Tentative Rulings in California Trial Courts: A Natural Experiment

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California state courts have issued tentative rulings for decades. Although the California Rules of Court specify some procedural requirements for all trial courts that provide tentative rulings in law and motion matters, practices vary substantially by county. Some counties don't provide tentative rulings at all, some release lengthy rationales the afternoon before oral argument, and some release short tentative rulings days before argument. Judges and lawyers have been supportive of tentative rulings in trial and appellate courts because they focus oral argument and reduce judicial costs associated with hearing unnecessary argument. This Note presents empirical research on the tentative ruling practices in California courts and suggests modifications to promote judicial efficiency. The Note argues that short tentative rulings provided well in advance of argument would economize proceedings by encouraging settlement and avoiding unnecessary judicial effort in many cases.

I. INTRODUCTION

What if a judge told you what he thought of your case before you even arrived for oral argument? He could tell you that he has read your moving papers, your reply, and the accompanying exhibits. He might ask that you not repeat anything included in those papers and that, based solely on the submissions, he is more persuaded by the opposing party. He might tell you that he doesn't like your first argument, but that he has questions about

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your second argument and wants you to spend your time in court explaining that line of reasoning.

The reader should not be surprised to find that hypothetical familiar, because some judges employ a similar practice in many state and federal courts. Even when judges are less explicit, parties analyze a judge's questions and temperament for hints. Some judges, like the hypothetical judge above, give an oral tentative ruling on the morning of the hearing. Other judges issue written tentative rulings ("tentatives") on the morning of the hearing (for example, on the calendar notes posted outside the courtroom), or days or weeks before a scheduled hearing.

This Note argues that tentative rulings impact judicial efficiency, and that courts and academics should study the qualities of tentative rulings in addition to the binary question of whether a court issues them. Compare the hypothetical lawyer who has a moment's notice about the judge's disposition to one who knows a week before argument that the judge thinks his only chance at a successful motion lies in his second argument. Longer notice gives the counselor more options: he can further develop the most persuasive argument, he can eschew the others, he can drop the motion, and he can pursue settlement negotiations with enhanced knowledge. Alternatively, consider a hypothetical lawyer who receives a tentative ruling weeks before argument that is limited in detail to the following: "After reading the papers, I am inclined to deny the motion." Even with weeks, the parties can do little with that limited information. This Note argues that there is an optimal value for both notice and thoroughness of tentative rulings, and that courts should experiment with those variables to issue tentative rulings that optimize judicial effort.

In Part II, this Note explains the history of tentative rulings in American courts. Part III examines what academics have already learned about the costs and benefits of the practice. Part IV describes variations in how California Superior Courts issue tentative rulings in practice, and Part V advances suggestions to improve tentative rulings. The Note concludes by suggesting that trial courts adopt the suggestions and empirically evaluate their impacts.

II. HISTORY OF TENTATIVE RULINGS

Judge Shirley M. Hufstedler is widely credited with introducing tentative rulings to American courts while sitting in Los Angeles Superior Court's law and motion department in the mid-1960's.[1] There, she began issuing tentative rulings for every case, although she knew of no other judge practicing that then-peculiar task.[2] Her tentative opinions would generally "state the judge's analysis of the issues involved, the key applicable authority, and a tentative ruling based upon the [moving papers submitted by counsel]."[3] In close cases, the tentative ruling would list questions meant to guide further argument.[4] Los Angeles Superior Court's law and motion department continues to issue tentative rulings today.

Justice Robert Thompson of California's Court of Appeal advocated for California's appellate courts to issue tentative rulings in a 1975 article, citing Judge Hufstedler and the Los Angeles Superior Court's practice explicitly.[5] Although it would be decades until any division of the California Court of Appeal adopted the practice, the Los Angeles Superior Court Appellate Division began issuing tentative rulings in March 1980.[6] The Los Angeles

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1. Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 JUDGES J. 20 (1981); Lawrence J. Siskind, *Living With Tentative Rulings*, CAL. LAWYER 59 (1996); Robert S. Thompson, *One Judge and No Judge Appellate Opinions,* 50 CAL. ST. B. J. 476, 516 (1975); Amanda Becker, *Features: Shirley Hufstedler*, AM. LAW. (Sept. 1, 2007); Interview by Dennis Perluss, Presiding Justice of Div. Seven of the Second Appellate Dist. of the Cal. Court of Appeal, with Shirley M. Hufstedler, Senior Of Counsel, Morrison & Foerster LLP (Apr. 17, 2007), http://www.courts.ca.gov/documents/Shirley_Hufstedler_6036.pdf (hereinafter Hufstedler interview). Judge Hufstedler would later sit both on California's Court of Appeal, Second Appellate District, Division Five in Los Angeles and on the Ninth Circuit of the United States Court of Appeals. *See Justice Shirley M. Hufstedler Biography*, CAL. CTS., http://www.courts.ca.gov/documents/Hufstedler_Shirley_M_Biography.pdf (last visited Jan. 20, 2013).

2. Hufstedler interview, *supra* note 1.

3. Thompson, *supra* note 1, at 516.

4. *Id.*

5. *Id.* at 516–19.

6. Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 SANTA CLARA L. REV. 1, 3 n.5 (1995); Saeta, *supra* note 1, at 23. The influence of Justice Thompson's article, published in the California State Bar Journal, is unknown. It should also be noted that Judge Hufstedler served on the Appellate Division for a year during her time with the Los Angeles Superior Court. For a contemporaneous analysis of the Los Angeles Superior Court Appellate Division's adoption of tentative ruling procedure written by a judge on the court. *See generally* Saeta, *supra* note 1.

Superior Court Appellate Division continues to issue tentative rulings today, and they are generally available the afternoon before oral argument is scheduled.[7]

The New Mexico Court of Appeals instituted a different but related system in 1975 by creating a "summary calendar" that differs from its traditional calendar.[8] Though the criteria are not formalized by a rule, in practice the Court's judges place a case on the summary calendar if it "can be decided without a transcript or tape of the trial" and "the issue is [not] one of first impression."[9] For those cases, a single judge writes and distributes a tentative ruling that spans about a page and a half and does not include a recitation of the case's facts.[10] The party who wins the tentative ruling need not respond.[11] If the losing party replies with an opposition to the tentative ruling, the judge then either schedules the case on the regular calendar for a hearing before a three-judge panel, recommends that a three-judge panel make the tentative ruling binding, or issues another tentative ruling on different grounds.[12]

The Second District of the Arizona Court of Appeal began issuing tentative rulings in 1982 and still does so today.[13] There, judges aim to provide counsel with opinions at least a week before the day oral argument is scheduled.[14] The form of the ruling is not rigid. It may consist of a thoroughly reasoned ruling citing supporting authority, or in a close case it may list questions that the judges think will helpfully guide oral argument.[15]

In 1986, California adopted section 22 "to the Standards of Judicial Administration, recommending that all trial courts pro-

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7. *See* L.A. SUPER. CT. R. 9.7(e), *available at* http://www.lasuperiorcourt.org/courtrules/CurrentCourtRulesPDF/Chap9.pdf#page=7. For a list of current tentatives, see *Tentative Rulings*, L.A. SUPER. CT. http://www.lasuperiorcourt.org/tentativeRulingNet/UI/main.aspx?caseType=appellate (last visited Feb. 12, 2014).

8. Thomas B. Marvel, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86, 86–87 (1991). *See generally* N.M. R. APP. 12-210.

9. Hollenhorst, *supra* note 6, at 5–8.

10. *Id*.

11. Marvel, *supra* note 8, at 89.

12. Hollenhorst, *supra* note 6, at 7.

13. Hollenhorst, *supra* note 6, at 3–4 n.6.

14. Mark Hummels, *Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination*, 46 ARIZ. L. REV. 317, 330 (2004).

15. *Id*. at 332.

vide tentative rulings procedures for law and motion matters in civil cases."[16] Section 22 has since been repealed as part of a reorganization of the California Rules of Court, but the 1986 rule evidences the state's early endorsement of tentative rulings by trial courts.[17]

The California Court of Appeal, Fourth Appellate District, Division Two was the next court to experiment with tentatives,[18] beginning in October 1990.[19] It is the only division of California's Court of Appeal to issue tentative opinions. The Court's website indicates that it mails "tentative opinions" to counsel seven to ten days before oral argument.[20] Although notice in the past has ranged from several weeks to several days, attorneys typically receive tentative opinions well in advance of argument.[21] According to Don Davio, the Managing Attorney of the Fourth Appellate District, Division Two, "tentative opinions are now [in 1981] mailed out . . . about one to two months before the oral argument is scheduled."[22] The Second Division's Internal Operating Practices and Procedures indicate that tentative rulings are mailed to counsel at least thirty days prior to oral argument.[23] In cases where "a majority of judges [on a panel] cannot concur on a tentative opinion," a memo "describing the issues disputed among members of the panel" is sent instead of a tentative opinion.[24] The California Supreme Court upheld the legality of the California Court of Appeal issuing tentative opinions in 2004.[25]

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16. Siskind, *supra* note 1, at 59.

17. CAL. STANDARDS OF J. ADMIN. § 22 (repealed Jan. 1, 2007).

18. This Note uses "tentative rulings" and "tentatives" interchangeably.

19. *See* Hollenhorst, *supra* note 6, at 1 n.2, 14; *Division 2, Tentative Opinion Program*, CAL. CTS., http://www.courts.ca.gov/2519.htm#tentative. This is notably a different District and Division than Judge Thompson served on. Judge Thompson sat in the Second Appellate District, Division One. *See* Thompson, *supra* note 1, at 477; Interview by David Knight with Justice Robert Thompson, Justice, Cal. Court of Appeal 8 (May 15, 2007), http://www.courts.ca.gov/documents/Robert_Thompson_6044.pdf.

20. *See Division 2, Tentative Opinion Program*, CAL. CTS., http://www.courts.ca.gov/2519.htm#tentative (last visited Feb. 12, 2014).

21. Saeta, *supra* note 1, at 23.

22. Hummels, *supra* note 14, at 8.

23. *See* CAL. R. CT., 4TH APP. DIST. INTERNAL OPERATING PRACS. AND P., DIV. 2, SEC. VIII ("Tentative opinions and oral argument").

24. Hummels, *supra* note 14, at 8.

25. People v. Pena, 83 P.3d 506, 513, 516 (2004). The Court similarly indicated approval of the practice for trial courts in 1990, stating that "formulating and announcing tentative rulings in advance of argument is a common practice in law and motion matters." People v. Hayes, 802 P.2d 376, 419 (1990). In *Pena*, however, the California Supreme Court held that the "oral argument waiver notice employed by the Court of Appeal

Judge Ronald Whyte of the Northern District of California formerly sat on Santa Clara County's Superior Court.[26] He issued tentative rulings as a state trial court judge and brought the practice to the federal bench when he was appointed to in the U.S. District Court for Northern California in 1992.[27] His tentatives are informal, have no binding effect, and do not vacate oral argument.[28] They tend to pose questions rather than delineate outcomes, and they cannot replace a full post-hearing opinion.[29]

By 1992, Judge Hufstedler's tentative ruling practice had spread to California trial courts beyond Los Angeles County, where judges sitting in law and motion departments throughout the state had adopted it informally.[30] Finally, "[t]he tentative ruling system which had long been informally utilized in many superior courts was formally acknowledged by California Rules of Court, Rule 324, effective July 1, 1992."[31] In contrast to the existing hodgepodge of court-specific (and sometimes judge-specific) practices, the rule standardized the procedural options by which law and motion matters could be tentatively decided.[32] California amended the rule in 2000 and again in 2007, when it was renum-

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in this case ha[d] the potential to improperly and unduly dissuade parties from presenting oral argument on appeal." *Pena*, 83 P.3d at 515. The Court went on to praise the tentative ruling experiment, if not the wording of the notice:

> "We strongly emphasize, however, that our decision in the present case is by no means intended, and should not be viewed, as discouraging experimentation by the Courts of Appeal through the adoption of procedural innovations designed to streamline the appellate process. . . . We applaud innovations, such as the tentative opinion program adopted by the Court of Appeal here, that are initiated to maintain the quality and integrity of the judicial process in spite of these obstacles. We simply conclude . . . that the particular waiver notice employed here is not a proper streamlining device."

Id. at 516.

26. *See Senior District Judge Ronald M. Whyte*, U.S. DISTRICT CT., N.D. DISTRICT CAL., http://www.cand.uscourts.gov/rmw (last visited Mar. 4, 2014).

27. *Id.*; Richard C. Braman, *Prehearing Tentative Rulings Promote Intellectual Integrity in Judicial Opinions and Respect for the System*, 49 APR FED. LAW. 50, 50 (2002)

28. Judge Whyte's current tentatives can be found at *Tentative Rulings*, U.S. DISTRICT CT., N.D. DISTRICT CAL., http://www.cand.uscourts.gov/rmwtenrulings (last visited Mar. 4, 2014). *See also* Braman, *supra* note 27, at 50.

29. *See id.*

30. Although Section 22 was added to the Standards of Judicial Administration in 1986, formal procedures were not enacted. *See* Siskind, *supra* note 1, at 59.

31. Groth Bros. Oldsmobile, Inc. v. Gallagher, 118 Cal. Rptr. 2d 405, 413 (Cal. Ct. App. 2002); CAL. R. CT. 3.1308; CAL. R. CT. 324 adopted, eff. July 1, 1992 (repealed).

32. CAL. R. CT. 3.1308(b).

bered.[33] Rule 3.1308 now governs the procedure for California trial judges who choose to issue tentative rulings for law and motion matters.

Rule 3.1308 moves toward standardizing previously informal tentative ruling practices by delineating two broad procedural options that courts issuing tentative rulings may follow. Under the first option, tentative rulings vacate oral argument by default.[34] Under the second, all parties must explicitly consent to waive oral argument.[35] Courts that choose to issue tentative rulings must follow one of the two procedures outlined in Rule 3.1308; no other tentative ruling procedures are authorized in California's trial courts.[36] Further, the rule dictates transparency by requiring each court to publish its procedures in its local rules.[37] In that respect, Rule 3.1308 advances a measure of uniformity for tentative ruling procedures between judges within a court or branch.[38] The rule applies only to judges who elect to issue tentative rulings, and even then only to the matters for which tentative rulings are issued.[39] Rule 3.1308 does not require any judge to issue tentative rulings.[40]

Aside from California Superior Courts, the history of tentative rulings is largely confined to appellate courts. Written tentative rulings have not spread beyond the courts mentioned above in any formal way, although some judges issue tentatives in some cases,[41] and others orally recite tentative positions informally on the day of argument. The practice has not failed to proliferate for lack of positive reviews. Quite the contrary: the reception from

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33. CAL. R. CT. 3.1308 [hereinafter Rule 3.1308]. The 2007 amendment was not especially substantive. It changed the word "shall" to "must" in a number of places and the phrase "prior to the hearing" to "before the hearing." An excerpt of the 2000 version of section (a) can be found in E2 Brokers v. Mickalich, C042513, 2003 WL 22476329 (Cal. Ct. App. Nov. 3, 2003).

34. CAL. R. CT. 3.1308(a)(1).

35. *Id.* 3.1308(a)(2).

36. *Id.* 3.1308(b).

37. *Id.* 3.1308(c).

38. *Id.* 3.1308(d).

39. *Id.* 3.1308(e).

40. *Id.*

41. Braman, *supra* note 27, at 50. Although rare, some judges who do not regularly issue tentative rulings will in some cases. Non-judicial arbiters also employ comparable practices. For a discussion on the analogies between "notice and comment" periods used by executive branch agencies and tentative rulings in courts see generally Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965 (2009).

judges, practitioners, and commentators has been mostly positive.

