

ARBITRATION

Daniel Garrie of ARC and Yoav Griver of Zeichner, Ellman and Krause say inclusion of an information system expert in arbitration allows for early discovery planning. **PAGE 5**

EDUCATION

While funding for technology projects is attractive for school districts, it is not without risks, caution Lynn Murphy and Greg Rodriguez of Fagen Friedman & Fulfroost. **PAGE 6**

BOOK EXCERPT

George Kimball of Baker & McKenzie explains how competing interests and elements of outsourcing fit together to provide the right results. **PAGE 6**

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Which Eye Doctor Will See You Now?

A War Between Optometrists And Ophthalmologists Over Glaucoma Care Heats Up

By Evan George
Daily Journal Staff Writer

Call it the battle of the lab coats. California's eye doctors are waging a tense and unlikely battle over who can, and can't, treat patients for serious vision loss.

In one corner are ophthalmologists — eye surgeons with medical degrees who treat the most serious cases; in the other, optometrists — eye specialists who treat other maladies without a medical degree and appear to be gaining ground in Sacramento.

The fight is over a pending regulation that would allow optometrists, with little to no hands-on training, to treat glaucoma, which leads to total blindness if not caught and managed. The new rule would require passing a brief training course, rather than the one-year residency under an expert that is now mandatory.

‘Would you want someone to fly an airplane without any flying experience?’

CRAIG H. KLIGER
CALIFORNIA ACADEMY OF EYE PHYSICIANS & SURGEONS

“The bottom line is they would allow an optometrist to become certified without ever having seen a glaucoma patient before,” said Craig H. Kliger, executive director of the California Academy of Eye Physicians & Surgeons, which represents ophthalmologists.

“Would you want someone to fly an airplane without any flying experience?”

Optometrists' lobbying group call that claim “absurd,” because they help treat dozens, sometimes hundreds, of glaucoma patients as part of their student training.



S. TODD ROGERS / Daily Journal

Martin Fishman, a Los Gatos ophthalmologist, warns against allowing optometrists to treat glaucoma patients.

Both sides agree the new regulation will greatly relax the rules, giving optometrists across the state control over tens of thousands of patients they would otherwise have to refer to a specialist.

The surgeons are just scared of losing business, said Tim Hart, a spokesman for the California Optometric Association. “It has to do with perceived competition,” Hart said. His group argues patients in California desperately need access to more glaucoma specialists.

“In 43 other states, optometrists can independently manage and treat glaucoma patients. What is the hold up in California?”

Observers said the escalating fight over glaucoma rules is just the latest saga in a decade-long dispute between the two types of professionals. Doctors in California have fought hard to keep other professionals from encroaching on their medical practice.

The Department of Consumer Affairs must sign off on the regulation before it can be approved. Ophthalmologists have filed a petition to block the new rule. The department is expected to make a decision in coming weeks.

Glaucoma is a big battle ground because so many people suffer from it and the consequences of failing to catch it are crippling.

Last summer, the U.S. Department of Veterans Affairs

investigated allegations that seven veterans went blind because optometrists at a VA hospital in Palo Alto failed to properly diagnose and treat the disease.

None of the optometrists at the VA have been found negligent, but two lawsuits are pending.

Despite heightened tensions, the new rule has been long in coming.

The issue surfaced in 2000, when optometrists first pushed the legislature to relax the rules that at the time said only physicians could treat the disease. Surgeons then agreed to a compromise, allowing optometrists to treat glaucoma patients but only if they met stringent criteria, including a 12-month program under the supervision of a trained expert, among other things.

Few made that commitment: only 132 optometrists have passed the training since 2000.

Optometrists tabled the push for eight years. But in 2008, lawmakers passed a bill sought by the California Optometric Association to loosen those stringent requirements. The law left it to a committee to decide what training would be required.

