatives*

In 1975, a Justice of Division Two proposed releasing draft opinions in advance of oral argument.<sup>16</sup> As he expected, however, nothing came of the proposal: “When the subject of pre-calendar circulation of tentative opinions is raised at

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13. *California Practice Guide*, *supra* n. 1, ch. 11-C, ¶ 11-37 (citing Ann. Cal. Gov. Code § 68210, discussing judicial pay schedule, and concluding that, “[a]s a practical matter, . . . the 90-day decision period begins to run near the end of the month in which submission occurred (so that the court may have slightly longer than 90 days to render an opinion)”).

14. Telephone Interview with Charles A. Bird, Partner, McKenna, Long & Aldridge (Oct. 31, 2012) (notes on file with author).

15. See e.g. Sedgwick Law, Publications, Christina Imre, *Tentative Opinions and the Right to Oral Argument on Appeal*, <http://www.sdma.com/Publications/detail.aspx?pub=3819> (June 2004) (accessed July 5, 2013; copy on file with Journal of Appellate Practice and Process).

16. See generally Robert S. Thompson, *One Judge and No Judge Appellate Opinions*, 50 Cal. St. B.J. 476 (Nov.–Dec. 1975); see also *id.* at 517 (noting that the practice would work only if the parties received the draft opinions far enough in advance of the court date to enable them to respond in writing and to frame those responses appropriately for use at oral argument).

meetings of appellate judges, it is as welcomed as a porcupine at a dog show. There is loud noise, but no one wants to get close to the intruder.”<sup>17</sup> He knew his colleagues well. It was not until fifteen years later that a court had the right combination of chutzpah and a crowded-docket crisis to try tentative opinions.

In 1990, Division Two of the Fourth District became the first court in California to systematically disseminate draft opinions in advance of oral argument.<sup>18</sup> The written tentative, spearheaded by Presiding Justice Thomas Hollenhorst, was born of necessity:

We were basically trying to handle the volume of maybe six or seven judges with three people on board . . . I can tell you from looking back on it they were horrible days. My personal record was 315 personal opinions filed in one year by myself.<sup>19</sup>

Short of judges and time, the court took drastic measures to stem the rising tide of cases awaiting argument, opting to send out draft opinions accompanied by waivers discouraging the parties from pursuing oral argument. Publicly, the court explained that the new procedure was for the sake of the parties, not its own efficiencies, adding this notice to its website:

To improve the quality and relevance of the oral argument experience, the justices of this court in October 1990 started mailing the preliminary draft of the opinion, which they called the “tentative opinion,” to counsel seven to ten days before oral argument.<sup>20</sup>

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17. *Id.* at 518.

18. California’s Second and Fourth District Courts of Appeal and some appellate courts in Arizona appear to be the only courts to have adopted this practice. See Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 Santa Clara L. Rev. 1 (1995) (discussing oral-tentatives practice in Arizona and California); see also *id.* at 5 (distinguishing the “second, and considerably different tentative opinion system . . . used by the New Mexico Court of Appeal,” which “differs substantially in [its] scope, format, and purpose, from the California and Arizona programs”). Noting that the practice of issuing oral tentatives is found only in California and Arizona, Justice Rubin of the Second District’s Division Eight jokes that “[i]t must be a desert phenomenon.” Interview with Laurence D. Rubin, Assoc. J., Cal. Ct. App., 2d Dist. (Dec. 19, 2012) (notes on file with author).

19. Telephone Interview with Thomas E. Hollenhorst, Assoc. J., Cal. Ct. App., 4th Dist. (Nov. 13, 2012) (notes on file with author).

20. *People v. Pena*, 83 P.3d 506, 510 (Cal. 2004) (describing tentative opinion program of Fourth Appellate District’s Division Two, and quoting notice then on court’s website);

And in fact, lawyers and clients saw the benefits of the new approach almost immediately. As one commentator noted, “counsel felt that once the tentative decision was received, the decision to proceed with oral argument became easier, and could be discussed with clients in light of the cost savings that accompany waiver of oral argument.”<sup>21</sup>

If there was no agreed-upon opinion, the court would send out focus letters—a practice other California courts turn to sporadically—notifying the parties that “[e]nclosed is a memorandum agreed on by the three justices on the panel hearing the appeal describing the key issues disputed among the panel members. Limit and focus your argument accordingly.”<sup>22</sup> This gambit worked. The tentatives discouraged parties from coming before the court for oral argument when the case had been decided or from using all of the time they had been allotted. The court concluded that

[t]he program . . . “significantly reduced the time spent on oral argument” because “argument has become more focused and taken less time as counsel can concentrate on the issues found significant by the court,” and “counsel often decide to waive oral argument once they see the court’s tentative opinion.”<sup>23</sup>

When the judges were unanimous in their tentative opinion, the court even offered strong hints in the form accompanying its draft opinion. This let the parties know when argument was not worthwhile by suggesting that oral argument was likely to be futile. But so strong were these admonitions against oral argument that the Second Division actually found itself embroiled in an appeal to the California Supreme Court, which held that the systematic use of strongly worded waiver notices to encourage parties to forego oral argument violated the due process provisions of the California Constitution.