III. ACADEMIC PERSPECTIVES ON TENTATIVE RULINGS

The academic literature discussing tentative rulings has overwhelmingly focused on their use at the appellate level.[42] The literature has discussed many benefits of tentative rulings: costs are saved when parties waive arguments or portions of arguments, tentative rulings shorten the length of oral argument, enduring oral arguments are more informed and relevant, and final judicial decisions are sounder and contain fewer errors.[43] Some academics have tangentially mentioned that tentative rulings may have a settlement-inducing effect.[44] The practice's negative effects have been treated with less gravity. The most oft-cited concern has been that writing a tentative ruling biases the judge toward the tentative outcome, thereby reducing the value of oral argument.[45] Authors have noted that the practice shifts judicial

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42. *See generally, e.g.*, Marvel, *supra* note 8; Bradley M. Bole, *Appellate Courts Experiment with Tentative Opinions Before Argument*, 19 LITIG. NEWS 2 (1993–1994); Hollenhorst, *supra* note 6; Hummels, *supra* note 14; Saeta, *supra* note 1; Thompson, *supra* note 1; Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1 (1986); Robert M. Tyler, Jr., *Practices and Strategies for A Successful Appeal*, 16 AM. J. TRIAL ADVOC. 617 (1993). *But see generally, e.g.*, Braman, *supra* note 27; Siskind, *supra* note 1 (discussing tentatives at the trial level).

43. *Id.*

44. One author observed that "[t]he number of settlements after the release of tentative opinions has increased and the numbers of petitions for rehearing have been reduced." *Innovations in Appellate Advocacy: The California Experiment in Tentative Opinions*, APP. PRAC. J. & UPDATE 3 (Fall 1992). Another author cites a survey of the Arizona Court of Appeals, Division Two to note "a final 'incidental benefit' as the occasional willingness of parties to waive oral argument and settle a case after having seen the draft." Hummels, *supra* note 14, at 332.

45. *See, e.g.*, Bole, *supra* note 42 at 2 ("Some practitioners fear that once a tentative opinion is issued, the preparing judges may be inclined to defend the opinion, thus stifling any meaningful discussion during oral argument."); Hollenhorst, *supra* note 6, at 28 ("Finally, the most vociferous critics of tentative opinions suggest that the court becomes locked into a position after the release of a draft. This argument has been one of the principal reasons cited by other courts in deciding not to institute such a program."); Thompson, *supra* note 1, at 519 ("Some able appellate judges express concern that the distribution of a tentative opinion to counsel prior to argument may freeze a panel into a position from which it cannot be swayed . . . . [P]resently, open minded judges sometimes admit a mistake in initial approach in private while under the proposed system the confession of error will be public."); Thompson & Oakley, *supra* note 42, at 27 ("In some courts, the likelihood that the prejudgment will prevail is confirmed in many cases by the denial of oral argument altogether. Efficiency is deemed to justify permitting even an opinion pre-

effort earlier in the case's timeline; that a judge may be perceived as an adversary during oral argument to counsel for whom the tentative ruling is unfavorable; and that panel decisions may reflect the opinion of only one judge, as the panel judges defer to the author of the tentative ruling.[46]

A. BENEFITS OF TENTATIVE RULINGS

The literature predominantly focuses on how tentative rulings improve oral argument. Parties are more inclined to waive oral argument on certain issues or even entire motions addressed by a tentative ruling, thereby saving resources for the judge, court administration, and the litigants.[47] Robert J. Timlin, once an Associate Justice of the California Court of Appeals, noted that counsel "seem to be more willing to waive oral argument after receiving the tentative opinion," and that "[a]s a result of the program . . . up to 20% of oral arguments are waived in civil cases."[48] Mendocino County Superior Court began issuing tentative rulings in July of 2012.[49] Since then, Judge Cindee F. Mayfield, the only judge that rules on law and motion matters in that court, has observed a dramatic drop-off in courtroom attendance for her

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pared by a non-judge to become the opinion of the court based solely upon staff-supplied information untested by the adversary process at oral argument. Where argument is allowed, the court hears it only after reading a document that is deemed most successful if it becomes the opinion ultimately filed by the court.").

46. Thompson, *supra* note 1, at 478–79 (Thompson discusses all three concerns: "There is the legitimate fear that the procedure will delay the ultimate decision in courts that are now reasonably current;" discussing improper deference by a panel to the author of a tentative, "The process falters if the members of the panel are not as dedicated to their job as they should be. Then the tentative opinion "precalendar memorandum of the preparing judge will usually be accepted on faith, subject only to flaws obvious on its face;" and "It requires an intellectually secure judge to accept criticism of work product of his court or of his own work."). *See also* Hollenhorst, *supra* note 6, at 26 ("time constraints to prepare the tentative opinion have occasionally resulted in continuances of cases because the tentative opinion had not been completed.").

47. Bole, *supra* note 42, at 2; Tyler, *supra* note 42; Telephone Interview with Judge Cindee F. Mayfield, Judge, Mendocino Cnty. Superior Court (Jan. 16, 2013). *See generally* Hollenhorst, *supra* note 6.

48. *Innovations in Appellate Advocacy*, *supra* note 44, at 3. *See also* Tyler, *supra* note 42, at 690. At the time of this publication, Judge Timlin is a Senior District Judge for the Central District of California. For biographical information about Judge Timlin, see *Interview by David Knight with Judge Robert Timlin, Senior Judge, Central District of California*, CAL. CTS., http://www.courts.ca.gov/documents/Robert_Timlin_6030.pdf (last visited Mar. 4, 2014).

49. *See* TENTATIVE RULINGS, SUPERIOR COURT OF CALIFORNIA COUNTY OF MENDOCINO, http://www.mendocino.courts.ca.gov/docs/TRAnnounce.pdf.

law and motion calendar.[50] More parties are waiving oral argument, she explained, so fewer people are showing up.[51] Justice Tomas E. Hollenhorst of the California Court of Appeal, Fourth Appellate District, Division Two explained that "the actual number of cases where oral argument was heard by the court declined [after the Court implemented a tentative ruling program]."[52]

Waiving oral argument benefits the court, counsel, and litigants in obvious ways. When a tentative ruling is unlikely to be successfully refuted at oral argument, waiving argument allows litigants to save on counsel fees. Attending law and motion hearings can be time intensive, especially in rural communities where distances are great and in districts where the law and motion calendar runs late into the day. Counsel may even use tentative rulings to help justify waiving oral argument to a client where an appearance will be fruitless, and they can ease malpractice concerns of waiving argument.[53] The court also directly saves from a reduction of cases on calendar. Judges are free to spend more time on other cases, and fewer staff hours are required for hearings. The value of judicial time saved can represent substantial savings.[54]

Counsel may alternatively choose to submit to the tentative in part only and use oral argument to focus on a subset of points in the motion. That strategy provides the benefits of waiver for some issues, and it reveals the chief benefit of tentative rulings in the eyes of appellate courts: greater quality of oral argument. When courts have transitioned into tentative ruling schemes, oral arguments have become shorter and focused on more important

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50. Interview with Judge Mayfield, *supra* note 47.

51. *Id.*

52. Hollenhorst, *supra* note 6, at 18. Justice Hollenhorst describes an initial spike in requests for oral argument because tentative opinions were only offered when counsel requested oral argument. Even accounting for the rise in overall requests for oral argument, the number of cases where oral argument actually took place still declined in the wake of the implementation of the program. *Id.* at 17–18.

53. *Id.* at 19.

54. *See id.* at 18, 24 ("The principal tangible benefit to the court from tentative opinions was in calendar management."); Thompson, *supra* note 1, at 517 ("Counsel's response or lack of response to the court's precalendar communication to him will greatly ease the pressure of case load by reducing the decision making points in it. The decision making points of the judge are zero where no response is possible, as will be the case in most criminal appeals and in a significant proportion of civil matters."); Interview with Judge Mayfield, *supra* note 47.

aspects of the case.[55] Tentative rulings also give counsel welcome insight into the "judge's thought process in preparation of a case so that counsel is aware of what he should do by way of argument to sway the court to his advocated position."[56] The court aids lawyers by identifying the most worthy issues and by evaluating arguments in the moving papers. Lawyers can then decide which claims were unpersuasive and whether they should invest additional time in crafting a more compelling argument.[57] Counsel are further helped by the judge's additional research, and they may reevaluate the strength of their claims entirely when confronted with previously unknown authority.[58]

Commentators have pointed out that judges who issue tentative rulings benefit at oral argument as well. Some judges run "front-loaded" courtrooms, meaning they write draft opinions based on moving papers before attending the hearing.[59] Having considered and tentatively decided the merits of the case before oral argument, those judges are better prepared for the hearing than a judge who has not so thoroughly considered the case.[60] A tentative ruling scheme effectively forces judges to run "front-loaded" courtrooms and consider each issue before argument. That leads to more fruitful hearings, as everyone is well informed before entering the courtroom. Judges also benefit from fewer errors in final opinions, as counsel have an opportunity to identify legal and factual discrepancies in the opinion before its publication.[61] More accurate opinions will, in turn, reduce the amount of petitions for rehearing.[62]

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55. Saeta, *supra* note 1, at 20. Judge Saeta, writing within a year of the Los Angeles Superior Court Appellate Division's transition into issuing tentative rulings, found that "[o]n the whole, argument seems to be shortened." *Id*. at 24.

56. Thompson, *supra* note 1, at 517.

57. For an overview of the procedures surrounding tentative opinions, see generally ERIC YOUNGER & DOUGLAS BRADLEY, YOUNGER ON CALIFORNIA MOTIONS § 4:56 (2d ed. 2013).

58. *See* Hollenhorst, *supra* note 6, at 19 ("Counsel recognize from the tentative opinion the case or cases which the court is relying upon for its draft opinion and are generally well prepared to discuss those cases in the context of the facts and tentative opinion."); Thompson, *supra* note 1, at 516 ("[Tentative opinions] state the judge's analysis of the issues involved, the key applicable authority, and a tentative decision based upon the paper work considered by the judge before the calendar is called for argument.").

59. *See* Hollenhorst, *supra* note 6, at 13 n.62, 16.

60. *See* Thompson & Oakley, *supra* note 42, at 27 ("The judge who has read counsels' briefs prior to argument is a much more intelligent participant than one who has not.").

61. *See* Bole, *supra* note 42, at 2; Braman, *supra* note 27, at 50; Hollenhorst, *supra* note 6, at 23 ("Where there are misstatements or misunderstandings in the draft, counsel

B. PROBLEMS WITH TENTATIVE RULINGS

Tentative ruling detractors criticize the practice's tendency to weaken the persuasive value of oral argument, and they caution against creating additional, earlier deadlines for already strained courts. Critics most commonly fear that authoring tentative rulings "fix" judges into their initial opinions.[63] Judges write tentative rulings based on moving papers prior to argument. Having completed an opinion, the fear is that judges will be less receptive to arguments contrary to their tentative view than if they had authored nothing.[64] Although many commentators do not have this concern, all tentative ruling advocates must answer it[65] because, even if untrue, popular belief that such a bias exists is itself damaging.[66] Ultimately, the bias criticism has little force as

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may point these problems out, frequently with citations to the record, so that they can be corrected."); Pamela Ann Rymer, *The Trials of Judging*, 4 GREEN BAG 2d 57, 59–60 (2000) ("Draft[ing] a tentative ruling that I gave to counsel before argument . . . helps focus their attention on the judge's concerns, and helps avoid needless error from lack of understanding."); Saeta, *supra* note 1, at 24. For a deeper discussion of error correction through notice and comment periods of judicial opinions, see generally Abramowicz & Colby, *supra* note 41.

62. *See* Bole, *supra* note 42, at 2; Braman, *supra* note 27, at 50.

63. *See* Thompson & Oakley, *supra* note 42, at 27, 66 ("In some courts, the likelihood that the prejudgment will prevail is confirmed in many cases by the denial of oral argument altogether"; "The use of the tentative opinion prepared before oral argument thus creates a special burden of persuasion that is difficult to meet.").

64. *See* Siskind, *supra* note 1, at 60 ("Lawyers must confront the fact that law and motion judges rarely change their minds."); Thompson & Oakley, *supra* note 42, at 65 ("If a court has reached a conclusion, even one that is labeled 'tentative,' oral argument involves a process by which minds must be changed rather than open minds persuaded."). Scholars have expressed similar concerns regarding federal administrative rulemaking. *See* Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U PITT. L. REV. 589, 591 (2002) ("Though often cited as a means of ensuring public participation, notice and comment rulemaking may diminish genuinely effective public input by encouraging agency 'lock-in,' or suboptimal change, through premature commitment to a proposal."). For a comparison of judicial lock-in and executive agency lock-in, see Abramowicz & Colby, *supra* note 41, at 1016–17.

65. *See* Braman, *supra* note 27, at 51 (arguing that any front-loaded courtroom faces this challenge, and that parties will incorporate knowledge of a judge's tendency to be "locked in" into their litigation strategies); Hollenhorst, *supra* note 6, at 28–30 (arguing that front-loaded courtrooms already face the challenge, petitions for rehearing are similar, and that the fear does not bear out in practice); Saeta, *supra* note 1, at 24 ("As with tentative rulings, it is my belief that the use of tentative opinions has not frozen the results. Changes have been made based on the persuasiveness of the argument."); Thompson, *supra* note 1, at 519 ("Experience with the law and motion tentative notes technique demonstrates that publicity of the fact that the judge is open minded is a virtue and not a vice.").

66. Although Judge Mayfield does not believe that judges are "fixed in" to their tentative rulings, she believes that the biggest drawback of adopting a tentative ruling scheme

applied specifically to the publication of tentative rulings. Assuming that writing an opinion may bias a judge, many judges draft tentative rulings before hearings even if they do not distribute them — motion practice is often decided on the papers.[67] The argument must rely on the marginal biasing effects of publishing a tentative opinion, conceding that the impact of writing the opinion is unrelated to tentative ruling systems.

Tentative rulings require judges to run front-loaded courts, which may come at a cost. Front-loading courts creates additional and earlier deadlines for already overworked judges. The practice requires judges to research and decide the issues of a case some time before oral argument, whereas judges who do not issue tentative rulings are free to postpone researching, deciding, and writing until after argument is heard. The thoroughness of a court's tentative rulings can affect the magnitude of the workload shift. For example, one court may circulate lengthy, publication-ready opinions as tentative rulings to provide counsel with maximum insight into the court's reasoning. A second court may research, prepare, and tentatively decide a case but withhold authoring a full opinion until after oral argument. That court might instead distribute an outline of an opinion, a bulleted list of the issues and their tentative resolutions, or some equally low-effort form of communicating the court's disposition. Converting to a front-loaded docket would be more costly for the court in the first example above. The second court would provide less information to the litigants, but in doing so it would delay the effort of committing words to paper and lessen the cost of front-loading.

Courts that issue tentative rulings have made different decisions regarding how much effort to front-load.[68] The nature of the court must play some role. Appellate courts are better able to author full opinions earlier, as they have longer temporal horizons. Particularly overworked trial courts may find it difficult to write more than a few lines. Other trial courts may find that longer opinions engender a greater rate of oral argument waiver, whether due to convincing opinions or a signal that the judge is

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has been the perception by some attorneys before the court that the judge is "fixed into" the tentative. Interview with Judge Mayfield, *supra* note 47.

67. *See* FEDERAL APPELLATE PRACTICE 65 (Philip Allen Lacovara, ed., Bloomberg BNA 2d ed. 2013).

68. *See supra* Part II. *See also infra* Part IV.A, for a breakdown of tentative ruling procedures in California by county.

"fixed in" to the ruling. Still other trial courts, depending on the court's submission deadlines for moving papers, may not have the time to craft an opinion before argument at all.