When that committee of three optometrists and three ophthalmologists reached a stalemate, a consultant was chosen to cast the deciding vote. The consultant was an optometrist, tipping the vote in their favor. The regula-

See Page 8 — REGULATION

Sentencing Proposals Mark Shift To Rehabilitation

By Robert Iafolla
Daily Journal Staff Writer

WASHINGTON — The U.S. Sentencing Commission has proposed what could be the most dramatic changes to the federal sentencing guidelines since a landmark Supreme Court ruling made them advisory five years ago, criminal justice experts said.

With the proposed amendments, which are open to public comment until March 22, the commission and its new chairman have signaled a willingness to move federal sentencing priorities away from retribution and toward rehabilitation.

Perhaps most significantly, one proposal would expand courts' authority to use probation and treatment programs as an alternative to incarceration for nonviolent, low-level drug offenders. Another would allow judges to consider a number of individual characteristics when imposing sentences, like an offender's age, mental and emotional condition, prior good works, and lack of guidance as a youth.

The commission's proposals come as the political atmosphere on criminal justice issues has opened to reform, experts said. That shift is due in part to declining crime rates and growing concern over the cost of holding 215,000 people in federal prisons and some 2.3 million in state facilities nationwide.

See Page 8 — SENTENCING

Toyota's Recall Woes Move Into Federal Court

By Ciaran McEvoy
Daily Journal Staff Writer

LOS ANGELES — Toyota Motor Corp.'s widening flap over sticky accelerator pedals has moved into federal court with a pair of class actions filed in Los Angeles.

The Japan-based automaker has been reeling from multiple recalls announced in recent months. Its monthly sales for January fell 16 percent.

Recalls and lawsuits over defects have been just one of Toyota's problems. The automaker spent much of the last year battling an attack by a disgruntled former in-counsel counsel who accused the company of repeated discovery violations in rollover lawsuits. In November, U.S. District Judge George H. King sent Dimitrios P. Biller's civil racketeering lawsuit against Toyota to arbitration. *Biller v. Toyota Motor Corp.*, CV 09-5429 (C.D. Cal.)

The two putative class actions filed in Los Angeles federal court Monday are rooted in Toyota's recall of roughly 6 million vehicles for repairs to the defective pedals. A Toyota spokesman declined to comment on the pending litigation, citing company policy.

In one class action, Pennsylvania resident Roz Schwartz, owner of a 2007 Toyota Camry, said she “experienced sudden accel-

See Page 8 — RECALL

GUEST COLUMN

With 250 million pounds of pharmaceutical waste disposed of annually, health and environmental impacts must not be ignored, writes **George Mannina Jr.** of Nossaman

A nationwide study on water quality published in 2002 by the U.S. Geological Survey found 80 percent of 139 streams in 30 states contained pharmaceutical or hormone waste. In March 2008, the Associated Press reported that its five-month investigation of pharmaceuticals in the environment discovered over 100 waste pharmaceuticals in the drinking water of 24 cities serving 41 million Americans.

While scientists do not know with certainty the effects of long term exposure to low levels of pharmaceuticals in water, or the cumulative effects of different drug mixtures, the evidence suggests potentially serious impacts. German and Swiss scientific and environmental agencies found certain pharmaceutical waste hinders kidney and immune system processes in fish and mammals. Italian researchers found pharmaceutical contaminants can inhibit human embryonic cell growth. Other scientists believe certain waste pharmaceuticals in water can cause human breast

cancer cells to multiply more rapidly. Still other researchers found a positive association between low level arsenic exposure and the onset of diabetes. Other studies found that waste pharmaceuticals in water cause male fish to develop female organs and vice versa, a decline in reproductive rates in mussels, and kidney failure in birds. Thus, although there is no definitive study of the individual and cumulative effects of waste pharmaceuticals in the environment, the available studies clearly suggest impacts.

