Out With the New, in With the Old

By Fred Silberberg

Assembly Bill 939, intended to reform our family court system is about to go into effect. The bill was introduced and unanimously passed after many problems with the existing system were exposed in the state Supreme Court's opinion in *In re Marriage of Elkins*. It is intended to revamp the manner in which family law cases are handled in California in several regards. One of the most significant changes is a return to what was the norm in family law courts 20 years ago: oral testimony.

In the 1980s, two appellate court decisions, *In re Marriage of Reifler* and *In re Marriage of Stevenot*, gave the court the discretion to limit oral testimony in family law proceedings as a way to speed up the process of resolving non-trial issues in family law cases in large, overburdened metropolitan court districts. By the beginning of the following decade, these decisions became the rule of law in most courts around the state. In family law cases, unlike civil or criminal matters, orders to show cause and motions are routinely filed by parties, resulting in hearings at which orders on such matters as finances, custody, support, and control of property are determined pending the final resolution of the case through settlement or trial. Because courts have been so slow to bring cases to final resolution (one of the other issues addressed in the *Elkins* case), such orders often lasted for years. The determination of these matters by the use of written declaration deprived parties of the ability to truly confront and cross-examine witnesses. It also deprived the court of assessing the demeanor and credibility of a witness or party, who prior to the passage of *Reifler* and *Stevenot* would have had to testify in court either in favor of, or against, the relief being sought.

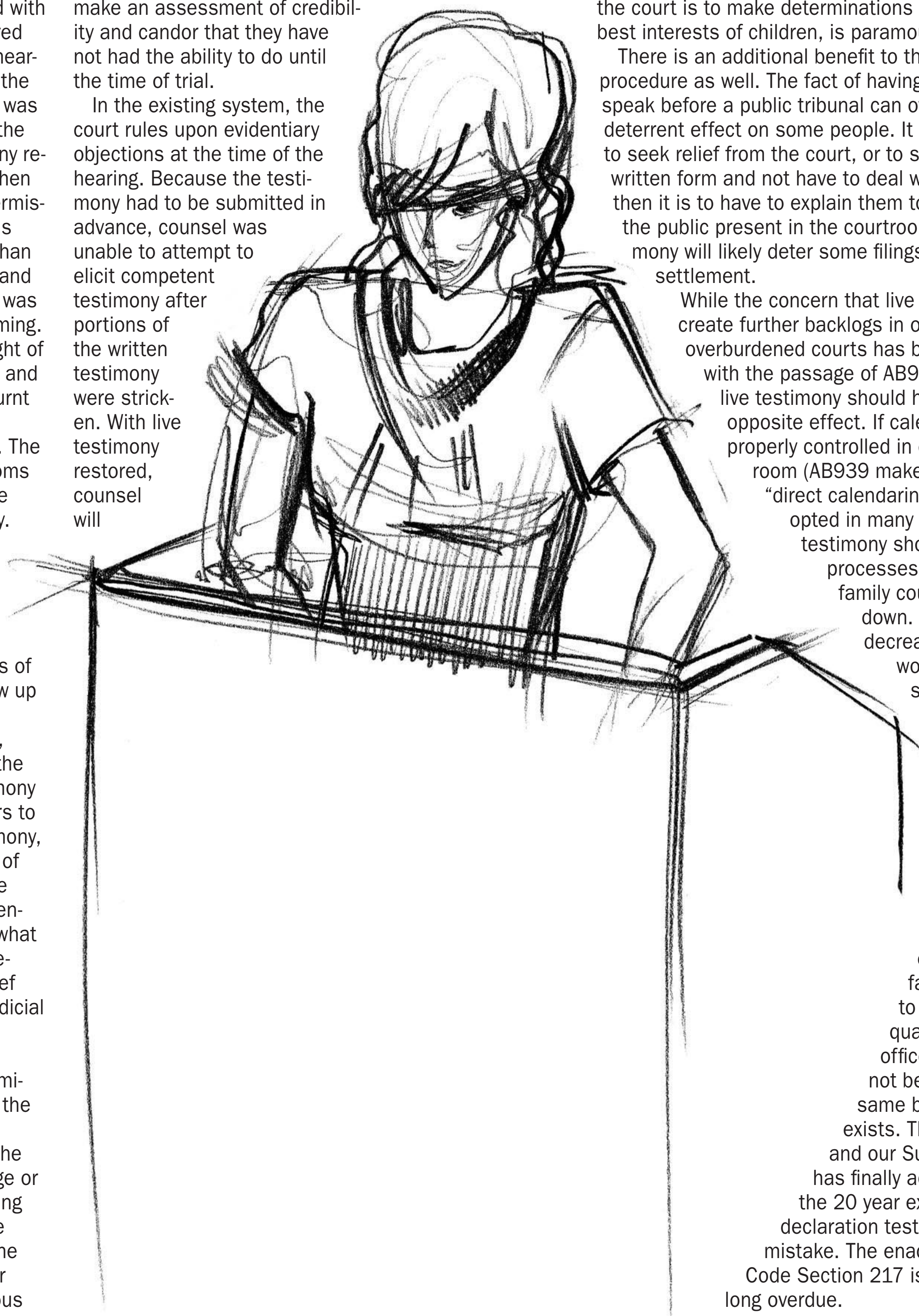
With the passage of AB939, Section 217 will be added to the Family Code to implement the return of live testimony to the family law courtroom for motions and orders to show cause.