IV. CALIFORNIA TRIAL COURT PRACTICE

Of California's fifty-eight counties, thirty-five issue tentative rulings for matters on their superior courts' law and motion calendars.[69] All but one of those, Imperial County, make the tentative rulings available online. California's trial courts employ a wide variety of tentative ruling procedures, offering perspective on the numerous ways a court can implement a tentative ruling scheme. Procedures vary by county, by division within county, and sometimes by judge within each division.[70] Rule 3.1308 broadly outlines the two methods by which counties may issue tentative rulings.[71] Because the methods are so broadly defined, counties are free to adopt their own rules regarding many particulars that have a great impact on the quality and usefulness of the rulings. The great variation provides insights into how courts can best use tentative rulings to promote judicial economy, inform litigants, limit the burdens of a front-loaded calendar, and avoid the appearance of being "locked in." This Note presents primary research focusing on two aspects of tentative rulings: thoroughness of the opinion and length of notice provided to liti-

69. Alameda County, Amador County, Butte County, Contra Costa County, El Dorado County, Fresno County, Imperial County, Kern County, Kings County, Los Angeles County, Marin County, Mendocino County, Merced County, Napa County, Nevada County, Orange County, Placer County, Plumas County, Riverside County, Sacramento County, San Diego County, San Francisco County, San Joaquin County, San Luis Obispo County, San Mateo County, Santa Barbara County, Santa Clara County, Shasta County, Solano County, Sonoma County, Stanislaus County, Tulare County, Tuolumne County, Ventura County, and Yolo County issue tentative rulings on their law and motion calendars. A greater number issue tentative rulings on other matters. For example, Siskiyou County issues tentative rulings for its Probate calendar, and Lassen County issues them for Family Law and Criminal Sentencing calendars. Alpine County, Modoc County, Siskiyou County, and Yuba County permit tentative rulings in their local rules, but they do not yet issue tentatives on law and motion matters. *See infra* Part IV.A. This information was obtained by accessing each county's tentative rulings depositories through their websites and by conversations with their clerks of court.

70. Rule 3.1308(d) provides that "[i]f a court or a branch of a court adopts a tentative ruling procedure, that procedure must be used by all judges in the court or branch who issue tentative rulings." CAL. R. CT. 3.1308(d). Even so, judges in counties that do not provide for a specific procedure in their local rules may employ procedural idiosyncrasies that betray the spirit, if not the letter, of the rule.

71. CAL. R. CT. 3.1308.

gants before the hearing. Before discussing observed court practices, this Note examines the different formal rules that guide county courts' tentative ruling procedures.

A. COURT RULES

Rule 3.1308(a) outlines two alternative methods by which superior courts can issue tentative rulings on law and motion matters. If a court follows Rule 3.1308(a)(1), a tentative ruling vacates oral argument on the motion unless either the court directs oral argument in its tentative ruling or a party properly gives notice of intent to appear.[72] Absent such notice, the tentative ruling becomes the final ruling.[73] Because of the finality of this outcome, the rule specifies firm notice requirements and deadlines: the court must publish its tentative ruling by 3:00 p.m. on the court day before the scheduled hearing, and the parties must give notice to the court and each other by 4:00 p.m. the same day if they wish to appear.[74] Rule 3.1308(a)(1) tentative rulings must be available by phone and by any discretionary methods chosen by the court (typically the court's website and a posted bulletin in the courthouse).[75] Litigants giving notice must notify other parties by telephone or in person, and each court has discretion to accept notice itself by other means (some courts accept emails or facsimiles).[76] That timeline puts counsel in a precarious position, as they could be required to collect, comprehend, consider the consequences of, confer with clients regarding, and communicate the desire to orally challenge a tentative ruling within an hour. Failure to notify in time acknowledges a final order.[77]

The second procedural option, Rule 3.1308(a)(2), offers an alternative procedure where parties are not required to give notice of intent to appear, the hearing is not vacated by default, and the tentative ruling has no binding effect.[78] Courts following Rule 3.1308(a)(2) may deliver a tentative ruling at any time be-

72. *Id.* (a)(1).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. At least, it is as final as a ruling on the motion after oral argument would be. Like any ruling on a motion, procedural options, like a motion to reconsider, are available. *See* CAL. CIV. PROC. CODE § 1008 (West 2012).
78. CAL. R. CT. 3.1308(a)(2).

fore the hearing, and all parties must communicate intent to submit to the tentative ruling to vacate the hearing.[79] The rule effectively creates an option to opt out of oral argument, as opposed to the opt-in requirement of Rule 3.1308(a)(1). This rule allows judges to post tentative rulings on the day of the hearing or to announce tentative rulings at oral argument.[80]

Another provision, Rule 3.1308(b), limits trial courts' tentative ruling procedure options to those listed in Rule 3.1308(a), although non-binding announcements may be made the day of the hearing.[81]

California courts approach these options in a variety of ways. The majority of the state's superior courts have adopted Rule 3.1308(a)(1), choosing to vacate oral argument by default.[82] Some counties mention tentative rulings in their local rules but adopt neither rule formally, leaving the particulars to the discretion of each judge.[83] Other counties make no mention of tentative rulings in their local rules at all, yet they post tentative rulings online.[84] Still others have local rules that specify that they may

79. *Id.*

80. *Id.* 3.1308(b)(1)–(2).

81. *Id.* 3.1308(b). Aside from an announced publication time, the non-binding announcements allowed under Rule 3.1308(b) are indistinguishable from tentatives under Rule 3.1308(a)(2). *Id.*

82. *See* Table 1 for a summary of all counties' rules. Twenty-five counties have adopted Rule 3.1308(a)(1), and approximately five have adopted Rule 3.1308(a)(2). Some counties' local rules do not explicitly adopt either, but the content of the rule and the language of the tentative rulings themselves suggest adoption of one or the other. Uniquely, San Francisco's rule provides that Rule 3.1308(a)(1) applies to tentatives issue before 3:00 PM the day before argument, and Rule 3.1308(a)(2) applies to opinions issued after that deadline. *See* S.F. SUPER. CT. R. 8.3.

83. Orange County mentions tentative rulings in its local rules but does not adopt Rule 3.1308(a)(1) or Rule 3.1308(a)(2) formally or by implication. ORANGE CNTY. SUPER. CT. R. 382.

84. Kern County and Los Angeles County provide tentative rulings but do not include a procedure in their local rules. Kern County states that it follows Rule 3.1308(a)(2) on its website, and its rules include a procedure for tentative rulings on probate matters. *See Search Tentative Rulings*, SUPER. COURT CAL., CNTY. KERN, http://www.kern.courts.ca.gov/home.aspx, (follow "Tentative Rulings" hyperlink) ("Tentative Rulings are provided pursuant to C.R.C. Rule 3.1308 (a)(2)."). KERN CNTY. SUPER. CT. R. 8.1.2.1 ("[Probate] Matters Note Ready for Hearing"). Los Angeles Superior Court, an historical pioneer of tentative rulings, also appears to follow Rule 3.1308(a)(2), although that information must be gleaned from notices appended to individual rulings. L.A. County's posted tentative rulings can be found at *Tentative Rulings*, L.A. SUPER. CT., http://www.lasuperiorcourt.org/tentativeRulingNet/ui/main.aspx?casetype=civil (last visited Mar. 13, 2014).

begin issuing tentative rulings at any time without modifying their local rules, although they do not yet issue them.[85]

Variations exist beyond choosing between Rule 3.1308(a) or (b). Rule 3.1308(a) establishes a timeline under which courts must distribute tentative rulings and parties must provide notice of their intent to appear for argument. Some counties have responded to the publishing deadline by mirroring it,[86] noncommittally aiming to beat it,[87] stating times after which opinions will be available (effectively creating a window between the local rule's time and Rule 3.1308(a)(1)'s time when the opinion will be published),[88] flaunting it,[89] hedging against it,[90] and even moving it up.[91] Notably, all but two of the counties that followed Rule 3.1308(a)(1) allowed opinions to be published at 3:00 p.m.

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85. Alpine County, Modoc County, Siskiyou County, and Yuba County are examples. ALPINE CNTY. SUPER. CT. R. 5.7.1; MODOC CNTY. SUPER. CT. R. 3.02(J); SISKIYOU CNTY. SUPER. CT. R. 3.02(F); YUBA CNTY. SUPER. CT. R. Rule 3.4(B) (adopted but not implemented due to technology constraints).

86. Alameda, Mendocino, Napa, Nevada, Riverside, Santa Barbara, Santa Clara, Tulare, and Tuolumne Counties repeat Rule 3.1.308(a)(2)'s 3:00 p.m. deadline in their local rules. *See* Appendix II. ALAMEDA CNTY. SUPER. CT. R. 3.30(c); MENDOCINO CNTY. SUPER. CT. R. 4.3; NAPA CNTY. SUPER. CT. R. 2.9; NEVADA CNTY. SUPER. CT. R. 4.05.3; RIVERSIDE CNTY. SUPER. CT. R. 3316; SANTA BARBARA CNTY. SUPER. CT. R. 1301(b); SANTA CLARA CNTY. SUPER. CT. R. 7(E); TULARE CNTY. SUPER. CT. R. 701; TUOLUMNE CNTY. SUPER. CT. R. 3.11.

87. Alameda and Santa Clara Counties noncommittally suggest publication at 4:00 p.m. two court days preceding the hearing and at 2:00 p.m. the court day preceding the hearing, respectively. Both repeat Rule 3.1.308(a)(2)'s hard deadline of 3:00 p.m. the court day preceding the hearing. ALAMEDA CNTY. SUPER. CT. R. 3.30(c); SANTA CLARA CNTY. SUPER. CT. R. 7(E). *See also* Appendix II.

88. *See* Appendix II. For example, Amador, Sacramento, Solano, Sonoma, and Yolo Counties publish opinions commencing at 2:00 p.m. on the court day before the scheduled hearing. San Mateo begins publishing at 3:00 p.m. on that day, while Contra Costa County publishes after 1:30 p.m. *See infra* Appendix II.

89. *See* Appendix II. Merced County promises published tentatives no later than 4:00 p.m. the court day preceding the hearing, and San Mateo will begin publishing after 3:00 p.m. MERCED CNTY. SUPER. CT. R. 3.2; SAN MATEO CNTY. SUPER. CT. R. 3.1. *But see* CAL. R. CT. 3.1308(a)(1) (requiring tentative rulings to be available "by no later than 3:00 p.m. the court day before the scheduled hearing.").

90. *See* Appendix II. San Francisco County is unique in its method of compliance with Rule 3.1308(a)(1). If opinions are published by 3:00 p.m., they follow Rule 3.1308(a)(1). If they are published late, they will be labeled as late and follow Rule 3.1308(a)(2). S.F. SUPER. CT. R. 8.3(F).

91. *See* Appendix II. Uniquely, El Dorado County requires publication before the time specified by Rule 3.1308(a)(1). El Dorado judges must publish tentatives no later than 2:00 p.m. the court day preceding the hearing. EL DORADO CNTY. SUPER. CT. R. 7.10.05(A)(1).

the court day preceding the scheduled hearing and also required notice of intent to appear one hour later, by 4:00 p.m.[92]

To opt in to oral argument under Rule 3.1308(a)(1), most counties require notification to the court in person or by telephone, but some now accept email or fax.[93] Only San Francisco County has deviated from Rule 3.1308(a)(1)'s requirement that parties notify each other in person or by telephone; it allows email to serve as notice to the court and to other parties.[94]

El Dorado County is the only county to mention content requirements for tentatives in its local rules. Its local rules state: "The tentative rulings *and complete written rationale* for each tentative ruling will be posted on the El Dorado County Superior Court web site at www.eldroadocourt.org by no later than 2:00 p.m. on the court day preceding the date the matter is set on the Law and Motion Calendar."[95] That rule suggests that tentative rulings in El Dorado might be longer and posted earlier than in other counties.[96]

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92. El Dorado County requires publication by 2:00 p.m. *Id.* Mendocino is in the process of adopting a rule change that would require publication by 12:00 pm. *See infra* note 152. Solano County has moved the notice of intent to appear deadline back to 4:30 p.m., but it is unclear how that rule comports with Rule 3.1308. SOLANO CNTY. SUPER. CT. R. 3.9(a).

93. El Dorado County accepts notice through a form on its website. EL DORADO CNTY. SUPER. CT. R. 7.10.05(B)(2)(a)-(b). Mendocino and San Francisco Counties accept notice via email. MENDOCINO CNTY. SUPER. CT. R. 4.3(b)(2); S.F. SUPER. CT. R. 8.3(D). Stanislaus County accepts notice by e-mail so long as the email is received prior to 4:00 p.m. and confirmed by a return e-mail from the court. STANISLAUS CNTY. SUPER. CT. R. 3.01(C). Tulare County accepts notice via facsimile. TULARE CNTY. SUPER. CT. R. 701.

94. *See* S.F. SUPER. CT. R. 8.3(D).

95. *See* EL DORADO SUPER. CT. R. 7.10.05 (emphasis added).

96. Unfortunately, El Dorado Superior Court's website does not provide information about when tentative rulings were posted, so the effect of its publication deadline could not be compared against other courts. Word counts are available, and perhaps unsurprisingly El Dorado County averages the second longest length of tentative opinions in California. *See Tentative Rulings,* SUPER. CT. CAL., CNTY. EL DORADO, http://eldocourtweb.eldoradocourt. org/tentative_rulings/default.aspx (last visited Mar. 4, 2014).

Table 1

County	Tentatives issued?	Tentatives online?	Analogous CA Rule	Local Rule
Alameda	Y	Y	3.1308(a)(1)	3.30(c)
Alpine	N	N	unknown	5.7.1
Amador	Y	Y	3.1308(a)(1)	4.03
Butte	Y	Y	3.1308(a)(1)	2.9
Calaveras	N	N		3.3.7 (Repealed for civil, now applies only to family ct.)
Colusa	N	N		
Contra Costa	Y	Y	3.1308(a)(1)	7(d)
Del Norte	N	N		not in rules
El Dorado	Y	Y	3.1308(a)(1)	7.10.05
Fresno	Y	Y	3.1308(a)(1)	2.2.6
Glenn	N	N		
Humboldt	N	N		
Imperial	Y	N	3.1308(a)(2)	3.2.0
Inyo	N	N		
Kern	Y	Y	3.1308(a)(2)	not in rules
Kings	Y	Y	3.1308(a)(2)	312
Lake	N	N		
Lassen	N	N		
Los Angeles	Y	Y	3.1308(a)(2) (this may vary by department)	not in rules
Madera	N	N		
Marin	Y	Y	3.1308(a)(1)	1.6
Mariposa	N	N		
Mendocino	Y	Y	3.1308(a)(1)	4.3
Merced	Y	Y	3.1308(a)(1)	3.2
Modoc	N	N	unknown	3.02(J)
Mono	N	N		
Monterey	N	N		

County	Tentatives issued?	Tentatives online?	Analogous CA Rule	Local Rule
Napa	Y	Y	3.1308(a)(1)	2.9
Nevada	Y	Y	3.1308(a)(1)	4.05.3
Orange	Y	Y	3.1308(a)(2) (this may vary by judge)	382
Placer	Y	Y	3.1308(a)(1)	20.2.3
Plumas	Y	Y	3.1308(a)(1)	2.7
Riverside	Y	Y	3.1308(a)(1)	3316
Sacramento	Y	Y	3.1308(a)(1)	1.06
San Benito	N	N		
San Bernardino	N	N		
San Diego	Y	Y	3.1308(a)(2)	2.1.19(B)
San Francisco	Y	Y	3.1308(a)(1) 3.1308(a)(2) if ruling issued past 3:00 p.m.	8.3
San Joaquin	Y	Y	3.1308(a)(1)	3-113(D) (Stockton branch only)
San Luis Obispo	Y	Y	3.1308(a)(2)	7.11.1
San Mateo	Y	Y	3.1308(a)(1)	3.1
Santa Barbara	Y	Y	3.1308(a)(1)	1301(b)
Santa Clara	Y	Y	3.1308(a)(1)	7(E)
Santa Cruz	N	N		
Shasta	Y	Y	3.1308(a)(2)	5.17(C)
Sierra	N	N		
Siskiyou	N	N	unknown	3.02(F)
Solano	Y	Y	3.1308(a)(1)	3.9
Sonoma	Y	Y	3.1308(a)(1)	5.5

County	Tentatives issued?	Tentatives online?	Analogous CA Rule	Local Rule
Stanislaus	Y	Y	3.1308(a)(1)	3.01(C)
Sutter	N	N		
Tehama	N	N		
Trinity	N	N		
Tulare	Y	Y	3.1308(a)(1)	701
Tuolumne	Y	Y	3.1308(a)(1)	3.11
Ventura	Y	Y	3.1308(a)(2)	8.00
Yolo	Y	Y	3.1308(a)(1)	11.4
Yuba	N	N	3.1308(a)(2)	3.4(B) Adopted but not implemented due to technology constraints

B. COURT PRACTICES

As the procedures guiding tentative rulings vary by court, so do the properties of the opinions themselves. Two important quantifiable attributes mark tentative rulings: thoroughness and notice.