The California Supreme Court endeavored to explain, however, that the impropriety lay in the use of waiver notices

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*see also* Cal. Ct. App., 4th Dist., Div. 2, IOP&P at § VIII—*Tentative opinions and oral argument* (describing creation and use of tentative opinions) (WestLaw 2013).

21. Hollenhorst, *supra* n. 18, at 19 (footnote omitted).

22. *Id.* at 3 n. 4 (citing Memo. from Don Davio to All Court Personnel (June 14, 1990)).

23. *Pena*, 83 P.3d at 510 (quoting program description then on the website of the Fourth District’s Division Two).

and the strong discouragement of oral argument, not in the use of tentative opinions. Indeed, it noted that “[t]he Court of Appeal’s adoption of a procedure under which it prepares and provides the parties with a tentative opinion prior to oral argument does not in itself improperly interfere with the right to present oral argument on appeal.”<sup>24</sup> Acknowledging that it did not want to “discourage[e] experimentation . . . to streamline the appellate process,”<sup>25</sup> and that it “applaud[ed] innovations,” the California Supreme Court “simply conclude[d] . . . that the particular waiver notice employed here is not a proper streamlining device”<sup>26</sup> and “direct[ed] the Court of Appeal to refrain from using this notice in future cases.”<sup>27</sup> The Supreme Court also made clear that it had already considered and rejected “the suggestion that a defendant receives a ‘less meaningful’ hearing when the court prepares a tentative opinion,”<sup>28</sup> and drew another distinction between the acceptable and the unacceptable: the tentative opinion had to be “truly” tentative.<sup>29</sup>

The Court did not equivocate on one key point. The tentative opinion was not by itself a constitutional concern. It cuts costs and it gives lawyers the ability to prepare better, more focused arguments. And yet, the written-tentatives practice of District Four’s Division Two has spawned no California imitators.<sup>30</sup> Justice Hollenhorst nevertheless remains both enthusiastic about the tentative opinion and optimistic that other courts will someday turn to it: “[W]hen you talk to groups of young judges about tentatives there really is an interesting visceral reaction. People are very impressed with it. A number

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24. *Id.* at 512.

25. *Id.* at 516 (adding that “[w]e are mindful that the appellate courts of this state face an increasing caseload”).

26. *Id.*

27. *Id.* at 515.

28. *Id.* at 513 (quoting *People v. Brown*, 862 P.2d 710, 722 (1993)).

29. *Id.* 514 (noting that “[b]y suggesting the Court of Appeal already has decided the case without oral argument and that oral argument, if requested, would have no impact on its decision, the oral argument waiver notice here has the potential to improperly discourage the exercise of the right to present oral argument on appeal”).

30. Mark Hummels, Student Author, *Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination*, 46 Ariz. L. Rev. 317, 320 (2004) (asserting that “to this day, no other state appellate court has followed the California or Arizona models,” which appears still to be the case almost ten years later).

of federal judges have mentioned to me that it's an intriguing idea and has a lot of merit.”<sup>31</sup>

### *B. District Two’s Eighth Division: Oral Tentatives*

The Eighth Division of the Second District, at only twelve years old, is one of the youngest courts in California.<sup>32</sup> As members of a new court, its justices may have felt freer to experiment with issuing tentative opinions. As one of its justices notes, “Division Eight has sort of a reputation for being a bit more inventive, a bit more creative. . . . They have some younger, less dug-in members of that court, than other divisions.”<sup>33</sup> And it has lived up to its potential for judicial innovation, perhaps in part because new judges typically “are viewing things with fresh eyes as opposed to the more jaundiced eyes [of older judges].”<sup>34</sup> True to form, the justices of the Eighth Division were, as one of their number puts it, “intrigued”<sup>35</sup> by the possibility of using tentatives when the court was new, and even went to Riverside to research the tentatives practice there.<sup>36</sup>

And yet, although the Eighth Division toyed with the idea of issuing tentative opinions from the beginning, it took over ten years for the court to turn to them routinely. Justice Grimes of Division Eight has been at the forefront of this development: She once turned a CLE event focused generally on appeals into a referendum on tentative opinions.<sup>37</sup> “I stole the occasion to change the topic to ask if the lawyers in the audience would be in favor of appellate courts giving tentative opinions before oral

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31. Hollenhorst Interview, *supra* n. 19.

32. The state added the Eighth Division due to need; its genesis story was like that of every other division added to deal with the state’s growing docket.