The implementation of the written testimony system had other unanticipated and far-reaching effects as well. The number of pages and exhibits submitted with the declarations was often voluminous and required hours of judicial time invested in advance of the hearing date, which only served to further exacerbate the backlog in the processing of cases. This problem was compounded by the fact that the submission of written testimony required the opposing party to then file motions to strike the impermissible testimony. Those motions were often more voluminous than the declarations themselves, and the process of ruling on them was quite tedious and time consuming. This, in turn, gave rise to a flight of experienced family law judges and commissioners who quickly burnt out on the inability to keep up with the volume of paperwork. The turnover in family law courtrooms remains higher than elsewhere in the court system to this day. In addition, the amount of fees incurred by parties in the preparation of the declarations and motions to strike was significantly more expensive than the costs of simply having the parties show up in court and testify.

With the passage of AB939, Section 217 will be added to the Family Code to implement the return of live testimony to the family law courtroom for motions and orders to show cause. Section 217 provides that live testimony, including the ability of the court to ask questions of the parties, shall occur absent a stipulation of the parties or finding of good cause by the court. Parenthetically, there is no suggestion in the bill as to what constitutes "good cause." Nonetheless, the implementation of Section 217 should be welcome relief for many family law litigants, practitioners, and judicial officers.

While the original concept behind eliminating oral testimony was to make the courts more efficient, the effect of the same was the converse. With the restoration of live testimony, a judge or commissioner will not have to expend hours reading declarations and motions to strike. A judge will be able to hear the testimony and make a ruling at the conclusion of that testimony. The party seeking or opposing the relief sought, will not incur voluminous hours of attorney fee charges for the time spent in preparing declarations, drafts, revisions, and motions to strike. Additionally, judges will have the opportunity to see litigants face-to-face, and to make an assessment of credibility and candor that they have not had the ability to do until the time of trial.

In the existing system, the court rules upon evidentiary objections at the time of the hearing. Because the testimony had to be submitted in advance, counsel was unable to attempt to elicit competent testimony after portions of the written testimony were stricken. With live testimony restored, counsel will have the opportunity to ask follow-up questions in order to attempt to find permissible ways to admit evidence that would otherwise have been excluded.



The importance of this right in custody cases, where the court is to make determinations concerning the best interests of children, is paramount.

There is an additional benefit to the live testimony procedure as well. The fact of having to face and speak before a public tribunal can often have a deterrent effect on some people. It is much easier to seek relief from the court, or to submit facts in written form and not have to deal with them again, then it is to have to explain them to a judge and the public present in the courtroom. Live testimony will likely deter some filings and encourage settlement.

While the concern that live testimony will create further backlogs in our already overburdened courts has been expressed with the passage of AB939, in fact, live testimony should have just the opposite effect. If calendaring is properly controlled in each courtroom (AB939 makes statutory the "direct calendaring" system adopted in many counties), live testimony should speed the processes taking place in family court, not slow it down. Moreover, the decreased paperwork load that should result from actual evidentiary hearings instead of pages upon pages of written declaration testimony and motions to strike should enable the family law bench to retain more qualified judicial officers who will not be subject to the same burnout that now exists. The Legislature and our Supreme Court has finally admitted that the 20 year experiment with declaration testimony was a mistake. The enactment of Family Code Section 217 is something long overdue.

Fred Silberberg is a certified family law specialist and a partner at Silberberg & Ross in Santa Monica.