By volume, the largest source of pharmaceutical waste is you and me. We excrete drugs that are not fully absorbed and we often dispose of expired drugs in our medicine cabinets down the toilet or in the trash where they may leak into groundwater from landfills. But the single most identifiable source of waste drugs in the environment is health care facilities. The AP investigative team reported hospitals and health care facilities dump 250 million pounds

of waste pharmaceuticals into the environment each year.

Drugs prescribed for patients may not be fully used for many reasons, including that the patient recovers before all are used, or dies; the drugs are not effective, or the patient has an adverse reaction, and drugs need to be changed; or the doctor prescribes a dosage smaller than the package amount sold by manufacturers and the remainder becomes waste.

The AP estimate of 250 million pounds of pharmaceutical waste disposed of into the environment by health care facilities each year may only be the tip of the iceberg. Few of the country's 5,700 hospitals and 45,000 long-term care facilities keep data about the volume of pharmaceutical waste they produce. Significantly, these wastes are typically far more concentrated and toxic than the wastes we excrete and the wastes from home medicine cabinets. Power-

See Page 7 — PHARMACEUTICALS

DAILY APPELLATE REPORT

CIVIL LAW

Real Property: Rent Stabilization and Eviction for Good Cause Ordinance authorizes recovery of attorney fees only in proceedings between landlords and tenants. *Woodland Park Management LLC v. City of East Palo Alto Rent Stabilization Board*, C.A. 1st/5, DAR p. 1801

CRIMINAL LAW

Criminal Law and Procedure: Three-judge panel exceeds its authority when overruling cases decided after 1993 amendment to U.S. Sentencing Guidelines. *U.S. v. Contreras*, U.S.C.A. 9th, DAR p. 1849

Criminal Law and Procedure: Restraint of victim enhancement is proper where third party restrained victim while executing defendant's

demand to convince victim to drop charges. *U.S. v. Loew*, U.S.C.A. 9th, DAR p. 1846

Criminal Law and Procedure: Court vacates sentence imposed on defendant convicted in relation to terrorist plot because district court failed to address government's arguments. *U.S. v. Ressam*, U.S.C.A. 9th, DAR p. 1817

Criminal Law and Procedure: Sexual assault conviction qualifies as 'violent felony' under Armed Career Criminal Act, subjecting defendant to enhanced sentence. *U.S. v. Terrell*, U.S.C.A. 9th, DAR p. 1840

Criminal Law and Procedure: Curative jury instruction striking detective-witness's testimony regarding inadmissible statement is not effective to eliminate jury's belief

that statement was confession by defendant. *People v. Navarrete*, C.A. 2nd/8, DAR p. 1807

Criminal Law and Procedure: Court's imposition of upper terms violates defendant's Sixth Amendment rights where court was notified of U.S. Supreme Court's decision of new law. *In re Watson*, C.A. 4th/1, DAR p. 1814

Criminal Law and Procedure: Probation conditions that do not contain knowledge requirement for gang-related activities are unconstitutionally vague. *People v. Leon*, C.A. 6th, DAR p. 1850

Juveniles: Contempt of court offense for violation of gang injunction is 'gang-related' offense and juvenile defendant is required to register as gang member. *J.V. v. Minor*, C.A. 4th/2, DAR p. 1811

BRIEFLY

The Millennium Bomber's 22-year sentence for plotting to detonate high explosives at Los Angeles International Airport on Dec. 31, 1999 is too short, the 9th U.S. Circuit Court of Appeals ruled Tuesday. A panel voted 2-1 to send Ahmed Ressam's case back to a different trial court for resentencing because the Seattle judge who imposed the 22-year sentence, John C. Coughenour, deviated so far downward from the federal guidelines range of 65 to 130 years.

A Riverside jury slapped a neurosurgeon with a \$16.5 million in damages late last week, finding that Christopher Pham was negligent in making a patient wait 2 days for spinal surgery. Trent and Lisa Hughes, who previously settled the

allegations with Desert Regional Medical Center, sued Pham for failing to provide timely care. Hughes is paralyzed from the waist down.