33. Hollenhorst Interview, *supra* n. 19.

34. *Id.*

35. Rubin Interview, *supra* n. 18.

36. *Id.*

37. Interview with Elizabeth A. Grimes, Assoc. J., Cal. Ct. App., 2d Dist. (Dec. 19, 2012) (referring to an Association of Business Trial Lawyers of Los Angeles program entitled *Everything Trial Lawyers Need to Know about Appeals*, see [http://www.abtl.org/pdfs/la\\_011712.pdf](http://www.abtl.org/pdfs/la_011712.pdf) (accessed June 17, 2013; copy on file with Journal of Appellate Practice and Process)) (notes on file with author). Featuring Judge Alex Kozinsky, Justice Grimes, and Miriam Vogel, a former California appellate justice, the event was moderated by Robin Meadow, a supporter of tentatives. See *Everything Trial Lawyers Need to Know About Appeals*, *supra* this note.

argument,” she says. “Everyone put their hands up. There was overwhelming support.”<sup>38</sup>

In December 2011, the Eighth Division started issuing tentatives more consistently,<sup>39</sup> but with a twist. These tentatives would be oral, not written, draft opinions because the Justices did not want to issue fully fleshed-out drafts and be too committed to their opinions, which they felt might be the case if they issued written tentatives. As Justice Grimes said, “When you draft opinions you become invested in them. It’s a challenge to provide a tentative and keep an open mind.”<sup>40</sup> Instead of running that risk, the justices of the Eighth Division decided to issue oral summaries of their likely rulings on dispositive issues and to indicate whether the court was inclined to affirm or reverse the decision below.<sup>41</sup>

Division Eight’s first oral tentatives were mini-opinions issued orally from the bench right at the onset of most oral arguments. This practice did not deviate too far from precedent in the California courts, because judges from time to time begin appellate arguments by explaining how they will likely rule and identifying the dispositive issues;<sup>42</sup> even the Eighth Division had itself done this occasionally. As an experienced practitioner reports, “[i]t is not uncommon for the [Presiding Justice] to say . . . ‘we’ve read the brief and we have a draft, we are pretty much looking at the case this way.’”<sup>43</sup> And appellate counsel throughout California are generally prepared for this eventuality, because it is known that “some courts might even give an oral tentative decision from the bench.”<sup>44</sup>

The oral tentative works well for the Eighth Division, because its judges are eager to hear argument on a narrowly

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38. *Id.*

39. *Id.* (noting that she had by then won over her three counterparts, including Presiding Justice Bigelow, and that the Los Angeles County Bar Association even sent the court a letter of appreciation for issuing tentative oral opinions).

40. *Id.*

41. *Id.*

42. *California Practice Guide*, *supra* n. 1, at ch. 10-B, ¶ 10:64 (citing Cal. Cts. of App. I.O.P., 6th App. Dist. § II(A)(3) and noting that “in some courts, the presiding justice routinely prefacing each argument with a statement that the court has reviewed the briefs and the record and held a prehearing conference, and then gives a short summary of the issues in the case”).

43. Bird Interview, *supra* n. 14.

44. *California Practice Guide*, *supra* n. 1, Ch. 10-B, ¶ 10:64.

defined issue or set of issues. “This sort of statement is usually intended to move argument along by reminding counsel that they should not rehash the discussions made in the briefs.”<sup>45</sup> But of course the Eighth Division takes the oral tentative further than any California court before it. With a level of consistency and clarity not present in other divisions, it delivers a tentative oral disposition at the beginning of nearly every argument.<sup>46</sup> Like virtually all divisions in California, the Eighth Division has already penned its opinion before oral argument commences,<sup>47</sup> but the court gives the parties and their counsel a thumbs up or down just as the argument opens. Generally, that announcement is given in a tentative fashion, as in “We’re inclined to affirm.”<sup>48</sup> Armed with the knowledge of who won at the preliminary stage and some semblance of a reason why, counsel for the appellant then commences his or her argument.

On December 19, 2012, about a year after the court had begun issuing tentative oral opinions in most arguments, its calendar featured sixteen cases. Dealing with them in an extremely efficient manner, the court at one point dispatched three appeals, including a thorny domestic case that Presiding Justice Tricia Bigelow wryly noted could be called *Modern Family*,<sup>49</sup> in twenty-one minutes.<sup>50</sup> And the fifth case of the day featured a tentative of between 300 and 500 words; it was not a

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45. *Id.*

46. I observed oral argument only on December 19, 2012, but my observation of the regularity of the oral-tentative practice matches what practitioners have told me about the court.

47. See n. 15 and accompanying text, *supra*.

48. Quotations from—and statements about—oral argument in this section are based on those observed by the Author on December 19, 2012, when the Author sat in observation for most of a day. They are supported by contemporaneous notes, identified hereinafter as “Stein Observation Notes—[Case], [Docket Number] ([Court]) ([Date]).”

49. Stein Observation Notes—*J.R. v. D.P.*, No. B236047 (Cal. App. 2d Dist. Div. 8) (Oral Argument Dec. 19, 2012) (copy on file with Journal of Appellate Practice and Process). The unpublished *J.R.* opinion is available on the website of the California Second District Court of Appeal, <http://www.courts.ca.gov/2dca.htm> (click on “Search Case Information,” enter docket number, then click “Search by Case Number”) (accessed June 18, 2013; copy on file with Journal of Appellate Practice and Process).