1. *Thoroughness*

A longer opinion (measured in this Note by word count) indicates greater depth of explanation and greater judicial effort.[97] For judges that issue fully explanatory tentatives, type and complexity of the case likely explains some variation in length. A ruling on multiple motions of first impression will naturally be longer than an opinion ruling on a single routine motion, as would be the case when comparing the final, binding rulings. The data, however, suggest variations that differing levels of complexity do not adequately explain. Particularly laconic judges are less prone to great surges of opinion length across all opinions — some judges rarely exceed a few phrases. What's more, observation confirms established differences of opinion length by county, notably present even though no formal rule guides behavior in this regard.[98]

Opinions were overwhelmingly under 1,000 words. Of the 3,288 opinions surveyed across thirty counties, opinions averaged 312 words. The shortest opinion was one word and the longest was 9,177. Nine percent were under ten words, fifty percent were under 142 words, and seventy five percent were under 307 words. Opinions longer than 307 words formed a long right tail along the distribution.[99]

Examining word count by county reveals systemic differences.[100] At the extremes, compare Kern, Butte, Riverside, and Amador Counties (average word counts of twenty five, thirty, sixty three, and eighty three respectively) with El Dorado, Fresno,

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97. The chosen variable "word count" has limits, like any variable that acts as a proxy for something else. However, it is relatively objective, verifiable, repeatable, and a reasonable indication of judicial effort.

98. An exception is El Dorado County. *See supra* Part IV.A.

99. *See infra* Figure 1.

100. *See infra* Figure 2.

San Luis Obispo, and Santa Clara Counties (average word counts of 1,172, 945, 919, and 729 respectively). El Dorado County had an average word count 18.7 times larger than Riverside County.[101] The right-hand tail did not account for the difference in average length for El Dorado County, either.[102] Only twenty-five percent of El Dorado County's opinions were under 386 words (compared to the total California sample average of 312), and only half were under 600.[103] By comparison, Riverside County's longest sampled opinion was 605 words.[104] Comparing El Dorado to Riverside opinion-by-opinion, it becomes clear that El Dorado judges consistently published tentatives that were much longer than those by Riverside judges.[105] These examples illustrate real, pervasive differences in tentative ruling lengths between counties.

Contra Costa, Sonoma, and Mendocino's tentative ruling practices share notable traits.[106] Although Mendocino County's average tentative ruling was twice as long as Contra Costa's, all three were in in the middle fifty percent of counties ranked by average tentative length.[107] In addition to average opinion lengths of 200 to 400 words, the distribution of opinion lengths was noteworthy. Each county had at least one opinion under ten words and published very short opinions for twenty five percent of its rulings.[108] The most straightforward twenty five percent of motions were handled with an opinion of less than 35 words (these could include unopposed motions, name change petitions, or straightforward motions that require only the citation of controlling precedent). The next quarter was longer but still short, from thirty-five words in Contra Costa to 130 words in Sonoma.[109] The second quartile rulings were two to five times longer than the first

101. Riverside has the third shortest opinions and El Dorado the second longest. Those counties were chosen for this example because of their equal and relatively large sample sizes.

102. *See infra* Figure 3.

103. *Id.*

104. *Id.*

105. *See infra* Figure 6. Note that because El Dorado's opinions so greatly eclipsed Riverside's in length, the y-axis is logarithmically scaled. Each point along the x-axis represents a single opinion; the sample size for the two counties is identical. *Id.*

106. *See infra* Figure 7.

107. *See infra* Figure 6.

108. *See infra* Figure 7.

109. *Id.*

quartile's, indicating that judged handled few cases with severe brevity. The pronounced difference in length between the first and second quartile indicates that the judges are judicious when allocating effort — they distinguish between cases that need different levels of attention. The next twenty five percent of opinions, the third quartile, are two to nine times longer than the previous quartile, and the fourth quartile maxed out at three to twelve times the length of the third, including the longest outlier cases.[110] The continued large variation in opinion lengths indicates different levels of depth for different cases, while the relatively short maximum opinion length cabins excessive attention to what could otherwise be the most consuming cases.

In summary, Contra Costa, Sonoma, and Mendocino Counties shared the following features: an exceptionally short minimum opinion length; very short opinions in the easiest quartile of motions; sharp growth in opinion length to handle complexities in the third quartile of cases; and expanded opinions when ruling on outliers that still did not exceed 2,000 to 3,000 words.[111]

By contrast, El Dorado County's shortest tentative ruling was fifty-five words, and both Fresno and El Dorado Counties' shortest quartiles were long, including opinions exceeding 350 words. Moreover, Kern, Fresno, and El Dorado Counties had relatively flat growth rates in opinion length, in contrast to the former counties' sharper growths, suggesting less distinction in effort between cases.[112] Judges might realize greater efficiency gains by sparingly allocating effort in proportion to a case's complexity.

One observation from the county data is true: Fresno and El Dorado Counties consistently issue longer opinions than Contra Costa, Sonoma, and Mendocino Counties.[113] But breaking the data down by growth rate of opinion length, from a county's shortest opinions to its longest, helps tell another story: Contra Costa, Sonoma, and Mendocino Counties distinguish between cases that should take no time, cases that should take some minimal time, and cases that should take a lot of effort.[114] Additionally, those counties cap the effort given to even the most intensive

110. *Id.*
111. *See infra* Figure 8.
112. *Id.*
113. *See infra* Figures 2, 7, 8.
114. *See infra* Figures 7, 8.

cases.[115] By contrast, Fresno and El Dorado Counties don't give any cases "no time"; their opinions grow gradually in length, and they are all very long.[116] Fresno and El Dorado Counties' standard of effort is too high, and they should be able to identify some cases that don't take any time.[117] Kern County exhibits a similar trend, only in the opposite direction.[118] Like Fresno and El Dorado Counties, it doesn't differentiate cases very much, but instead writes universally short tentative rulings.[119]

In addition to averages and trends, some extremes and idiosyncratic practices are worth highlighting. Two hundred and ninety-nine tentative rulings, or nine percent of the sample, contained ten or fewer words. Thirty-six had one word, sixty had two words, and forty-seven had three words. To provide context, a statement as uninformative as, "The defendant's unopposed motion is denied with leave to amend" is ten words. At the extreme, one judge in Orange County's Department C16 delivered the tentative rulings for a case with five motions in the form of a check box, ticking off "grant" or "deny" next to each motion in a list.[120]

Table 2

Thoroughness Data				
County	Average	SD	Min	Max
Alameda	606.8	555.6	69	2458
Amador	83.3	72.1	22	405
Butte	30.4	36.2	7	186
Contra Costa	194.9	356.6	1	2771
El Dorado	1171.8	1428.2	13	9177
Fresno	945.4	959.3	55	5941
Kern	24.7	18.6	2	64
Kings	148.8	130.2	34	336
Los Angeles	365.7	463.3	6	2639

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *See infra* Figure 13.

2. *Notice*

Because most counties have adopted Rule 3.1308(a)(1) without modification of the notice provision, there are few differences in the formal notice requirements between the counties.[121] Unlike tentative ruling length, the counties that follow Rule 3.1308(a)(1) operate under a formal minimum notice period requirement (although one could think of a tentative ruling's minimum length requirement as one word). Like tentative ruling length, though, the notice period given in practice varies by county.[122] The trend is overwhelmingly to provide minimal notice, and the variations by county are not nearly as pronounced as variations in tentative ruling length.

A note on data collection practice prefaces this section.[123] Collecting word counts for published opinions was relatively straightforward. Most published tentative rulings can be found online, though some were gathered through personal correspondence with clerks of the court. Gathering notice figures was much more difficult, and reliable data were only available for six counties: Alameda, Butte, Kern, Placer, Plumas, and Sacramento. In order to calculate notice, one needs the date and time of the hearing (which were easy to obtain) along with the date and time of the opinion's publication (which were more difficult). The greatest challenge was determining when the opinion was published. Most counties did not provide any information about publication date or time. For counties that provided dates but not times of publication and hearing, this Note assumes that any opinion published the day before a hearing provided twenty-four hours of notice, which almost certainly overstates the length of notice.

The aggregate data suggest that counties took Rule 3.1308(a)(1)'s minimum requirement for a target. Rule 3.1308(a)(1) requires publication by 3:00 p.m. on the court day before the scheduled hearing.[124] Based on the author's observation of publication times, courts construe that rule to require publication on the weekday before the scheduled hearing, not the

121. *See supra* Part IV.A.
122. *See infra* Figure 9.
123. More thorough explanation of data collection methods is included in Part IV.C. *See infra* Part IV.C.
124. CAL. R. CT. 3.1308(a)(1).

law and motion calendar court day before the scheduled hearing.[125] Courts following Rule 3.1308(a)(1)'s minimum notice requirement would provide approximately thirty hours notice on average.[126] Counties measured in this Note actually following Rule 3.1308(a)(1) give little more notice than the statutory minimum's average would suggest, providing on average forty-one hours of notice, or about ten hours more than the required average.[127] Unsurprisingly, there was a large cluster around twenty-four hours, and another cluster suggestive of a Friday or Thursday to Monday gap at sixty-six to ninety-six hours.[128] Placer County illustrated that phenomenon perfectly.[129]

Los Angeles County provided an atypical example of notice length. It followed Rule 3.1308(a)(2) in some form, though its procedures varied by individual judge.[130] Although Rule 3.1308(a)(2) puts little pressure on notice length because there is no default provision or notice requirement for argument, Los Angeles County published the longest outliers in notice length. Surveyed cases included at least 22 days, 114 days, 115 days, and 246 days of notice.[131] Orange County provided another extreme example: one tentative in the sample was published on the day of the hearing.

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125. Some courts hear law and motion matters only one or two days per week but publish tentative rulings only the weekday before law and motion. If one assumes that the deadline is the prior weekday, then nearly all tentative rulings meet the requirement. If one assumes that the prior law and motion day is the proper deadline, then the vast majority of opinions would be late under the statute. *See infra* Figure 10.

126. Assuming that tentatives are equally likely to be published on any day of the week and that the law and motion hearings are scheduled at 9:00 a.m., publishing by 3:00 p.m. on the court day before the scheduled hearing gives an average of 27.6 hours notice when calculated precisely, or 33.6 hours when calculated crudely by assuming an opinion published the day before a hearing provided twenty-four hours notice. This is because opinions published on Fridays give sixty-six or seventy-two hours, depending on the precision of measurement.

127. *See infra* Table 3. By one measurement, counties that follow Rule 3.1308(a)(1) provide 7.4 more hours of notice than counties that do not follow Rule 3.1308(a)(1); by another measurement, 13.4 more hours of notice are provided.

128. *See infra* Figure 10.

129. *See infra* Figure 11.

130. *See generally supra* note 84 (describing practices in L.A.).

131. Unfortunately, Los Angeles County's website did not make data collection about notice feasible for a large sample because tentative rulings did not include publication dates. Those outlier periods were calculated based on the date the author accessed them, and were thus likely underestimates. For a list of current tentatives, see *Tentative Rulings*, *supra* note 84.

Table 3

Notice Data				
County	Average	SD	Min	Max
Alameda	56.0	18	48	120
Butte	24.0	0	24	24
Kern	42.9	36	16	93
Placer	31.8	30	17	89
Plumas	105.7	23	80	138
Sacramento	38.4	26	10	96
Global	**41**	**30**	**10**	**138**

C. DATA COLLECTION METHODS AND LIMITS

At this point it is relevant to explain the nature of the source data upon which this Note relies. In gathering the data, the author limited his research to California opinions that were available online.[132] Effort was made to collect all opinions from October 2012 through February 2013 for all counties. Courts vary in providing public access to past tentative rulings with varying tenacity, and the completeness of past records accounts for some discrepancy in the sample size between counties. The absolute number of tentatives issued by the court, however, was the major driver of sample size difference.[133]

The author only collected data for motions containing issues that were decided in a tentative ruling. If the tentative ruling was blank or read "no tentative ruling" or "appearance required," they were not included in the sample. The author made every effort to only include rulings that could be read to affirm or deny

132. As Imperial County was the only county that issues tentative rulings and does not make them available to the public online, the author excluded all cases from that jurisdiction from the study. Additionally, the author received copies of tentative rulings that were not available online from the clerk of court at Mendocino County. *See* E-mail from Tracy Johnson, Clerk, Mendocino Cnty. Superior Court, to the author (Jan. 14, 2013, 04:43 EST) (on file with author). Tentative opinions are generally available on their website, but their system could not yet handle opinions beyond a certain length, so the author included those tentative opinions sent directly to him in the sample.

133. Some counties had only one division or one judge that issued tentatives, and some had fewer posted tentatives per judge. San Francisco and Los Angeles Counties, for example, both had very large volumes of tentative rulings issued daily, while smaller counties like Tulare and Tuolumne posted very few. Plumas County posted tentative rulings only sporadically.

an active motion. Likewise rulings where the outcome was a continuance were not included (although denials with leave to amend were included, for example). Rulings that only vacated the hearing from the calendar were not included, nor did the author include tentatives that only announced that the case had been withdrawn because of a settlement notice or because the motion was dropped.

The author categorized tentative rulings by county. No effort was made to differentiate between divisions within a county or between judges within the divisions.[134] The data collected by county have huge standard deviations in opinion length; some are greater than the average opinion length for the county.[135] One would expect that such large standard deviations would shrink substantially if the data were analyzed at the individual judge level.

Collecting word counts for published opinions was relatively straightforward. It only required access to published tentative rulings.[136]

The large volume of tentatives and style of publication for San Francisco County provided both an opportunity and a challenge. The author elected to sacrifice accuracy of the word count at the individual opinion level for a larger sample. To gain the larger sample, average tentative ruling length was calculated for each day's tentative rulings.[137] This method allowed for a larger sample size of opinion lengths, but it sacrificed quartile figures, standard deviation, minimum/maximum, and other measures of variance. Accordingly, only averages for San Francisco County are presented, which are well supported by the data. That methodology made a more granular analysis of that county impossible.

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134. Anecdotally speaking, there was tremendous variation by judge. Any further research in this area would benefit from collecting judge-specific data. Because the rules governing tentative ruling procedure are very loose, individual judges customize the practice.