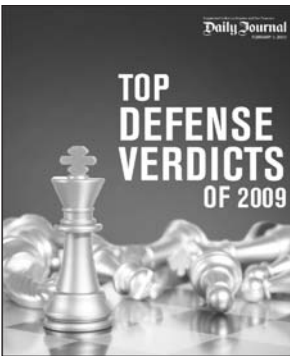
The global economic crisis has led an increasing number of U.S. municipalities to consider extreme penny-saving measures, including seeking Chapter 9 bankruptcy protection. The Beverly Hills Bar Association is hosting a program discussing municipal bankruptcies, including their merits and effects. The program's panel is comprised of retired U.S. Bankruptcy Judge John E. Ryan, Bruce S. Bennett and Victor A. Vilaplana. The program, which includes dinner, is scheduled for Tuesday, Feb. 9 at 6 p.m. at the Beverly Hills Country Club, 3084 Motor Ave., Los Angeles.

MORE NEWS



A Lawyer's Judge

After 16 years as a prosecutor, Judge Michael A. Latin understands what lawyers are going through when they litigate a case. **PAGE 2**



Read our roundup of the Top 10 Defense Verdicts of 2009 in California. **SUPPLEMENT**

Pharmaceuticals in the Environment: Something Can Be Done

Continued from page 1

ful oncology drugs are just not found in home medicine cabinets and some of these drugs are known carcinogens, at any concentration, when healthy individuals are exposed.

Each year, U.S. hospitals are estimated to purchase over 3.5 billion vials, bottles, and syringes of pharmaceuticals that are classified as hazardous. A typical hospital handles over 700,000 containers of this hazardous pharmaceutical waste annually. Add up the numbers and U.S. hospitals could be handling and disposing of 5 billion containers of pharmaceutical waste annually.

To properly dispose of this waste, hospital health care providers must know the correct disposal protocol for each pharmaceutical. But there are over 160,000 National Drug Codes. Overworked hospital staff cannot be expected to remember which of the 160,000 are hazardous much less the different disposal protocols. Adding to the confusion, the Food and Drug Administration does not require a hazardous symbol for drug labels as is done with other chemicals.

An Environmental Protection Agency study between 1998-2004 surveyed the pharmaceutical waste disposal practices at 37 hospitals that volunteered for the study. EPA found these 37 hospitals had pharmaceutical waste disposal violations that would have resulted in almost \$9 million in fines if this had been an actual enforcement action. The number one reason for the violations was that doctors, pharmacists, and nurses did not know what was required by federal law for pharmaceutical waste disposal.