50. *Id.* As the court went into recess, Justice Grimes, who saw the Author in the audience, remarked in reference to the speed of the morning’s proceedings, “Mr. Stein, this is another consequence of our approach.”

mere thumbs up or down.<sup>51</sup> After announcing the court's disposition—"Our tentative is to affirm the judgments of conviction"—the presiding justice walked through each key issue and indicated how the court had ruled.<sup>52</sup> Appellant's attorney, who understood from hearing the tentative that she had lost, began by acknowledging her plight. "Since the court was not too convinced," she said, "I'll go straight to the merits."<sup>53</sup>

The eleventh case featured a tentative on an arbitration case: "We're inclined to affirm. The arbitrators made all necessary disclosures and did not exceed their powers."<sup>54</sup> In this case, the losing lawyer proceeded as though he had not even heard the outcome. He argued that "vacatur should be automatic . . . a direct bullet to the heart."<sup>55</sup> Justice Rubin told opposing counsel, who could only snatch defeat from the jaws of victory, "Let me see if I can lead you down the garden path."<sup>56</sup>

In the next case up, a lawyer was caught unaware of the court's practice of issuing tentatives, apparently having failed to observe the arguments in a case heard before his own. As he began his argument, Presiding Justice Bigelow interjected, "Excuse me, but we have a tentative in this case. . . . We find that this appeal is moot." The lawyer, now aware that he had likely lost his appeal, began with what might have been the only possible opener: "I don't think that the appeal is moot."<sup>57</sup>

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51. Stein Observation Notes—*People v. Rodezno*, No. B234852 (Cal. App. 2d Dist. Div. 8) (Oral Argument, Dec. 19, 2012) (copy on file with Journal of Appellate Practice and Process). The unpublished *Rodezno* opinion is available on the website of the California Second District Court of Appeal, <http://www.courts.ca.gov/2dca.htm> (click on "Search Case Information," enter docket number, then click "Search by Case Number") (accessed June 17, 2013; copy on file with Journal of Appellate Practice and Process).

52. *Id.*

53. *Id.*

54. Stein Observation Notes—*Rosen Capital Partners v. Merrill Lynch Prof. Clearing*, No. B239404 (Cal. App. 2d Dist. Div. 8) (Oral Argument Dec. 19, 2012) (copy on file with Journal of Appellate Practice and Process). The unpublished *Rosen Capital* opinion is available on the website of the California Second District Court of Appeal, <http://www.courts.ca.gov/2dca.htm> (click on "Search Case Information," enter docket number, then click "Search by Case Number") (accessed June 17, 2013; copy on file with Journal of Appellate Practice and Process).

55. *Id.*

56. *Id.*

57. Stein Observation Notes—*Soni v. CH &I Techs.*, No. B240173 (Cal. App. 2d Dist. Div. 8) (Oral Argument Dec. 19, 2012) (copy on file with Journal of Appellate Practice and

Toward the end of the afternoon, the court heard two pro-se appeals, which were the only two cases on that day's docket in which the court did not begin by announcing tentatives. And the court finished with its sixteenth appeal, a contract dispute in which its tentative decision was "to affirm the summary judgment . . . based on sworn deposition testimony."<sup>58</sup>

#### IV. COMMON CRITICISMS OF THE ORAL TENTATIVE

Announcing a winner and a loser at the start of oral argument should not be confused with a revolution. It is, however, quite helpful to judges, lawyers, and clients alike. It costs nothing and though its drawbacks could lead some to argue that you get what you pay for, it is nevertheless a step forward. Tentative oral opinions represent something of a transformation in appellate procedure, even more so than do the written tentatives that have been much heralded (if not emulated). But to experienced appellate lawyers, the tentative oral opinion may not seem like a significant departure from business as usual, and may seem to fall far short of the benefits they believed written tentatives could provide. The discussion that follows will summarize those criticisms.

##### *A. The Oral Tentative Is Too Little Too Late*

The oral tentative is sometimes unfavorably compared to the written tentative, which gives lawyers a couple of weeks in which to fashion responses to judges' articulated concerns. This criticism, which can be translated into a complaint that oral tentatives force lawyers to think too quickly on their feet, is a

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Process). The unpublished *CH&I* opinion is available on the website of the California Second District Court of Appeal, <http://www.courts.ca.gov/2dca.htm> (click on "Search Case Information," enter docket number, then click "Search by Case Number") (accessed July 18, 2013; copy on file with Journal of Appellate Practice and Process).

58. Stein Observation Notes—*Cloud v. Metropolitan West Asset Mgt., LLC*, No. B238724 (Cal. App. 2d Dist. Div. 8) (Oral Argument Dec. 19, 2012) (copy on file with Journal of Appellate Practice and Process). The unpublished *Cloud* opinion is available on the website of the California Second District Court of Appeal, <http://www.courts.ca.gov/2dca.htm> (click on "Search Case Information," enter docket number, then click "Search by Case Number") (accessed June 17, 2013; copy on file with Journal of Appellate Practice and Process).

non-issue. Oral argument is already one of the last remaining opportunities for attorneys to respond to the judges' concerns and to help the court understand the case. If anything, knowing the likely outcome unburdens lawyers from having to read judges' facial expressions and body language as the argument proceeds. The judges' collective inclination is laid bare before them. The winning attorney must simply take a victory lap without stumbling. His adversary is charged with trying desperately to change minds. And depending on what the judges say in the tentative, desperation might be premature: If the panel is split, the losing lawyer has only to buttress one justice's version of the law at the expense of another's and try to swing that one vote.