135. See *supra* Table 2.

136. The author interchangeably used the word count feature of Microsoft Word, as well as the following Microsoft Excel function, whose results approximately equaled Word's word count function:

=IF(LEN(TRIM([cell containing full opinion text]))=0,0,LEN(TRIM([cell containing full opinion text]))-LEN(SUBSTITUTE([cell containing full opinion text],"
","",""))+1)

137. To account for setup and other non-opinion language (e.g., the case name, the parties, etc.), twenty-five words were subtracted per case.

Gathering notice data was much more difficult, and as such reliable data was only available for six counties: Alameda, Butte, Kern, Placer, Plumas, and Sacramento. In order to calculate notice, the date and time of the hearing was needed along with the date and time of the opinion's publication.[138] The greatest challenge was determining when the opinion was published. Most counties do not provide any information about actual publication date or time for their tentative rulings. For the counties that provided the dates but not the times of publication, any opinion published the day before a hearing was counted as providing twenty-four hours of notice, which almost certainly overstates the length of notice. The author used full day figures, in twenty-four-hour increments for Alameda and Butte Counties. Placer and Plumas Counties provided hearing dates and times with their tentative rulings, and the author assumed the tentatives were published at 4 p.m. on the date of publication.[139] Kern and Sacramento Counties had very accurate posting timestamp and scheduled hearing times, so the author was able to calculate notice with precision for those two counties.

V. RECOMMENDATIONS

To date, the literature discussing tentative rulings has focused on whether they should be issued and the practice's costs and benefits.[140] Discussion about *when* tentative rulings should issue has largely left unexplored the question of *how* they should be issued. Altering the values of two tentative ruling metrics, notice and thoroughness, can augment or diminish the benefits and costs of a tentative ruling scheme. Thanks to existing characteristics of California state trial courts, they are already primed to experiment with the composition of those metrics. First, the practice is already widespread. Today, sixty percent of California's counties issue tentative rulings in law and motion matters.[141] Second, individual courts have the flexibility to experiment with tentative ruling procedures. Although California's

138. For some counties only the date was provided, which was used when available.
139. The stated deadline was 4:00 p.m., and repeated visits to the websites anecdotally suggested that opinions were not regularly posted much earlier than the deadline.
140. *See supra* Part III.
141. *See supra* Part IV.A.

Rule 3.1308 requires some uniformity in procedure, courts and judges may vary tentative rulings in important ways.[142] This Note advocates systematic experimentation in notice and thoroughness with a specific eye to settlement and withdrawn motion rates. The diverse California state court system could provide a model experiment to enhance judicial economy with a more informed tentative ruling procedure.

A. THOROUGHNESS

The thoroughness of a tentative ruling serves a rough proxy for how much effort the court shifts to the front-end of a motion. To issue a tentative ruling at all, the court must have thoroughly researched and reasoned through a decision on the motion. The court could stop, however, before spending effort on writing a quality draft. Since the court already reasoned through the decision, the only effort saved by issuing a two-word tentative is that of committing completed thought to writing. The magnitude of that effort is highly variable based on the complexity of the case, but compared to two word tentatives, the saved effort can quickly accumulate with a busy law and motion calendar. On the other end of the effort spectrum is a completed, ready-for-publication opinion. California superior courts already issue tentative rulings that resemble both extremes.[143] Unfortunately, this Note was not able to incorporate settlement, submission, or withdrawn motion rates attributable to tentative opinions.[144] But future studies should analyze those figures against the already-varied field of tentative ruling lengths. Courts should experiment with tentative opinion lengths to achieve efficiencies, while being mindful of the bar's response, with the following cautions in mind.

1. *Tentatives Should Not Be Too Short*

Tentative rulings reveal a tremendous amount of information to litigants regardless of their thoroughness. Even a two-word

142. *See supra* Part IV.
143. *See supra* Part IV.B.1.
144. A more complete study would be able to incorporate such results attributable to tentative rulings and count the associated savings among tentatives' benefits.

opinion reading "motion granted" can be telling. Because motions are decided largely based on the filed papers, even such an unexplained ruling is a credible prediction of the final outcome.[145] Such a bare tentative ruling might allow some settlement discussions to proceed even though the parties do not know the reasoning behind the ruling.

A two-word ruling, however, is not very helpful to a party interested in addressing the judge's concerns at oral argument. Any hope of shaping, shortening, or improving an oral argument based on a tentative ruling is lost when a judge gives no substantive guidance on the issues.[146] That is especially notable when a motion has multiple issues or alternative bases of support, as issuing a single ruling for all questions does not inform counsel of the relative merits of his various arguments. Two-word rulings could discourage parties' submission to tentatives by creating legitimate confusion regarding the strength of the claims. Furthermore, the parties cannot check such curt opinions for errors, a significant benefit of full-length tentative rulings. A short ruling, even if tentative, could also be damaging to the judiciary if viewed as arbitrary or unfounded. This would be especially true if it became common practice for parties to settle and waive based on short tentatives, as they would come to function as *de facto* opinions. Judges are understandably in the habit of explaining the bases of their rulings and citing to supporting authority — such integrity is a basis of judicial authority.[147] Thus, the judicial economy of issuing a two-word opinion may not be so great as to justify its adoption over a 200-word opinion. Short explanations on each issue would provide many of the communicative benefits that two-word opinions lack without a significant loss of judicial economy.

With these considerations in mind, experimenting courts should not adopt a single-minded rule favoring short opinions over long ones. A court experimenting with thoroughness would sacrifice important goals of the judiciary by universally issuing

145. *See* Bole, *supra* note 42, at 2; Interview with Judge Mayfield, *supra* note 47.

146. *See* Saeta, *supra* note 1, at 22 ("Counsel replying to my inquiry have stated that the more detailed the tentative ruling, the better it focuses their preparation and argument and that tentative rulings tend to shorten their time estimates.").

147. *See* Interview with Judge Mayfield, *supra* note 47. Judge Mayfield writes tentative rulings that are the same quality as her final rulings because judges have a duty to explain the bases of their rulings. *Id.*

two-word tentatives. Rather, as with final orders and memoranda, courts should be mindful of motions that warrant varying depth of treatment and vary their decision lengths accordingly.

2. *Tentatives Should Not Be Too Long*

While two-word rulings are too short to achieve the proper balance between effort and efficiency, fully formed tentatives are too long. Writing a tentative ruling as though it will be the final published opinion provides no reduction in workload — the practice serves only to shift work by front-loading it. Although efficiencies are gained in other respects, as the literature on tentative rulings has explicated, drafting efforts are not saved.[148] For trial courts facing time shortages between filed motions and hearings, frontloading may simply be untenable. Courts can achieve efficiencies by publishing shorter tentative rulings, thereby reducing the costs of front-loading. Assuming that some cases will settle or submit before the hearing as a result of the tentative, the front-loading will result in a net saving of judicial effort.

Mindful of this, experimenting courts should caution against unnecessarily lengthy tentatives. Although the tentative may more closely approximate a final ruling, a court experimenting with thoroughness would sacrifice efficiency gains when producing uneconomical elements of opinions, like factual backgrounds or universally agreed upon legal matters. Even very thorough tentatives should prioritize the most beneficial aspects of an opinion, like evaluation of arguments, and omit uninformative and uncontroversial components, like the procedural posture and factual background.

B. NOTICE

The impact that a tentative ruling can have is limited by the amount of time parties have to review and act in response to it. Proponents of tentative rulings at both trial and appellate levels praise tentative rulings' effect of reducing hearing frequency.[149]

148. *See* Hollenhorst, supra note 6, at 16 ("[T]he release of tentative opinions before oral argument presents little deviation from the normal work flow in the court. The only adjustment necessary is providing enough advance preparation time on cases.").

149. *See* Interview with Judge Mayfield, *supra* note 47 (tentative rulings reduce frequency of hearings at the trial court level); *see generally* Hollenhorst, *supra* note 6; Hum-

To optimally reduce hearing frequency, parties must have an opportunity to react to the ruling. California trial courts overwhelmingly publish tentative rulings mere hours before requiring parties to act on them.[150] While parties ultimately act in the limited time they are provided, they lack a meaningful opportunity to discuss the tentative ruling and its effect on the case with each other.[151] Tentative rulings provide litigants with a tremendous amount of information. Allowing parties to internalize and act on the information may produce settlement discussions that further enhance efficiencies achieved through waivers. Particularly when tentative rulings are not wholly one-sided but parse multiple complex issues, parties would be able to better incorporate the judge's persuasive forecast into their broader litigation strategy. When a party loses a motion, he typically has some time to consider filing for reconsideration, to evaluate the strength of an appeal if the denial is dispositive, and to consider the monetary and temporal costs of new litigation strategies. When a party loses a tentative ruling, he has only an hour. That may be enough time to craft a better-focused oral argument on the motion, but it is not enough time to adapt his strategy.

Additionally, increasing the amount of time that parties have access to tentative rulings enhances the error checking function that tentative rulings promote. More time allows counsel to thoroughly read a tentative ruling, research the judge's positions, and fact-check against the record. For the same reason, increasing time to review tentatives before hearings would enhance the quality of oral argument more than a tentative issued mere hours before argument. A day may be enough time to give notice to opposing parties and the court, craft an oral argument in response to the judge's concerns, reevaluate long-term litigation strategy with a client, explore new settlement terms with opposing counsel, or check the tentative ruling for errors. It may not be enough time to do them all.

Notably, giving more notice would shift the workload further up for judges who may be hesitant to begin issuing tentative rul-

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mels, *supra* note 14; Saeta, *supra* note 1 (supporting the same proposition at the appellate court level).

150. *See supra* Part IV.B.2.

151. *See* Hummels, *supra* note 14, at 347–48 ("Several lawyers commented that the receipt of draft opinions just a few days before oral argument often provides too little time to re-open settlement negotiations after receipt of the draft but before argument.").

ings for just that reason. As some judges argue that initiating the practice of issuing tentative rulings more than makes up for the front-loading of work in realized efficiencies, so too might providing greater notice.

There are limits to how far in advance a judge is able to issue a tentative ruling. For one, some courts' motion rules require parties to submit moving papers only days before argument. Such a short period of time may serve a valid purpose for high volume state trial courts, but allows little hope for the consistent delivery of tentative rulings much in advance of the scheduled hearing. The Mendocino Superior Court, for one, responded to these concerns and will soon advance delivery of tentative rulings from 3:00 p.m. on the court day before argument to 12:00 p.m.[152] That procedural change is in response to surveys solicited from attorneys practicing before the court who found the previous threshold challenging to meet.[153] The limitation placed on some courts by tight filing deadlines might advise moving those deadlines up, or it might suggest experimenting with greater notice in other courts, perhaps federal courts, where submission deadlines are further from hearing dates.

Finally, with a lengthier notice period, courts can universally adopt the opt-in oral argument requirement of Rule 3.1308(a)(1) rather than the opt-out provision in Rule 3.1308(a)(2), thereby further enhancing judicial economy by vacating hearings by default.[154] Such default provisions would guide parties following the path of least resistance to the judicially efficient outcome, and a longer notice period would mitigate fairness concerns that short opt-in periods raise. With more than an hour to review the tentative ruling and inform the court and opposition of one's intention to appear for argument, there would be fewer reasons to question the fairness of an opt-in requirement.

C. SUMMARY

Courts should methodically experiment to discover the ideal length of a tentative in order to harness its benefits while mini-

152. Interview with Judge Mayfield, *supra* note 47.

153. The timing requirement in Rule 3.1308 operates as a floor. Counties are free to provide more notice.

154. CAL. R. CT. 3.1308(a)(1)–(2).

mizing its costs. The proper length will depend on the case, and a discerning judge should not have a one-length-fits-all approach. Issuing a short and reasoned tentative may be best, as such an opinion would increase the likelihood of settlement. More settlements, submissions to the tentative, and withdrawn motions would reduce the total number of full opinions that are needed, while providing all of the other benefits that come with issuing tentative rulings.

Experimentation may show that short opinions that address every issue, argument, and line of reasoning are ideal. The ruling should say why the argument fails in a sentence and cite the authority that the court relied on, especially if the moving papers did not. Tentative rulings that follow such a pattern would provide parties with adequate information for settlement talks, thereby reducing the number of full written opinions the court must prepare.[155]

Regarding notice, more seems superior to less. Operating within the constraints of filing deadlines and calendar management, there is likely no amount of notice that would be too great. Courts should experiment to find a period of time that is manageable for judges and provides enough time for meaningful negotiations between parties before oral argument. If judges are already running front-loaded courtrooms to issue tentative rulings, running them farther ahead and adjusting opinion length merely shifts court effort earlier, providing some benefit without creating more effort.

A potentially efficient combination of notice length and opinion thoroughness is illustrated in Figure 12.[156] Experimenting courts could aim for 96 to168 hours of notice, four to seven full days, and opinion lengths that vary according to complexity of the case. Averages in tentative length are less important than tailoring the opinion to the complexity of the case, however, which

155. *See* YOUNGER & BRADLEY, *supra* note 57, at § 4:56 ("If you have some deep-down reservations about your pleading of the duty issue in the second cause of action and learn that it is the source of the judge's concerns, you may well 'submit on the tentative' by deciding to amend. This saves the judge and opposing counsel the need for a hearing. If the tentative does not explain the judge's position, the hearing will go forward. Even the slightly expanded calendar note style gives you functionally much more important input: 'Pl. fails to set forth source of duty in 2nd c/a. 1st c/a O.K.' Knowing that the judge was only bothered by the issue where you saw a problem lets you 'submit' with comfort.").

156. *See infra* Figure 12.

means that the ideal length for an individual opinion ranges widely from one word to potentially a thousand words or more. The average tentative may require a 100-word explanation, with only outlier cases calling for thousands of words. Although Figure 12 does not show it, longer tentatives should be published with greater notice, as length would ideally correlate with complexity of the case to allow time for productive discussions between litigants in anticipation of the hearing and binding ruling. As courts experiment with different combinations of notice and thoroughness, they should note the effects on the court and poll the bar for feedback. Experimentation with different variable combinations and methodically recording results would help all courts that issue tentative rulings identify targets for their own tentative practices.

VI. CONCLUSION

California trial courts are already running a natural experiment that could test the impact of altering various tentative ruling metrics. Courts should modulate the notice and thoroughness values of their tentative rulings to find values that maximize judicial efficiency. Increasing up-front research effort to provide more notice might ultimately decrease total judicial effort required by facilitating settlements or motion withdrawals. Because the research must be done eventually unless the motion is withdrawn, increasing notice would be a time-shifting but not effort-increasing change. Optimizing writing effort to provide enough, but not too much, information for litigants to act on can offset the burden imposed by increasing the notice period. A tentative ruling that spans thousands of words conveys finality, and it may stand as wasted effort if the parties settle in response to information that a shorter tentative could have conveyed. To further the goal of economizing judicial effort, lengthy rulings are properly delayed until a binding decision must be explained. Short tentative rulings that address each issue, each argument, and each line of reasoning with as much notice as possible serve the best chance of facilitating settlement, motion withdrawal, or the earnest strengthening of an argument without the fear of judicial prejudice.

California state trial courts have tremendous latitude when it comes to crafting their tentative ruling schemes. Some pilot

counties, divisions, or judges could consistently modify the notice length and thoroughness of their tentative rulings and document the results. With a specific eye to settlement rates and withdrawn motions, the already-diverse California state court system could provide a model experiment to enhance judicial economy with a more informed tentative ruling procedure.