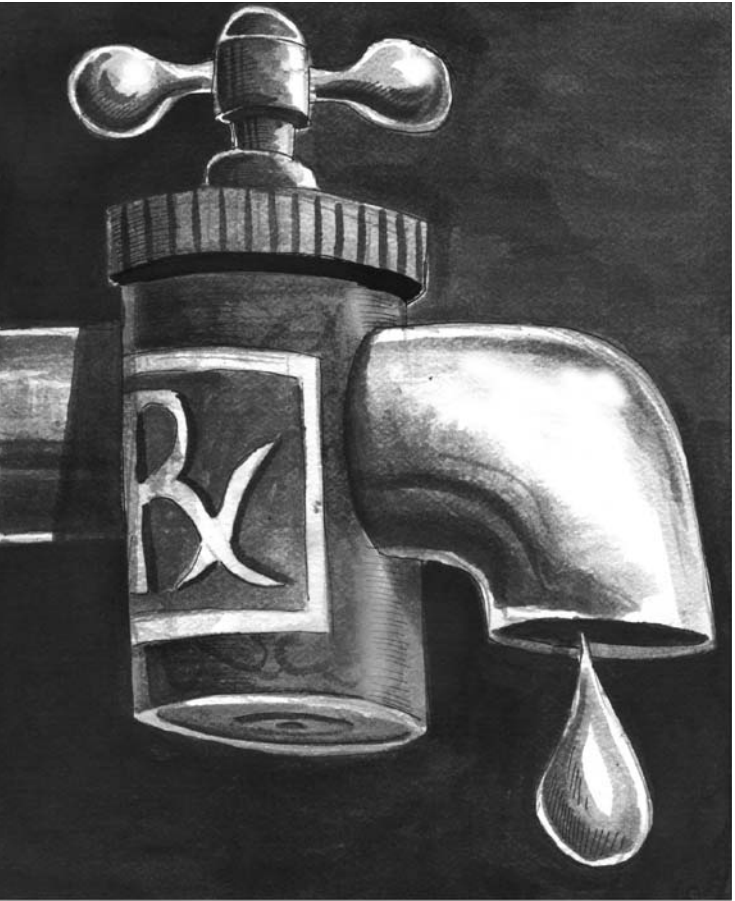
The Resource Conservation and Recovery Act (RCRA) already regulates the disposal of hazardous wastes, including pharmaceutical wastes. Yet EPA has done little to educate hospitals about their RCRA responsibilities — and has done even less to enforce the law. The Bush Administration decided the best it could do was design a survey of hospitals asking about waste disposal. Just asking the questions would help hospitals and other health care facilities to understand

Obama Administration stopped the survey and has done nothing more about the issue of pharmaceuticals in the environment. Instead, EPA is pressing forward with a Bush Administration proposal called the Universal Waste Rule, which could unintentionally result in hospitals not segregating and properly disposing of their hazardous waste but instead, lumping their wastes together as if all are non-hazardous. These wastes would then end up in our landfills and waterways.

This applies to Veterans Administration and Department of Defense hospitals as well. EPA has already fined some VA hospitals, which reportedly includes Kansas and California VA hospitals, for improperly disposing of hazardous pharmaceutical waste.

Congress passed RCRA in 1976, however, the list of pharmaceu-

The single most identifiable source of waste drugs in the environment is health care facilities.



ticals considered hazardous has never been updated. Since 1976, thousands of new drugs, including powerful oncology drugs and other chemicals, have become available to improve our healthcare. EPA has never looked at whether the disposal of these new chemicals should be regulated under RCRA to prevent them from being flushed down the drain or sent to landfills. EPA should do so.

The Food and Drug Administration should stop telling people that it is okay to dispose of unused drugs by flushing them down the drain. And the Drug Enforcement Administration should figure out how pharmaceuticals classified as controlled substances can be disposed of other than by flushing them down the toilet. How many of us have had a loved one pass away under hospice care? One of the first things the hospice nurse does is dispose of the painkillers and other controlled drugs by flushing them down the toilet, often with family members as witnesses. The hospice caregiver is doing that which is required by the DEA. No one disputes the importance of the DEA's mission to pre-

vent controlled substances from being sold on the street, but surely the DEA and EPA can devise a way to accomplish the DEA's important mission without undermining the EPA's equally important mission of preventing our waterways from being contaminated by hazardous waste pharmaceuticals.

Although some people argue that we shouldn't do anything about waste pharmaceuticals until we know the exact extent of the problem, and while comprehensive studies will define the total scope of what should be done, it would seem intuitively obvious that adding substances like arsenic and powerful oncology drugs that are designed to kill things and not break down in water is probably not a good thing.

Years ago, we learned to properly dispose of paints and chemicals in our houses. We can also be taught to properly dispose of waste pharmaceuticals in our medicine cabinets. Our medical care professionals who dedicate their lives to helping people need to be educated about existing legal requirements and given the tools to properly manage pharmaceutical waste.

One thing that can be done right now is to educate health care professionals about RCRA's requirements so that hospitals and health care facilities can take the necessary steps to properly dispose of pharmaceutical wastes. This country's medical care professionals are in the business of helping people. They do not want to be in the business of creating new patients. An industry-EPA environmental education program will go a long way to address this problem - but any such program must be followed by appropriate enforcement so that we know education is followed by action.