Being required so rapidly to confront the news that the case is either a winning or losing one could make it hard for at least one party's lawyers. But appellate lawyers are used to being prepared for anything when they approach the podium, just as they know that they may be required to think quickly when making their arguments and answering questions. This aspect of the tentative-oral-opinion procedure, by itself, does not represent a sea change in appellate practice.

Still, tentative oral opinions introduce a new kind of quick-thinking challenge to oral argument: Lawyers, upon learning whether they are likely to win or lose, must then strategize right off the bat. But not one lawyer questioned in connection with this article volunteered that he or she prepared differently for an appearance before the Eighth Division than before any other California appellate court. Although some advocates would rather have a tentative opinion weeks before argument, they do not necessarily believe that oral tentatives should change how lawyers tackle oral argument. As one lawyer noted, "courts can always change their minds," and he believes that he would "probably" prepare for oral argument before the Eighth Division in "the same way" as he would prepare for oral argument before any other division.<sup>59</sup>

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59. Telephone Interview with Robin Meadow, Partner, Greines, Martin, Stein (Nov. 2, 2012) (notes on file with Author). Meadow later clarified this statement by saying that he would "probably weight time toward the issues identified in the tentative opinion," but "would still prepare for all issues." E-mail from Robin Meadow, Partner, Greines, Martin, Stein to Author (Jan. 22, 2013, 6:10 p.m. PST) (copy on file with Author).

For appellate judges, however, the oral-tentatives practice presents a difference. Unlike trial judges listening to argument on a motion made in the middle of a hearing, appellate judges using oral tentatives have by the oral-argument date had a bit more time to consider their plan of action, which might make it harder for lawyers to change their convictions about the cases before them. As every appellate lawyer knows, “[a]ppellate judges have the benefit of a long time to think about their decisions,” have “clerks who look into the legal issues,” and “have bench memoranda by the time they get to oral argument.”<sup>60</sup> The oral tentative only cements this reality.

### *B. Appellate Advocates Do Not Need Oral Tentatives to Know Who Won*

Veteran appellate advocates also point out that an experienced advocate can often tell simply from the content and tone of questioning who is going to win and why.<sup>61</sup> One describes the process this way:

A discerning lawyer who’s been around for a while and who has experience with the way we do stuff will be able to tell with some degree of correctness what’s going to happen in a case after oral argument because of the questions being asked or not being asked.<sup>62</sup>

Thus, Division Eight’s oral tentatives cannot be all that earthshaking because the outcomes of most oral arguments are not in doubt. Lawyers already have their ways of figuring them out: “When there are certain signals, when the appellant doesn’t

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60. Telephone Interview with Manuel F. Cachán, Partner, Munger, Tolles & Olson. (Feb. 27, 2013) (notes on file with Author).

61. Research indicates that statistical analysis can presage outcomes too: “[T]he number of questions asked and the number of words per question asked are both negatively correlated with a party’s likelihood of winning.” Lee Epstein, William M. Landes, Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. Legal Stud. 433, 4 (2010); see also Sarah Levien Shullman, *The Illusion of Devil’s Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. App. Prac. & Process 271, 272 (2004) (asserting that “by keeping track of the number of questions each Justice asks, and by evaluating the relative content of those questions, one can actually predict before the argument is over which way each Justice will vote”).

62. Hollenhorst Interview, *supra* n. 19.

get any questions, and you turn and ask respondent if they have anything else they like to add, that's a clue.”<sup>63</sup>

Experienced appellate advocates—and even neophytes familiar with the scholarly research on this topic—may pride themselves on seeing where the justices are leaning and on sizing up their chief concerns. But even experienced advocates are not always right, and not every party before the appellate courts is represented by an experienced appellate litigator. With some frequency, then, the justices are helping parties by announcing their likely intentions, giving the losing side’s lawyers an opportunity to turn their appellate arguments into rapid-response recovery efforts.

### *C. Oral Tentatives Convey Too Little Information to Improve Oral Argument*

Skeptics also claim that oral tentatives are too short to be helpful. Justice Hollenhorst of the Fourth District’s Second Division, for example, doubts that oral tentatives provide enough information to be of use to lawyers: “The idea of identifying a winner or loser is somewhat useful,” he says, “but where you have three four or five issues and say that one of them is dispositive for a particular side, . . . [w]hat have you really conveyed?”<sup>64</sup> His final analysis is that the oral tentative may be “an improvement over saying nothing,” but he believes that “it certainly doesn’t do much good.”<sup>65</sup> The crucial point, at least from Justice Hollenhorst’s perspective, is that an announcement about winning and losing alone is not helpful. As he sees it, “the question is why not go the extra step and tell them why . . . someone wins and why someone loses.”<sup>66</sup> One of California’s most experienced appellate advocates agrees, characterizing oral tentatives as “not very helpful” because

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

"[y]ou can often get that sense anyway. You want to know why."<sup>67</sup>

#### *D. Oral Tentatives Pale in Comparison to Written Tentatives and Focus Letters*

Some members of the appellate bar do not like being tantalized by oral tentatives because they know that there are draft written opinions behind them. "If they are going to be up on the bench reading off a draft opinion and asking me about it, I'd rather they share it with me," one says.<sup>68</sup> He also would prefer the Eighth Division's distributing focus letters to give the lawyers more time to prepare<sup>69</sup> instead of springing the likely verdict on counsel at the onset of argument, characterizing the latter procedure as "not that helpful."<sup>70</sup> He also believes that "a more interactive process"<sup>71</sup> would be "better" than the oral-tentative practice.