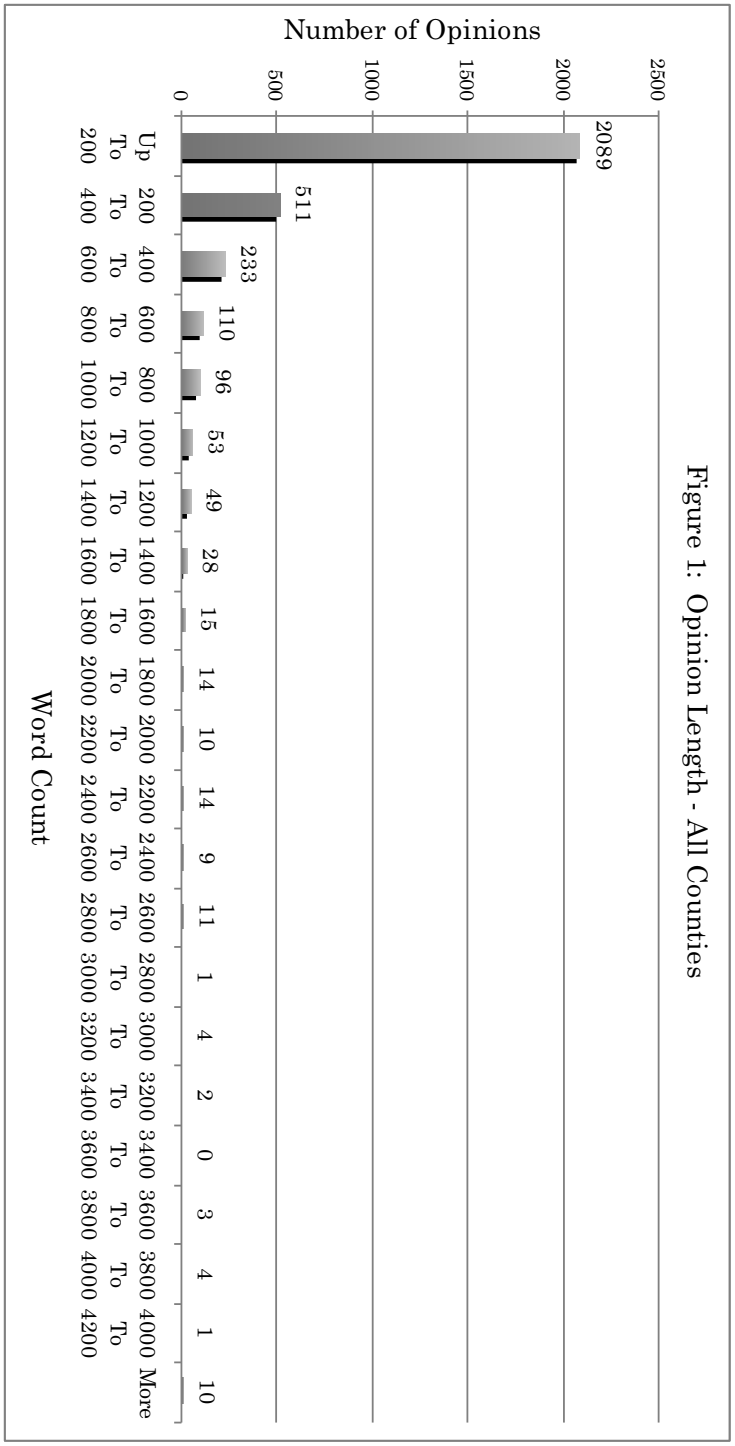
Figure 1: Opinion Length - All Counties
Number of Opinions
2500
2000
1500
1000
500
0
2089
511
233
110
96
53
49
28
15
14
10
14
9
11
1
4
2
0
3
4
1
10
Up To 200
200 To 400
400 To 600
600 To 800
800 To 1000
1000 To 1200
1200 To 1400
1400 To 1600
1600 To 1800
1800 To 2000
2000 To 2200
2200 To 2400
2400 To 2600
2600 To 2800
2800 To 3000
3000 To 3200
3200 To 3400
3400 To 3600
3600 To 3800
3800 To 4000
4000 To 4200
More
Word Count