We also need to establish public take back programs so unused and outdated pharmaceuticals can be returned to a hospital, community drug store, or otherwise. Some states, notably Maine and Iowa, have established take back programs that need to be expanded throughout the country.

Legislation now being considered in Congress generally seeks to study the problem. We can all benefit from additional studies to determine the full extent of the problem, but we should be taking steps now to prevent known problems from becoming worse. We should be enforcing existing RCRA requirements to prevent arsenic, carcinogens, and other hazardous substances from entering the environment and we should be fixing regulations that encourage such disposal. Addressing this problem is good not only for human health and the environment but may also have positive effects on national health care costs. The full accounting for, and proper management of, pharmaceutical waste will provide valuable information about the actual amount of drugs used. If the health care industry had better estimates of the amount of drugs that lie unused in medicine cabinets and are disposed of at health care facilities, then drug production rates, dosage amounts, and package sizes might better match actual usage, thus reducing overall drug costs.



GEORGE J. MANNINA JR. is a partner at Nossaman's Washington D.C. office. He has significant experience in environmental litigation including demonstrated expertise with oceans and fisheries law, the Endangered Species Act, Superfund's natural resource damages program, and the Clean Water Act. He can be reached at (202) 887-1491 or gmannina@nossaman.com.

Letters to the Editor

Statewide Case Management System Stirs Up Mixed Reactions

The January 20 opinion piece, "*New Computer System is Trouble Laden*," by Sacramento Superior Court Judge Loren McMaster incorrectly faults a developing statewide case management system for problems that have occurred *only* in his court. The interim version of the California Case Management System (CCMS) he writes about was installed in six courts, including Sacramento. Five of the six courts, including Sacramento, were involved in the design of the application from its inception through the current maintenance and support efforts. Unlike the other courts, Sacramento chose to deploy the system on its own and only engage the services of the CCMS deployment vendor where they felt it was needed.

As a result, the court developed significant problems with its system that the other courts are not experiencing and last July, the court asked the Administrative Office of the Courts for assistance. The AOC sent a team of experts to discuss the court's concerns and the team spent time with six of the judges who were using CCMS, including Judge McMaster. Some 36 issues were raised. Most of them - 29 - involved local court issues. Only seven would require CCMS enhancements.

The AOC sent the court an in-depth report in November outlining the steps Sacramento needs to take to resolve their issues and to use the system effectively. The presiding judge and the CEO thanked the AOC for its work and guidance. Sacramento now needs to take the next step and develop a plan to implement the report's findings. The backlog referred to by Judge McMaster existed prior to the development of CCMS but only became apparent when CCMS was deployed and the court - against recommendations - went paperless, which required the court to scan all its documents.

Judge McMaster and other critics of CCMS are fond of repeatedly contending that the system costs about \$1 million per judge. In fact, the system isn't being built for judges alone. It's being built for 37 million Californians. It's being built so that courts can move out of the technological dark ages, share vital information with each other, with the public, and with other justice system partners, such as law enforcement and social service agencies. It's a system being built to protect the public. Of course there will be problems as we move toward a statewide system. Like anything else, problems can be solved with the cooperative efforts of everyone involved.

not required to do. These "tests" included going paperless, and the use of an out-of-state location for its data base, causing CCMS to run much slower in Sacramento than elsewhere.

Sacramento staff took part in CCMS design and presented Sacramento's minimum requirements, some taken from our own program designed by Sacramento IT staff. AOC and its no-bid, sole source contractor, Deloitte, largely ignored these requirements.

Sacramento is blamed for not hiring Deloitte (at a multi-million dollar cost) to assist in deployment. That decision, as well as the decision to go paperless, was made by our then CEO, who is now an AOC Regional Director. Financial issues also played a role.