In short, oral tentatives are not considered by California's appellate bar to be the best alternative to written tentatives. Many prefer focus letters, which narrow the questions presented in the briefing to a few dispositive issues suggested by the court, because they give lawyers time to prepare. They lack the finality and detail of the full-blown written tentative, but such a letter can forecast a court's position in advance of oral argument, helping attorneys prepare for oral argument and showing parties which way the court is leaning.<sup>72</sup>

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67. Telephone Interview with Jon B. Eisenberg, Counsel, Horvitz & Levy (Nov. 2, 2012) (notes on file with Author). Mr. Eisenberg is an author of the *California Practice Guide*, *supra* n. 1.

68. Telephone Interview with Robert Olson, Partner, Greines, Martin, Stein (Oct. 31, 2012) (notes on file with Author).

69. *Id.* Mr. Olson also pointed out that the Fourth District's Second Division "has been better about in advance providing issues that they would hope that counsel would focus their arguments to. That's more helpful. If that happened more generally, that would help both counsel and the court: what the court wanted to hear and you know what to concentrate on." *Id.*

70. *Id.*

71. *Id.*

72. Telephone Interview with Jeremy B. Rosen, Partner, Horvitz & Levy (Nov. 6, 2012) (notes on file with Author) ("It's very helpful. I wish that more of the courts would do some version of it.").

As these criticisms indicate, oral tentatives may not be as useful as other measures an appellate court might employ. But the reality is that the alternatives are costlier to adopt and have not in fact been widely adopted. Anointing the oral tentative as the right option is simply a matter of choosing the measure of reform most likely to catch on and succeed.

## V. THE VALUE OF TENTATIVES, WHETHER ORAL OR WRITTEN

Oral tentatives may not represent a watershed change and might pale in comparison to written tentatives, but they provide many of the benefits of draft opinions with few of the costs or drawbacks associated with other methods of narrowing the focus of oral argument. And although oral tentatives share some advantages of written tentatives, there are some advantages unique to oral tentatives.

The chief advantage that both types of tentatives afford to lawyers on the losing side is one last chance. And what appellate lawyer wouldn't be happy to have that one final swing for the fences, even if the odds are long? As one advocate notes, "[i]f you know what the court is thinking you have ten, fifteen, [or] thirty minutes to do your best in your last shot at convincing them."<sup>73</sup>

Because of this urgency, tentatives make oral argument more meaningful for appellate judges, enabling courts to cut to the chase without wasting time. Instead of looking to trim the number of oral arguments,<sup>74</sup> courts that want more efficiency might consider emulating California's Division Eight by issuing oral tentatives, which can improve the both the quality and the number of the oral arguments that they hear.<sup>75</sup>

Clients too want a meaningful oral argument. "First and foremost among the reasons why counsel and their clients wish

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73. *Id.*

74. See e.g. David R. Cleveland & Stephen Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119, 119 (2013) (noting that "the role of oral argument has been greatly diminished" over the past thirty years and that "only one quarter of all federal appeals were orally argued" in 2011).

75. The Eighth Division's experience certainly suggests that adopting the oral tentative has yielded increased efficiency in both oral-argument procedure and judicial decisionmaking. See text accompanying n. 50, *supra*.

to have oral argument is that it may determine the result of the case.”<sup>76</sup> But oral argument also provides a psychological benefit, for

deep within the Anglo-American legal psyche, mixed in with notions about the opportunity to be heard and the concept of due process, is the idea that a litigant and his lawyer should be able to face their judges and communicate directly to them.<sup>77</sup>

This being so, why not provide an oral-argument format in which the client’s advocate “communicates directly” to the appellate court about precisely the issues that concern its members most?

Although oral argument is expensive for courts, costing judges’ time, it is also worthwhile. In one study, “eighty percent of the judges said that oral arguments are very important to the resolution of cases.”<sup>78</sup> If oral argument is so costly and so important, should not judges be interested in simple changes that can improve it? More to the point, improved oral argument aids judges in perhaps their most important job: “getting it right.” Anything they can do to empower appellate counsel to address the most important issues will help them accomplish that goal by giving counsel “an opportunity to engage or get into the judge’s mental process”<sup>79</sup> with respect to key issues as part of oral argument’s “principal purpose of aiding judges in deciding cases.”<sup>80</sup>

Judges might argue that dissemination of a tentative—oral or written—is dangerous because it reveals a closed judicial

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76. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 17 (1986) (referring to cases in which oral argument is “decisive” or “changes the judge’s view about the proper result”).

77. Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 Md. L. Rev. 732, 736 (1983) (footnote omitted).

78. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 39 (1986) (referring to Thomas B. Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* (Greenwood Press 1978)).