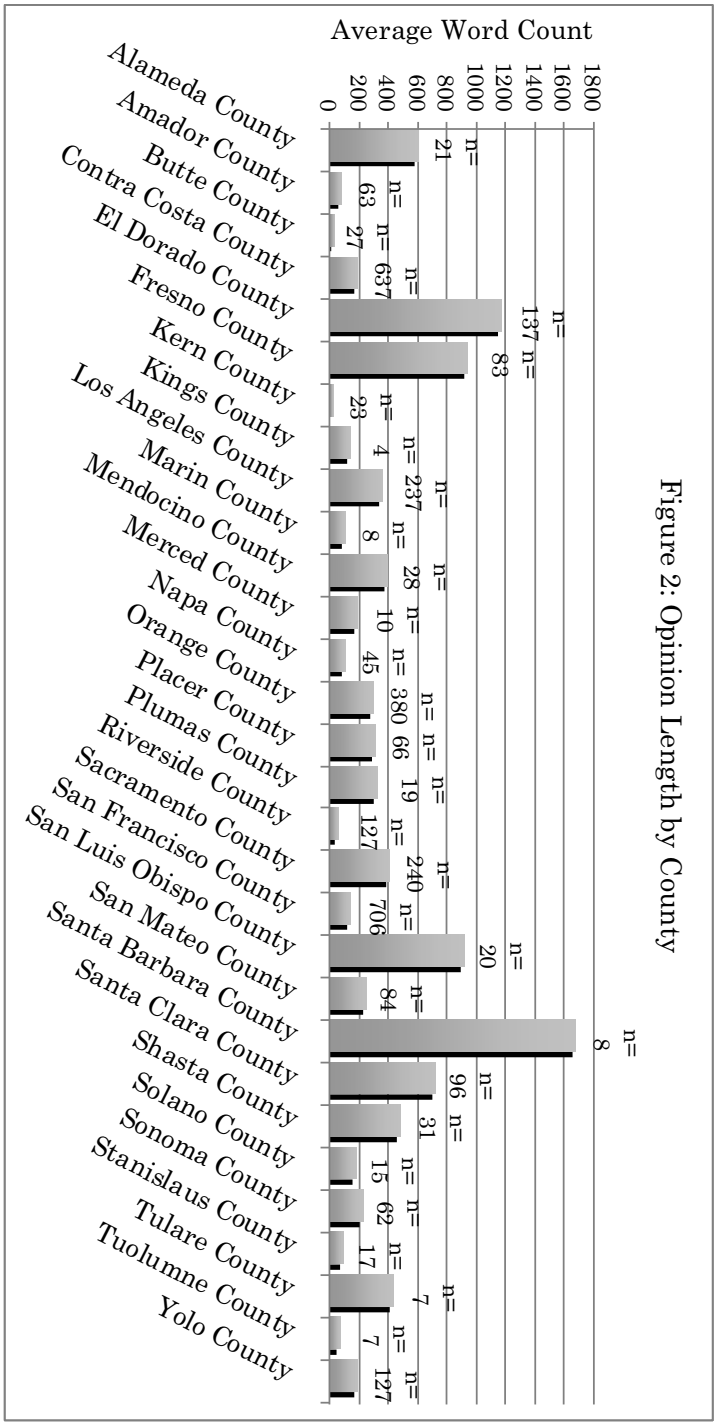

Figure 2: Opinion Length by County

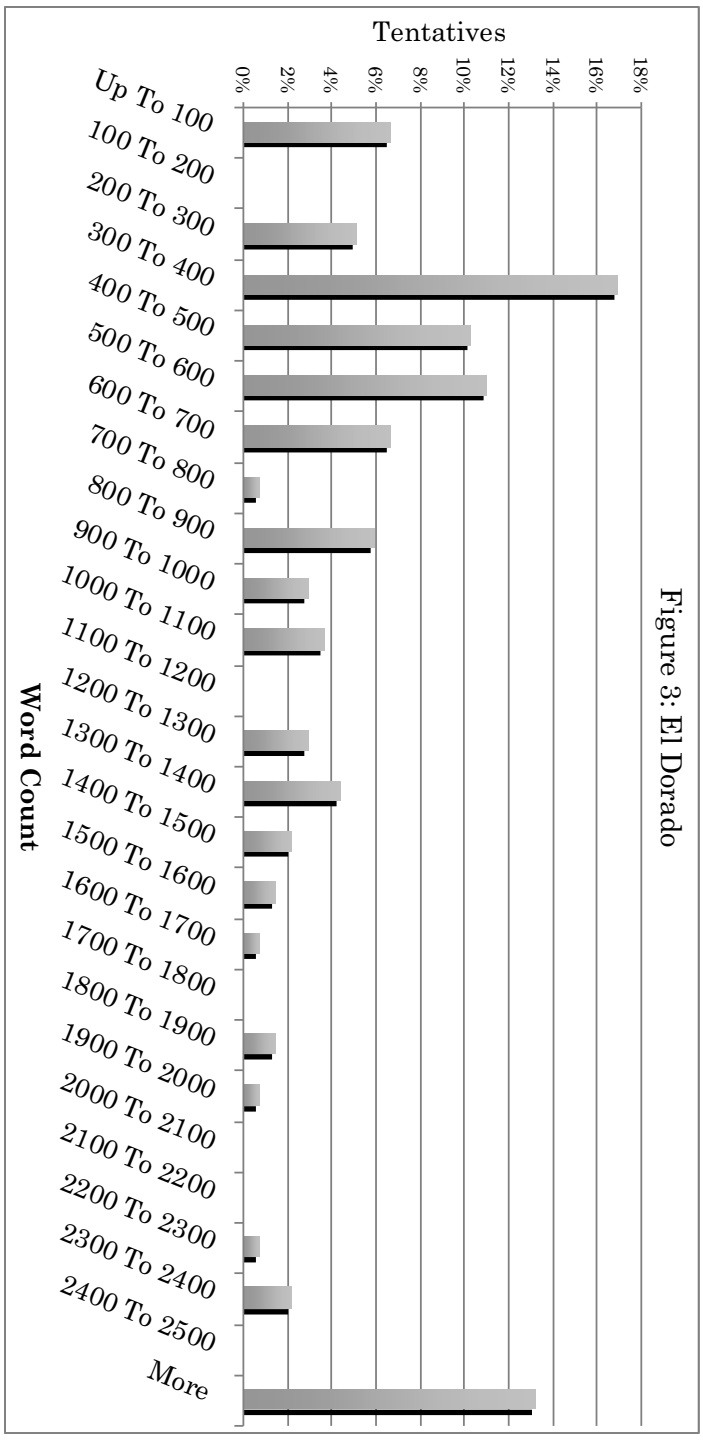

Figure 3: El Dorado

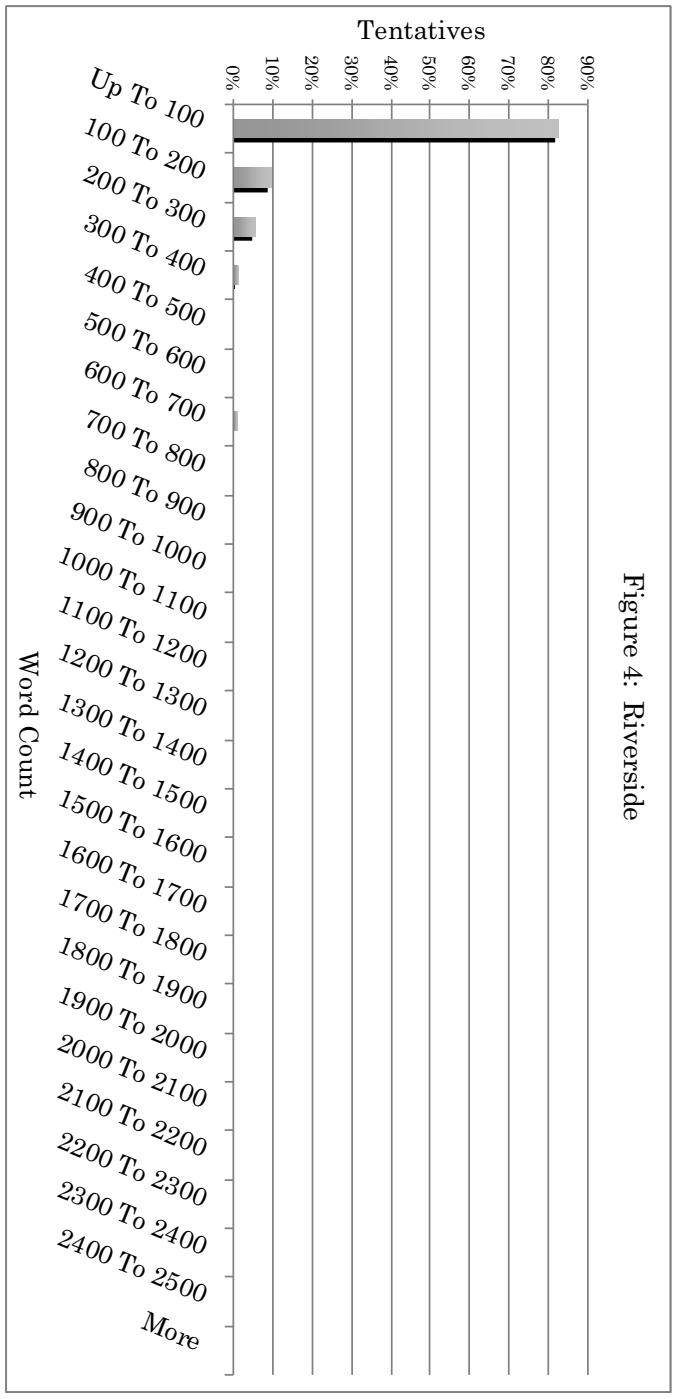

Figure 4: Riverside

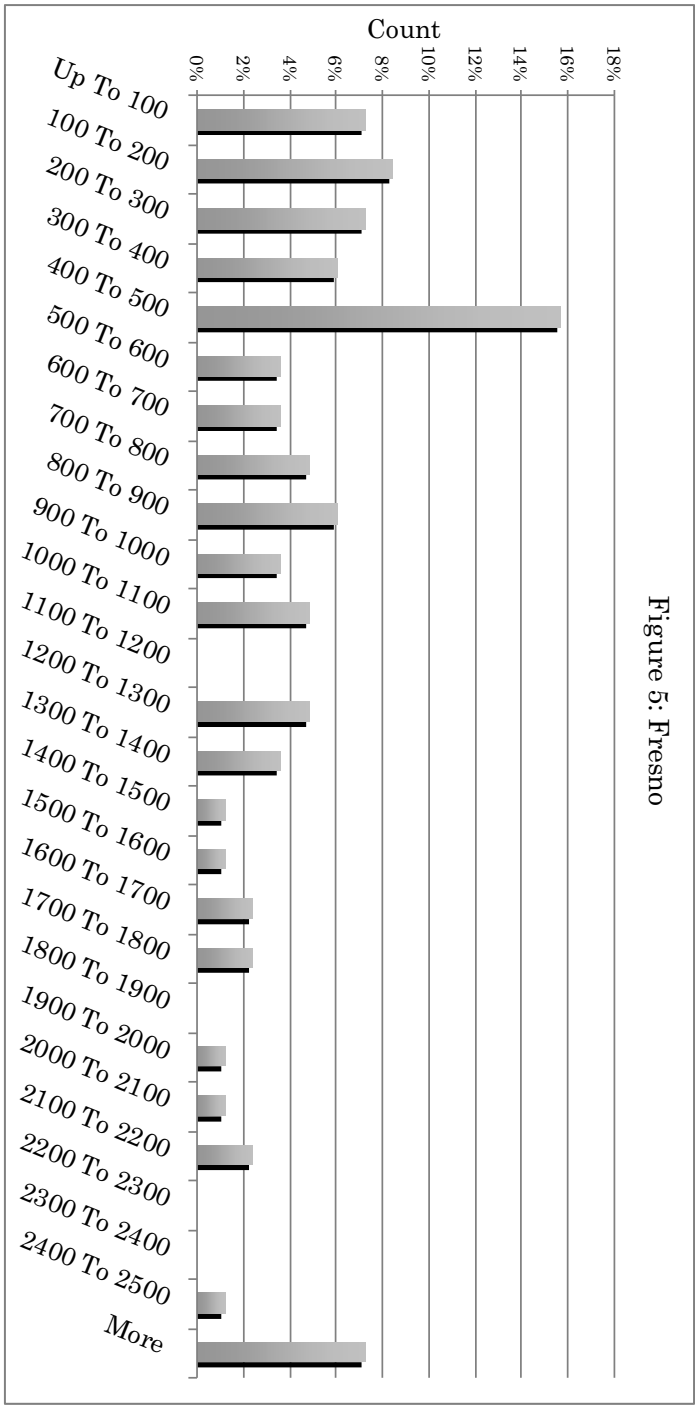

Figure 5: Fresno

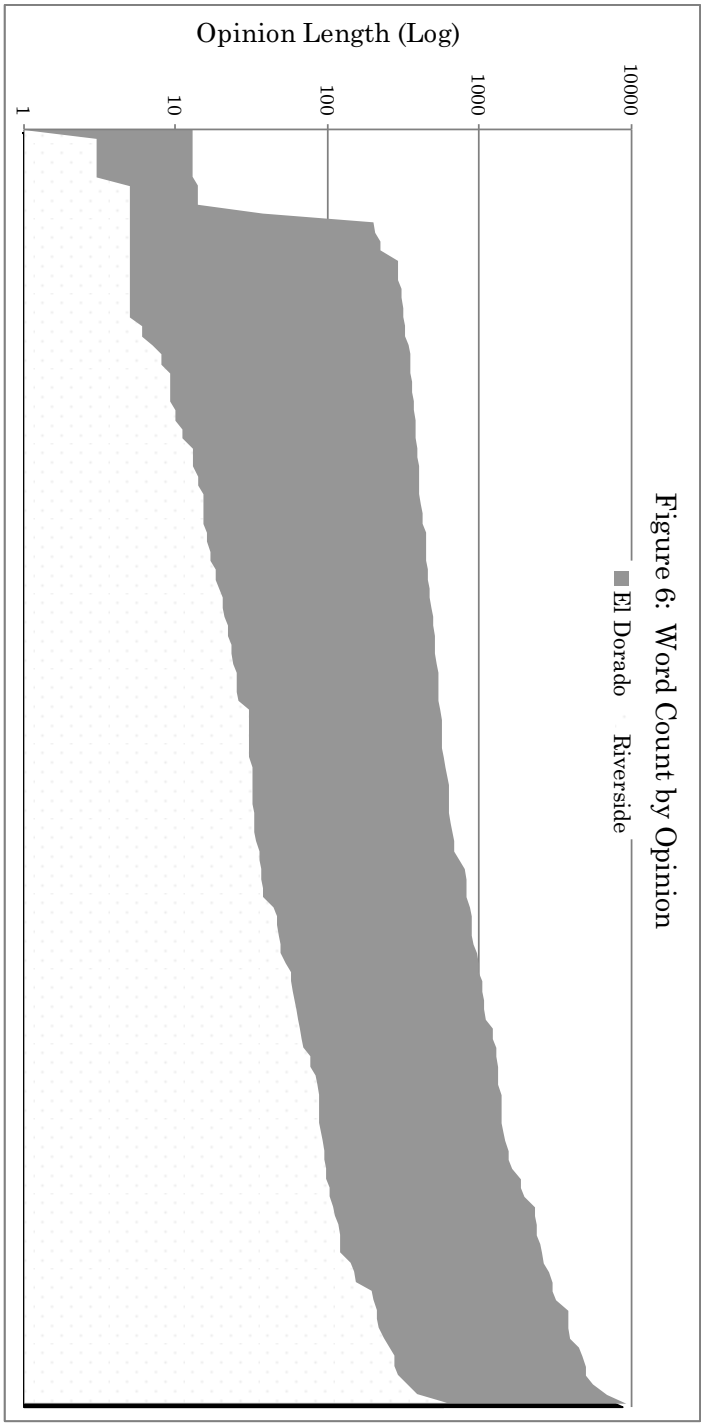

Figure 6: Word Count by Opinion

Figure 7: County Highlights						
	Balanced Opinions			Skewed In Length		
County	Contra Costa	Sonoma	Mendocino	Kern	Fresno	El Dorado
n (sample size)	637	62	28	23	83	137
Average Length of Tentative	194.9	231.5	400.5	24.7	945.4	1171.8
Quartile of Counties	2	2	3	1	4	4
Shortest Tentative	1	7	4	2	55	13
Longest Tentative	2771	1239	2033	64	5941	9177
Quartile 1 Outside Length	7	31.5	34.25	9.5	354	386
Quartile 2 Outside Length (Growth	35 (5x)	130 (4.1x)	69.5 (2x)	21 (2.2x)	616 (1.7x)	600 (1.6x)
Quartile 3 Outside Length (Growth	229 (6.5x)	302 (2.3x)	607.8 (8.7x)	34.5 (1.6x)	1284 (2.1x)	1333 (2.2x)

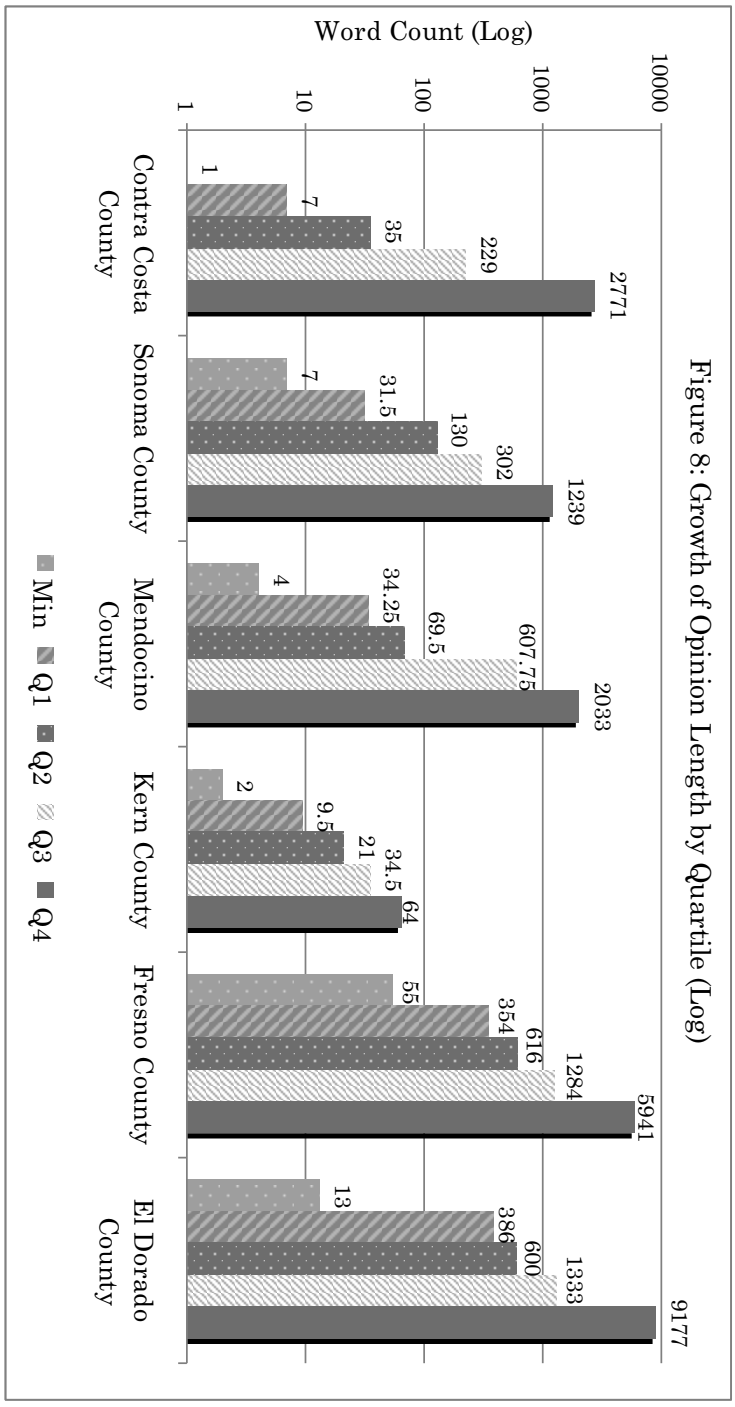
Figure 8: Growth of Opinion Length by Quartile (Log)
Word Count (Log)
10000
1000
100
10
1
Contra Costa County
Sonoma County
Mendocino County
Kern County
Fresno County
El Dorado County
1
7
35
229
2771
7
31.5
130
302
1239
4
34.25
69.5
607.75
2033
2
9.5
21
34.5
64
55
354
616
1284
5941
13
386
600
1333
9177
Min
Q1
Q2
Q3
Q4