Mr. Carrizosa has it backwards; Sacramento did not plead for AOC assistance last July. Rather, our court demanded that AOC and Deloitte fix their dismal program, or risk our dropping further participation in CCMS. The "experts" were embarrassed when their demonstration was a failure, due to the slowness of CCMS.

The experts finally met with me and law and motion staff, after ignoring us for five years. They were shown the many "work-arounds" necessitated by CCMS design problems, which double staff workload. The faulty CCMS design precludes law and motion judges from using it for the preparation of rulings or publishing that days' calendar. We have no interest in regressing.

Many Sacramento employees are now declining to work further with AOC or Deloitte, expressing frustration that, in the words of one employee, staff were left with "the impression that we court employees were just there to give rubber stamp approval to whatever Deloitte and the AOC wanted to do, not to offer constructive criticisms or suggest program improvements."

Mr. Carrizosa seeks to deflect focus from CCMS problems by trotting out a bogus public safety argument. A system is in place (CLETS) that law enforcement personnel and judges use to check for warrants and restraining orders. If that system needs an upgrade, then upgrade it. To use public safety as an argument to justify CCMS is cynical and misleading.

AOC has posted an "RFI," seeking outside money for CCMS. Perhaps reality is setting in - taxpayers will not pay to clean up this mess.

Loren E. McMaster
Superior Court Judge
Sacramento County

Proposed System Will Allow Judges to Be Better Informed

Following the January 20 article "*New Computer System is Trouble Laden*" by Judge Loren E. McMaster, I would like to clarify the record relative to any misinformed and misguided criticism of the California Case Management System.

I have been using the "V3" version of the

California Case Management System (CCMS) in my courtroom, every day, many times each day, for more than two years. Though originally developed to efficiently manage a court clerk's office, a "Judicial Officer" portal was added to "V3" to allow my colleagues and I to efficiently conduct judicial business electronically.

"V3" is amazingly simple for a judge to operate. The first page of the "Judicial Officer" screen is a standard daily calendar, populated with each category of calendar events set on a particular day, by time. A single mouse click takes me to the particular "basket" of cases I need to hear; a click on a particular case in the opened "basket" opens up the electronic file for that case. It therefore takes only two clicks to open up a court file.

When the calendar event is a civil motion, a menu opens up, offering "tentative rulings;" "research notes;" "comments" and "JO notes." At a minimum, "real time" analysis from the legal research department will have been previously uploaded into the second menu item. From my "tentative ruling" screen I prepare my own tentative rulings, often "cut and pasted" into the screen from applicable statutory or case law. My tentative ruling is sent to the Internet via the Court's public Web site by clicking "publish."

With any file open, a third click opens up a docket/register of actions, in which each filing is identified with reference to the exact minute it was received. From that point, "V3" has the capability of opening any particular document in .pdf format with only one more click. In counties with document management ("imaging") systems and third party electronic service ("e-filing") providers in place, all filed documents will have an electronic image; in those counties where a document management system is still being vetted, all internally generated documents including notices, minute orders and probate investigative reports are still loaded instantly into the system in .pdf format when first generated.

Because all of this information is delivered instantly on my courtroom laptop and in-chambers PC; augmented by Lexis Nexis (or West-Law) tools on one screen and proposed orders through courtroom e-mail on another, virtually all judicial business in my courtroom can and is being handled electronically.

At trial, exhibit lists from counsel received electronically in Microsoft Word format are directly uploaded into the "trial exhibit" portion of the "V3" software, where they are converted to an Excel trial exhibit spreadsheet.

While "V3" makes my job infinitely easier, its benefits pale in comparison to the proposed "V4," extending to all case types and allowing public access through the proposed statewide California courts electronic "portal." I am obviously a huge proponent of CCMS, which, in the final analysis, makes me a better informed judge and therefore, a better judge.

Glen M. Reiser
Superior Court Judge
Ventura County



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