79. *Id.* at 37 (quoting William H. Rehnquist, J., S. Ct. of the U.S., in *Transcription, Jurists-in-Residence Program*, St. Louis University School of Law (Apr. 8, 1983)). And Judge Bright himself pointed out that “[t]he ability to face the court directly provides the litigant with a better opportunity to inform the judges of the litigant’s position and the impact that a particular decision will have on the individual parties; cold, printed words convey little in regard to the sense of urgency under which a party may be operating.” *Id.*

80. Martineau, *supra* n. 76, at 33.

mind that would do more to compromise an oral argument's value than would counsel's arguing without knowledge of the court's predilections. Nevertheless, the ninety-day rule makes a failure to acknowledge that California courts have not by oral-argument day already walked pretty far down the road to decision the utter feigning of ignorance. Improving oral argument by making the parties aware of the obstacles they face is more likely to yield arguments that change judges' minds than are arguments in which courts sit in pretended neutrality because "[s]ending draft opinions to the parties before argument serves to thaw, not freeze, the court's initial impressions of a case," and "[o]pening the draft to comment by advocates—the individuals most knowledgeable about the case [and] most motivated to seek flaws in a draft opinion—provides a check on the power of a single authoring judge."<sup>81</sup> The same can be true of an oral tentative. Indeed, Justice Hollenhorst likes to compare tentative opinions and the oral arguments that follow them to notice-and-comment rulemaking: "We give lawyers a chance to comment and sometimes we get talked out of it. There are a variety of ways to argue. It gives the lawyers some input into the development of the law."<sup>82</sup>

## VI. ORAL TENTATIVES ARE BETTER THAN WRITTEN TENTATIVES: LET ME COUNT THE WAYS

Both oral and written tentatives have the potential to improve oral argument. There are three ways, however, in which the oral tentative may eclipse the written in its ability to enhance argument: It is cheaper, it enables the court to avoid the potential embarrassment of issuing an unfinished opinion, and it fosters appellate lawyers' more full-hearted preparation for, and participation in, oral argument.

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81. Hummels, *supra* n. 30, at 351.

82. Hollenhorst Interview, *supra* n. 19; see also Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. Chi. L. Rev. 965, 1035 (2009) ("In the short term, we would encourage individual judges to experiment with opening tentative opinions to public comment, even if that is not likely to be as effective as a more institutionalized approach.").

#### *A. The Costs Associated with Oral Tentatives Are Negligible*

The oral tentative's costs are negligible, whether measured by time or money. The cost of innovation in the courtroom can be prohibitive, especially in an era of budgetary austerity. Yet sometimes change is cheap; it might even be free, as in the case of the oral tentative.<sup>83</sup>

The fate of the written tentative, perhaps one of the most notable examples of judge-led reform in California procedure, epitomizes the reality that time and money can be pivotal considerations. In the early 1990s, when the Fourth District's Second Division began issuing written tentative opinions, there was some cost associated with the new practice. The court had to send out an additional set of written, polished opinions; these required the investment of some judicial and staff resources in the new venture. The exigencies of the court's then-current situation,<sup>84</sup> however, spurred adoption of the new effort even in the face of those relatively minor costs, and it has been almost universally praised as a successful reform. Nonetheless, that written-tentative system has never been replicated in another California court, perhaps because the costs associated with it—whether measured in time or money, and low though they may be in either respect—have been enough to hold other divisions and districts back.<sup>85</sup>

It is hard to find a single bad word in print about the written-tentative practice. But Division Two's twenty-year record of failing to inspire another court to adopt the practice speaks for itself. The oral-tentative practice as used by Division Eight is, in contrast, a truly free way to reform appeals. Its costs can be measured in the mere seconds that it takes for the Justices to explain their tentative disposition in each case. This trifling expense encapsulates the chief reason that the practice may someday spread to other divisions: It's cheap.

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83. For just this reason, one practitioner sees expecting other courts to adopt Division Eight's dissemination of oral tentatives as "more realistic" than expecting them to take on Division Two's written-tentative practice. Rosen Interview, *supra* n. 72.

84. See text accompanying n. 19, *supra* (reporting comments about crushing workload by Justice Hollenhorst, long California's chief evangelist for the written-tentative model).

85. No publicly available information explains other courts' lack of interest in implementing similar programs, so one can only speculate about its cause.

### B. Oral Tentatives Do Not Make Judges Vulnerable to Added Criticism

Judges may fear setting themselves up for criticism by distributing written tentatives, but an oral tentative does not present the risks that might accompany circulating a fully fleshed-out written draft opinion.<sup>86</sup> Judges can provide just enough meat in an oral tentative to guide the parties' lawyers toward giving a much sharper and effective oral argument.

Indeed, Division Eight's Justices are happy to see errors corrected because of oral tentatives. "You're vulnerable to counsel when you give a tentative," acknowledges one Justice, adding that the Justices "don't want to defend [their] analysis," but "want to do the right thing," and she admits that "[t]here's nothing too trivial to be corrected."<sup>87</sup> This is a sensible approach because the more transparent appellate judges are, the better they will be at performing their chief task: coming to the correct result.