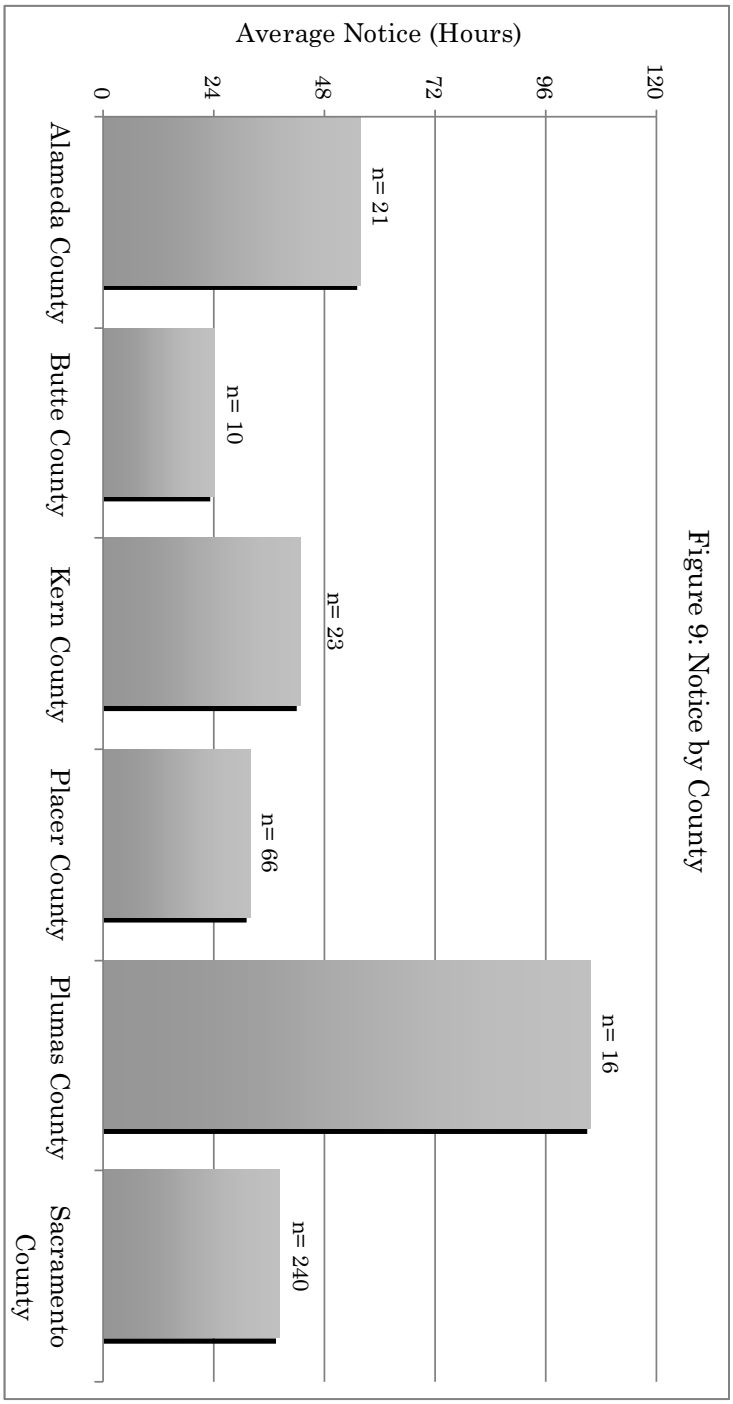

Figure 9: Notice by County

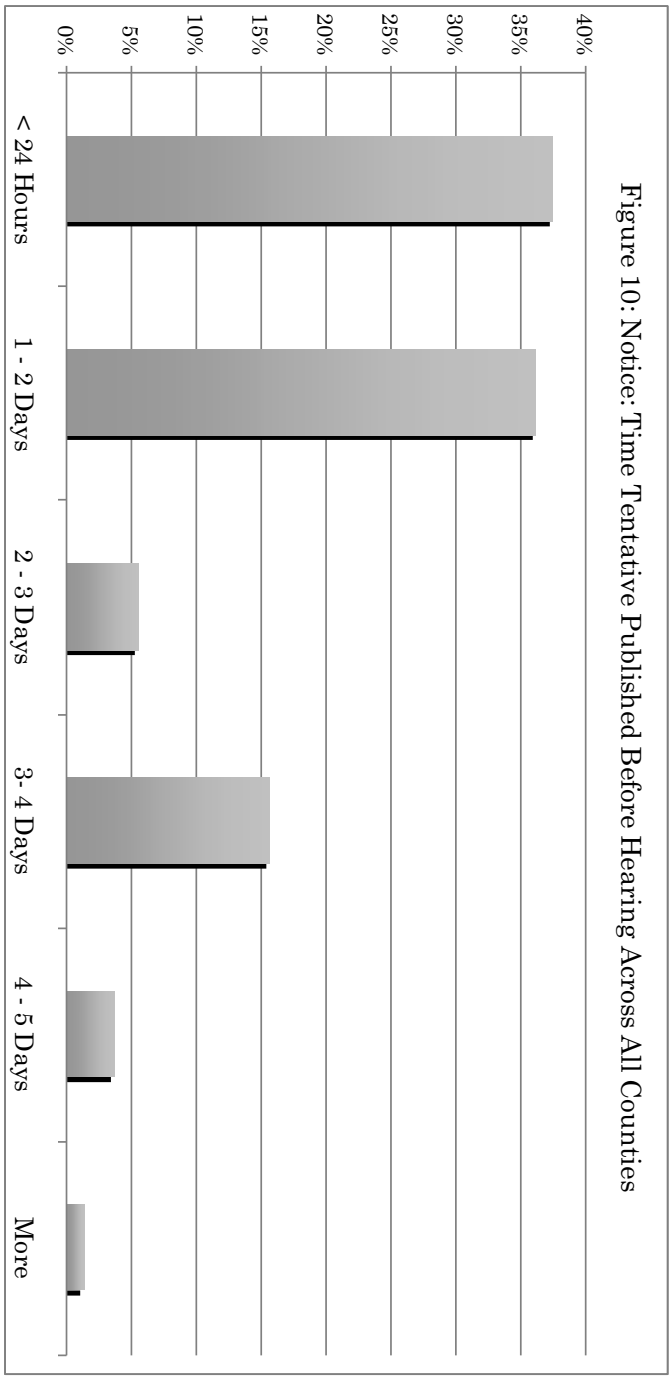

Figure 10: Notice: Time Tentative Published Before Hearing Across All Counties

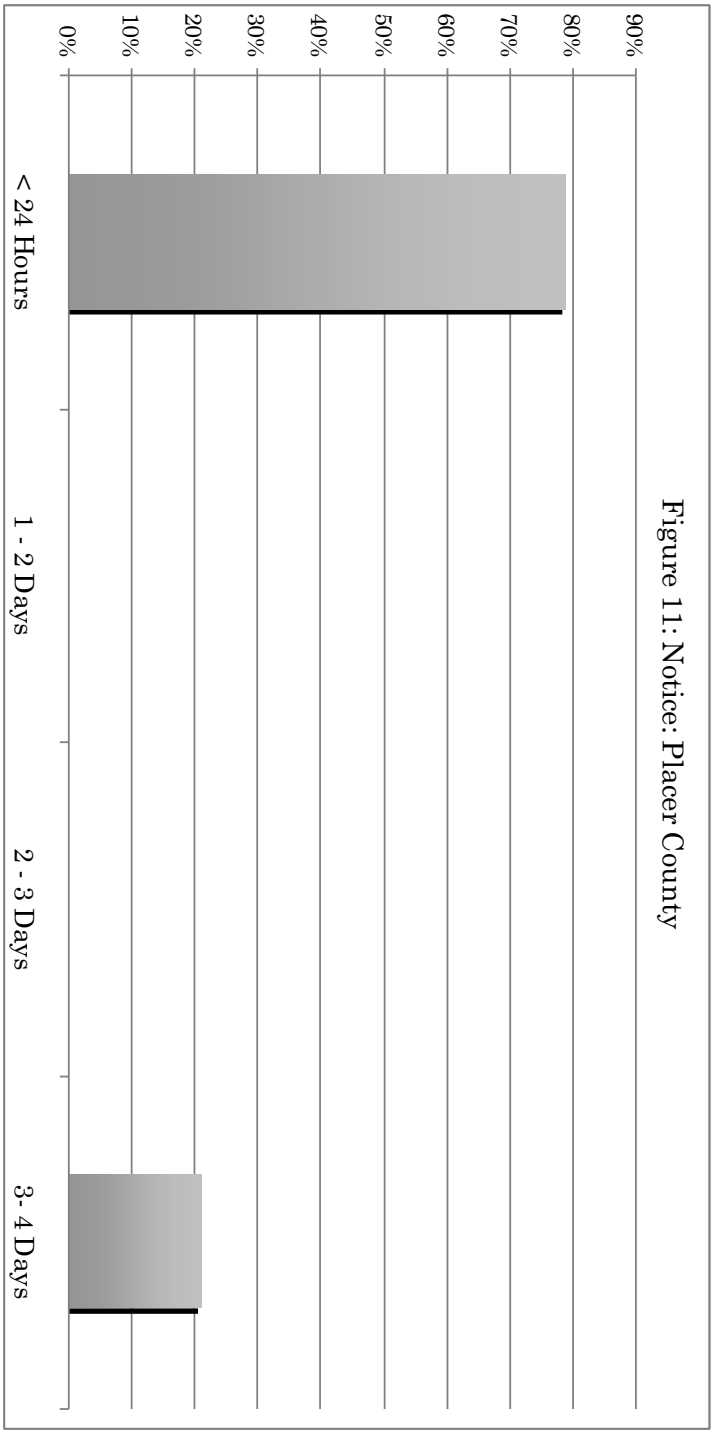
Figure 11: Notice: Placer County
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
< 24 Hours
1 - 2 Days
2 - 3 Days
3- 4 Days

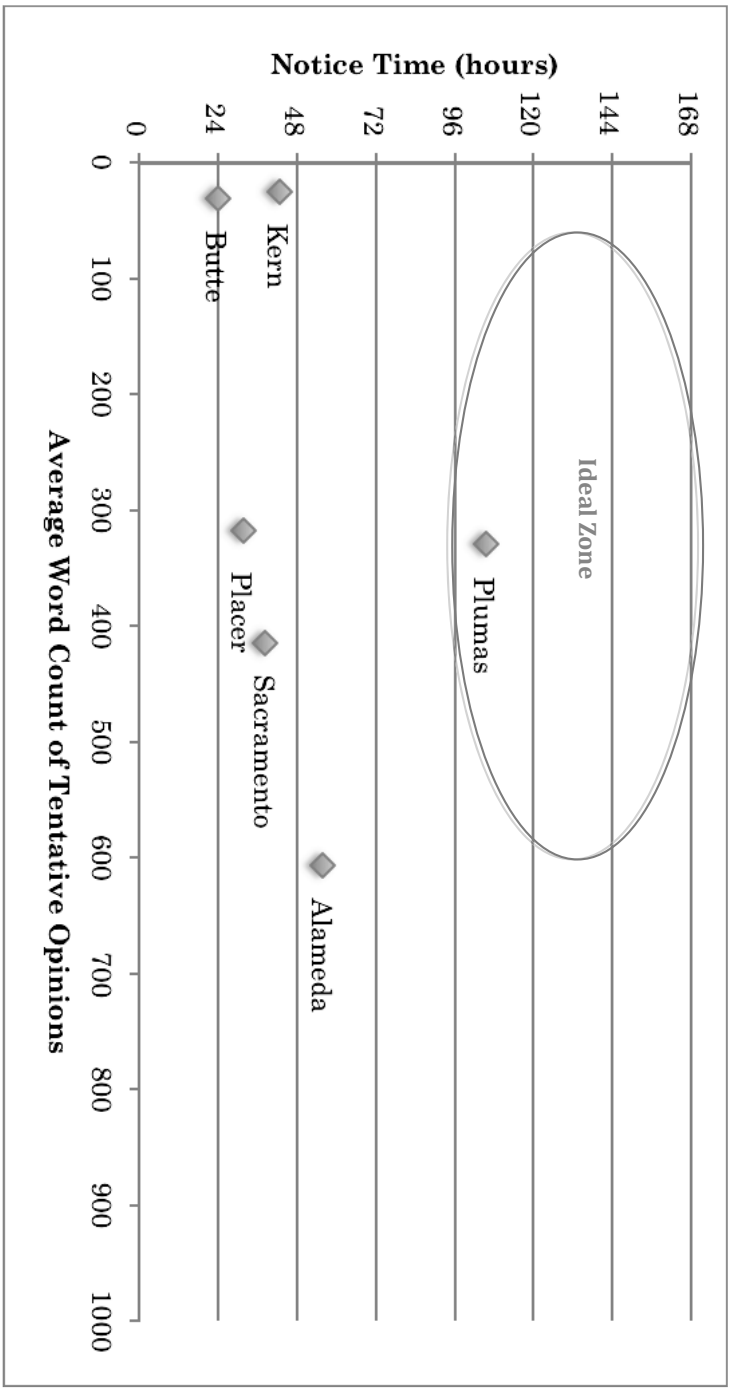

Figure 12: County Plot: Thoroughness by Notice

Figure 13: Sample tentative ruling

3/23/13 19.html

Department C16 Law & Motion Calendar
Date: January 8, 2013

The Court will hear oral argument on all matters at the time noticed for the hearing. If you would prefer to submit the matter on your papers without oral argument, please advise the clerk by calling **(657) 622-5216**. Court Call appearances are permitted. Court Call must be contacted to appear by phone. Call 1-888-88Court for more details. **The court will not entertain a request for continuance nor filing of further documents once the ruling has been posted.**

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http://www.occourts.org/directory/civil/tentative-rulings

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2012-00557675

CIT Technology Financing Services, Inc. vs. Direct Advertising Response, Inc.

	PLAINTIFF'S MOTIONS IN LIMINE	Grant	Deny
#1	Preclude Reference to Prior Expunged Convictions	X	
	DEFENDANT'S MOTIONS IN LIMINE	Grant	Deny
#1	**Exclude Testimony of Incurred, Not Actual Expenses** Court will reduce after trial	X	
#2	**Limit Expert Testimony** Subject to Cross Examination and Evidence Code 352 objection		X
#3	**Limit Expert Opinion to Area of Expertise** Subject to Cross Examination and Evidence Code 352 objection		X
#4	**Bar Plaintiff's Claim of Past Lost Wages** Plaintiff Confirms no testimony past lost wages	X	
#5	**Limit Testimony of Plaintiff's Non Retained Physician to Facts from His Cross Examination** Subject to Cross Examination and Evidence Code 352		X

Court urges counsel to continue discussing settlement.

Appendix I – Length

County	Average Length	Sample Size	Tentatives Online
Alameda	606.76	21	http://apps.alameda.courts.ca.gov/domainweb/html/calinfobody.html *then click* "get department listings"
Alpine			
Amador	83.33	63	http://www.amadorcourt.org/os-tentativeRulings.aspx
Butte	30.41	27	http://www.buttecourt.ca.gov/tentative_rulings/publicrulingviewlist.cfm
Calaveras			http://www.calaveras.courts.ca.gov/online-services/tentative-rulings/case-management
Colusa			
Contra Costa	194.87	637	http://www.cc-courts.org/index.cfm?fuseaction=page.viewpage&pageid=4176
Del Norte			
El Dorado	1171.80	137	http://eldocourtweb.eldoradocourt.org/tentative_rulings/default.aspx
Fresno	945.45	83	http://www.fresno.courts.ca.gov/tentative_rulings/law_motion.php
Glenn			
Humboldt			
Imperial			
Inyo			
Kern	24.65	23	http://www.kern.courts.ca.gov/home.aspx

County	Average Length	Sample Size	Tentatives Online
Kings	148.75	4	http://www.kings.courts.ca.gov/depts/civil/Tentative%20Ruling.asp
Lake			
Lassen			http://www.lassencourt.ca.gov/index.php?option=com_content&view=category&id=40&Itemid=89
Los Angeles	365.69	237	http://www.lasuperiorcourt.org/tentativeruling/
Madera			
Marin	104.63	8	http://www.marincourt.org/civil_tentative.htm
Mariposa			
Mendocino	400.54	28	http://www.mendocino.courts.ca.gov/tr.htm
Merced	198.30	10	http://www.mercedcourt.org/tentative_rulings.shtml
Modoc			
Mono			
Monterey			
Napa	114.04	45	http://www.napa.courts.ca.gov/civil/t_rulings
Nevada			http://www.nevadacountycourts.com/cgi/dba/t-rulings/db.cgi?uid=default&switch=1&ruling=Law+and+Motion&location=Nevada+City&ww=1&sb=1&so=descend&view_records=1&ID=*
Orange	304.32	380	http://www.occourts.org/directory/civil/tentative-rulings/
Placer	317.92	66	http://www.placer.courts.ca.gov/tentative_rulings/tentative_rulings_intro.html
Plumas	329.21	19	http://plumascourt.ca.gov/Rulings.htm

County	Average Length	Sample Size	Tentatives Online
Riverside	62.55	137	http://www.riverside.courts.ca.gov/tentativerulings.shtml
Sacramento	414.07	240	https://services.saccourt.ca.gov/publicdms/search.aspx
San Benito			
San Bernardino			
San Diego			
San Francisco	149.75	706	http://www.sftc.org/uniface_urds/rulings.urd/CRULING302
San Joaquin			Rulings on matters will be available one to three days before the hearing date. http://www.sftc.org/uniface_urds/Civil_tentative_rulings.htm
San Luis Obispo	918.65	20	http://slocourts.net/case_inquiry/tentative_rulings
San Mateo	258.30	84	http://www.sanmateocourt.org/online_services/law_and_motion_tentative_rulings/index.php
Santa Barbara	1680.38	8	http://www.sbcourts.org/tentativeruling/
Santa Clara	729.06	96	http://www.scscourt.org/online_services/tentatives/tentative_rulings.shtml
Santa Cruz			
Shasta	482.03	31	http://www.shastacourts.com/menu.php?page=tentative
Sierra			
Siskiyou			
Solano	178.53	15	http://www.solanocourts.com/TentativeRulings.html

County	Average Length	Sample Size	Tentatives Online
Sonoma	231.48	62	http://sonoma.courts.ca.gov/online-services/tentative-rulings#trcd
Stanislaus	100.47	17	http://www.stanct.org/Content.aspx?page=civil_tentative_rulings
Sutter			
Tehama			
Trinity			
Tulare	439.00	7	http://www.tularesuperiorcourt.ca.gov/1_General_Information/Tentative_Rulings_Civil/Civil_Rulings.htm
Tuolumne	74.57	7	http://www.tuolumne.courts.ca.gov/tentativerulings.htm
Ventura			
Yolo	191.49	127	http://www.yolo.courts.ca.gov/Calendars/TentativeRulings/calsearch.php?month=Month&day=Day&year=2012&Submit_x=41&Submit_y=2&Submit=Submit&all=1&pg=0
Yuba			

Appendix II – Notice

County	Hours Notice	Sample Size	Required Notice (if different than Rule 3.1308(a)(1))
Alameda	56.00	21	**Suggested:** 4 p.m. two court days before hearing. **Required:** no later than 3 p.m. the court day before the hearing.
Alpine			
Amador			After 2:00 p.m the court day preceding the hearing
Butte	24.00	10	
Calaveras			
Colusa			
Contra Costa			After 1:30 p.m. the court day preceding the hearing
Del Norte			
El Dorado			No later than 2:00 p.m. the court day preceding the hearing * The tentative rulings requires a **complete written rationale**
Fresno			
Glenn			
Humboldt			
Imperial			
Inyo			
Kern	42.88	23	
Kings			**Suggested:** by 4:00 p.m. the court day preceding the hearing
Lake			
Lassen			
Los Angeles			"The Court may change tentative rulings at any time."
Madera			

County	Hours Notice	Sample Size	Required Notice (if different than Rule 3.1308(a)(1))
Marin			2:00 p.m. to 4:00 p.m. the court day preceding the hearing
Mariposa			
Mendocino			no later than 3:00 p.m. the court day preceding the hearing
Merced			no later than 4:00 p.m. the court day preceding the hearing
Modoc			
Mono			
Monterey			
Napa			no later than 3:00 p.m. the court day preceding the hearing
Nevada			no later than 3:00 p.m. the court day preceding the hearing
Orange			Varies by judge. Examples: "Tentative rulings are typically posted by 3 PM on the day before the scheduled hearing date" "All rulings will be posted on the internet at by Friday 11:00 A.M. The Law & Motion hearings are scheduled on Friday at 1:30 p.m. and all arguments will be heard at that time."
Placer	31.77	66	after 12:00 noon the court day preceding the hearing
Plumas	105.72	16	after 4:00 p.m. the Thursday before the Civil Law and Motion Calendar

County	Hours Notice	Sample Size	Required Notice (if different than Rule 3.1308(a)(1))
Riverside			no later than 3:00 p.m. the court day preceding the hearing
Sacramento	38.43	240	after 2:00 p.m. the court day preceding the hearing
San Benito			
San Bernardino			
San Diego			
San Francisco			**Suggested:** by 3:00 p.m. the day before the hearing. **If late**: Convert to Rule 3.1308(a)(2)
San Joaquin			beginning at 1:30 p.m. the court day preceding the hearing
San Luis Obispo			no later than 4:00 PM the court day preceding the hearing
San Mateo			after 3:00 p.m the court day preceding the hearing
Santa Barbara			not later than 3:00 p.m. the court day preceding the hearing
Santa Clara			**Suggested:** by 2:00 p.m. **Required:** and no later than 3:00 p.m. the court day preceding the hearing
Santa Cruz			
Shasta			no less than 12 hours in advance of the time set for hearing
Sierra			
Siskiyou			
Solano			after 2:00 p.m. the court day preceding the hearing

County	Hours Notice	Sample Size	Required Notice (if different than Rule 3.1308(a)(1))
Sonoma			commencing at 2:00 p.m. the court day preceding the hearing
Stanislaus			the Court day prior to the hearing date after 1:30 p.m.
Sutter			
Tehama			
Trinity			
Tulare			by 3:00 p.m the court day preceding the hearing
Tuolumne			by 3:00 p.m. the court day preceding the hearing
Ventura			by 4:00 p.m. the court day preceding the hearing
Yolo			after 2:00 p.m. the court day preceding the hearing
Yuba			