To: Hon. Louis R. Mauro, Chair
Appellate Advisory Committee

Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair
Family and Juvenile Law Advisory Committee

455 Golden Gate Avenue
San Francisco, California 94102

From: The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association

Date: June 8, 2018

Re: Settled Statements in Unlimited Civil Cases - SPR18-04

The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association supports this proposal but suggests some modifications, as noted below in response to the Invitation to Comment's request for specific comments.

- **Does the proposal appropriately address the stated purpose?**

Yes, the new and revised forms make the complex settled statement process more understandable for litigants, especially self-represented litigants. In particular, we believe that domestic violence survivors, a population that is overwhelmingly self-represented in family court, will be able to navigate the settled statement forms, given the new layout, questions, and structure of the documents. However, there is a concern that these forms may mislead self-represented litigants into thinking that the alternatives to a reporter's transcript may lead to greater success in their appeal. Thus, as suggested below, we encourage the Judicial Council to make two changes to avoid this potential problem.

As APP-001-INFO correctly identifies, a general principle of appellate law is that an appellate court will presume that the judgment or order is correct and imply any findings in favor of the prevailing party at trial to uphold the order. Yet, this form does not explain the general exception to this rule that appellate courts will not make this presumption if a statement of decision has been prepared and the record shows that any omission or ambiguity in that decision was brought to the attention of the trial court by the appealing party. The form further does not explain that some appellate districts may still make this presumption even if the settled statement has been

prepared. (Compare *A.G. v. C.S.* (2016) 246 Cal.App.4th 1269, 1282 ["[T]he use of a settled statement in lieu of a reporter's transcript does not negate the doctrine of implied findings where the parties waived a statement of decision."] with *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 550, fn. 11 [doctrine of implied findings does not apply where statement of decision is waived, and a settled statement including the court's factual and legal basis is used in place of a reporter's transcript]; *In re Marriage of Seaman & Menjou* (1991) 1 Cal.App.4th 1489, 1494, fn. 3 [same]; *In re Marriage of Fingert* (1990) 221 Cal.App.3d 1575, 1580 [same].)

As a result, while the new and revised forms make it easier for self-represented litigants to navigate the intricate settled statement process, there are nevertheless concerns that many litigants still will not have meaningful access to an appeal because a statement of decision was not prepared in their case. (See *A.G. v. C.S.*, *supra*, 246 Cal.App.4th 1269 [applying the doctrine of implied findings to affirm a custody order because the settled statement used by the parties did not "contain an express statement by the trial court that it complied with the procedures required for adopting a statement of decision and that the settled statement serves as the court's statements of decision"].)

The appellate court will not apply the doctrine of implied findings when the record clearly demonstrates what the trial court did; and, in our experience, the best way to demonstrate that is with a reporter's transcript. Because the election of a settled statement, therefore, may have practical consequences for a litigant to obtain meaningful relief on appeal, we encourage the Judicial Council to add the following:

1. Inset in APP-001-INFO: "**Please note the type of oral record you choose, including a reporter's transcript or a settled statement, should be carefully considered as it may have effects on your appeal and you may want to consult with an attorney to determine the best option in your case.**"

2. Adding a checked box on APP-022 stating: **"This settled statement contains the court's decision and the court's factual and legal basis for its decision."**

- **Would the forms work well in all types of unlimited civil cases?**

APP-014, APP-020, APP-014A, and APP-022 will work in family law cases, including domestic violence restraining order cases. However, we encourage the following amendments to APP-001-Info to make this form more understandable for survivors of domestic violence with proceedings in family court:

> **Under #3, "Do I need a lawyer to represent me in an appeal":** It presently states: "you must put an address, telephone number, fax number (if available)…." Due to safety concerns, survivors of domestic violence may need to keep their information private. Therefore, we suggest adding: "If you want to keep your information private, you may give a different mailing address and telephone number instead, but you should make sure to regularly check the address and telephone number provided to stay informed regarding your appeal."

Under #6, "Can I appeal *any* decision the court made?": Self-represented litigants may not be able to identify that an "injunction" includes a domestic violence restraining order. We encourage the following addition to the fourth bullet point: "Grant or dissolve an injunction or refuse to grant or dissolve an injunction *(including a domestic violence restraining order)*." (See *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 332 [a domestic violence restraining order is appealable under Code of Civil Procedure section 904.1(a)(6)].) In addition, since family law dissolution matters often include final orders of the court before the dissolution judgment that may be appealed as collateral orders, such as child and spousal support orders, we encourage the following addition at the end of the list of CCP 904.1 exceptions: "*In addition, some final orders the court makes before the final judgment may be appealed immediately. You should consult an attorney or a court self-help center to determine if your order is final and appealable*."

Under #9, "Is there a deadline to serve and file my notice of appeal?": It presently states that the deadline to file the Notice of Appeal is triggered by the service of a "'Notice of Entry' of the trial court judgment or a file-stamped copy of the judgment." However, the deadline also is triggered by service of file-stamped copies of final orders, e.g., fully adjudicated custody orders. Therefore, we suggest adding "*or order*" after the word "judgment" both times it appears in this section.

Under #11, p. 4, "If I file a notice of appeal, do I still have to do what the trial court ordered me to do?": In addition to stating the examples of payment of money or delivery of property, we encourage the Judicial Council to add custody matters on the list of examples." (See Code Civ. Proc., § 917.7 [stating that custody matters are not stayed on appeal].)

Page 7, under "(1) Reporter's Transcript…when available": We recommend a change to the following sentence: "A court reporter will not have been present unless you or another party in your case made specific arrangements to have a court reporter present." The sentence will not be accurate in all cases and may confuse some survivors of domestic violence, as it is the practice of some counties to provide court reporters in family law and/or Domestic Violence Prevention Act ("DVPA") matters. Further, to the extent a litigant has a concern about whether a court reporter was present, the sentence that follows provides clear instruction on what the litigant should do; it states: "If you are unsure, check with the trial court to see if a court reporter made a record of the oral proceedings in your case before choosing this option." We suggest the sentence be amended to read: "A court reporter *may* not have been present unless you or another party in your case made specific arrangements to have a court reporter present, *as some counties do not provide court reporters in all cases*."

Furthermore, we encourage the following to provide more clarity to APP-001-Info:

Under #2, "What is an appeal?": We recommend that a website link be inserted that identifies the counties included in each appellate district.

#18, p. 12, "What is 'oral argument'?": In our experience low-income self-represented litigants do not understand that an appellate "oral argument" is different than a "hearing or trial" such that no new evidence can be considered. In #15 ("what is a brief?") there is an advisement that an appeal is not a new trial. We also suggest that such advisement be included in the Oral Argument section. The following could be added: "*Remember that an appeal is not a new trial. The Court of Appeal will not consider new evidence, such as new exhibits or testimony of new witness, so you will not be able to present any new evidence at oral argument*."

Does moving nonparty testimony and evidence to an attachment improve form APP-014?

Yes.

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