And a practitioner notes that although issuing a tentative opinion might "invite nitpicking and sniping" from lawyers, "that's . . . what [judges] ought to want if they want to ensure the soundness of their decisions."<sup>88</sup> Opaqueness threatens judicial legitimacy; judges who keep their cards too close to the chest are more likely to get it wrong. They also become more distant from the process they oversee, making their decisions seem both arbitrary and imbued with unwarranted certitude.<sup>89</sup>

Reformers should push judges toward greater responsiveness to the arguments they hear,<sup>90</sup> and the oral

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86. One practitioner describes that risk in this way: "They have the draft tentative opinion . . . and they are just not going to share it with the counsel or the litigants. The reason they are not going to do it in my view is they want to avoid embarrassment." Olson Interview, *supra* n. 68.

87. Grimes Interview, *supra* n. 37.

88. Eisenberg Interview, *supra* n. 67.

89. Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harv. L. Rev. 1, 75 (2011) (pointing out that "[t]he unflinching certitude characteristic of judicial opinions . . . provokes both suspicion among members of groups disposed to question a contentious decision and identity-protective defensiveness by groups disposed to agree with it").

90. See e.g. Chad M. Oldfather et. al., *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal*

tentative encourages responsiveness by giving the appellate lawyers on the losing side a chance to challenge the court's preliminary conclusions. Yet it does not require the court to let lawyers see a written opinion before it is ready to be disseminated. Thus, oral tentatives can be credited with "removing the veil of secrecy or privacy in the judiciary,"<sup>91</sup> without intruding into courts' existing procedures.

### *C. Written Tentatives May Cause Lawyers to Ease Up on Oral-Argument Preparation*

In spite of their advantages, written tentatives can engender a less comprehensive approach to oral-argument preparation. Although there is always the opportunity in oral argument to change the panel's mind by trying "to destabilize the court's confidence in a draft that's going against you,"<sup>92</sup> some lawyers seem to view a written tentative as something of a get-out-of-argument-free card; the draft opinion lets them know where they stand well before argument day.<sup>93</sup> But because oral tentatives are not delivered until the day of argument, lawyers cannot use them as an excuse for less-thorough preparation. Thus, because advocates are not yet discouraged in their preparation by a written tentative, they prepare, as they should, for whatever is coming and can defend their clients' positions with more vehemence. In short, a court using oral tentatives ensures that lawyers representing both sides come prepared to win.

## VII. CONCLUSION: APPELLATE COURTS SHOULD CONSIDER ORAL TENTATIVES

As one California Justice reports, when lawyers were questioned about the written-tentative practice, "[t]he uniform

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Scholarship, 64 Fla. L. Rev. 1189, 1192 (2012) (pointing out that "the judicial role is, and for the most part ought to be, fundamentally reactive").

91. Rubin Interview, *supra* n. 18.

92. Bird Interview, *supra* n. 14.

93. *Id.* ("Lots of lawyers love the [written] tentative opinion process because they think they don't have to spend so much time preparing for oral argument. . . . To me that's lazy. . . . Why give up when your client still has a chance?").

response from counsel was supportive.<sup>94</sup> And, as he puts it, those lawyers “are out trying to sell it. That’s not going to stop.”<sup>95</sup> But because appellate judges are in general traditionalists instead of natural innovators, written tentatives have been slow to catch on. Even if critics of oral tentatives see them as watered-down versions of the written alternative, then, they must acknowledge how much easier oral tentatives would be to adopt. The oral-tentative practice seems simply to stand a much greater chance of spreading successfully than does the written-tentative practice. The proof is in Division Eight’s experience. It has found in the oral tentative a cheap, easy-to-swallow way of making oral argument more meaningful while improving the efficiency of appellate procedure.

Consider the consequences if every appellate court adopted the oral-tentative practice: Even if appellate lawyers would not have the extra preparation time that written tentatives would give them, they would still have that last chance to change the court’s mind after learning what the judges were thinking. And clients would benefit from obtaining information as soon as it is available: “At least if you get a thumbs up or a thumbs down you can tell your client. He doesn’t have to spend a month or two or three worrying.”<sup>96</sup>

And because other appellate courts have already considered and rejected the written-tentatives practice, oral tentatives like those used by Division Eight of California’s District Two may be the only tentatives lawyers can hope to get their hands on. One appellate practitioner summed the situation up this way:

Obviously, I think the [written-tentative] approach is the best, but I’ve heard enough from other Justices that it’s a non-starter. I think the realistic way to improve oral argument is to encourage more courts to do what Division Eight is doing and to couple that with the pre-argument focus letters.<sup>97</sup>

Justices Grimes and Rubin acknowledge that they too would like to send out more such letters.<sup>98</sup> But time constraints stand as an

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94. Hollenhorst Interview, *supra* n. 19.

95. *Id.*

96. Eisenberg Interview, *supra* n. 67.

97. Rosen Interview, *supra* n. 72.

98. Grimes and Rubin Interviews, *supra* nn. 37 & 18.

obstacle to their good intentions, while no such hurdles hinder courts and judges considering adoption of the oral tentative.

