



1-1-2017

## Chapter 467: Increasing Efficiency in California's Civil Courts

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### Recommended Citation

April Perkins, *Chapter 467: Increasing Efficiency in California's Civil Courts*, 48 U. PAC. L. REV. 537 (2017).

Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol48/iss3/10>

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**Chapter 467: Increasing Efficiency in California’s Civil Courts**

*April Perkins\**

*Code Sections Affected*

Code of Civil Procedure §§ 129 (amended), 2025.280 (amended), 2034.415 (new).  
AB 2427 (Chau); 2016 STAT. Ch. 467.

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I. INTRODUCTION

The civil court system provides an important service to Americans; it is an avenue to pursue justice and domestic tranquility.<sup>1</sup> However, congestion and

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inefficiency are longstanding problems in civil courts.<sup>2</sup> Public opinion of the civil court system reflects these problems, creating a culture of distrust in the civil system.<sup>3</sup> In a recent study commissioned by the National Center for State Courts, 54 percent of voters surveyed agreed with the statement “the court system is inefficient, intimidating, and expensive. While some disputes can only be solved by a court, the court system should only be used as a last resort.”<sup>4</sup> Voters also indicate distrust in the ability of judges to separate their opinions from their political ideals, and a majority of voters feel that the civil system was not the best way to settle disputes.<sup>5</sup> As a result of this reputation and the problems creating it, there is a nation-wide movement to reform the civil court system.<sup>6</sup>

Every year, the California Defense Counsel and Consumer Attorneys of California collaborate to sponsor a bill that “seeks to create efficiencies in civil litigation, seeking to improve the process for litigants, attorneys, and the courts.”<sup>7</sup> This year, the two organizations came together to co-sponsor Chapter 467.<sup>8</sup> Chapter 467 proposes three changes to the California Code of Civil Procedure.<sup>9</sup> Two changes focus on procedural aspects of expert witness file discovery, while the other focuses on making postmortem images more easily accessible for deceased individuals’ family members.<sup>10</sup> These changes aim to save time and money, while making the civil court system more efficient.<sup>11</sup>

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1. Samuel Krislov, *20/20 Vision: The Future of the California Civil Courts*, 66 S. CAL. L. REV. 1915, 1916 (1993).

2. Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960–1990*, 66 S. CAL. L. REV. 2049, 2052 (1993).

3. Rebecca Love Kourlis, *10 Ways to reform the civil justice system by changing the culture of the courts*, ABA JOURNAL (Jan. 14, 2016), available at [http://www.abajournal.com/legalrebels/article/to\\_reform\\_the\\_civil\\_justice\\_system\\_we\\_need\\_more\\_than\\_rule\\_changes](http://www.abajournal.com/legalrebels/article/to_reform_the_civil_justice_system_we_need_more_than_rule_changes) (on file with *The University of the Pacific Law Review*).

4. ANALYSIS FROM GBA STRATEGIES ON THE ANALYSIS OF NATIONAL SURVEY OF REGISTERED VOTERS TO THE NATIONAL CENTER FOR STATE COURTS 2 (Nov. 17, 2015), available at [http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC\\_2015\\_Survey%20Analysis.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx) (on file with *The University of the Pacific Law Review*).

5. *Id.* at 2–3.

6. Rebecca Love Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. KAN L. REV. 877, 877 (2013).

7. ASSEMBLY FLOOR, FLOOR ANALYSIS OF AB 2427, at 1 (Aug. 26, 2016), available at [file:///Users/April/Downloads/201520160AB2427\\_Assembly%20Floor%20Analysis-%20\(9\).pdf](file:///Users/April/Downloads/201520160AB2427_Assembly%20Floor%20Analysis-%20(9).pdf) (on file with *The University of the Pacific Law Review*).

8. Email from Judy Yee, Staffer for Assembly Member Chau, to April Perkins, U. PAC. L. REV. Legislative Staff Writer (Aug. 1, 2016) (on file with *The University of the Pacific Law Review*).

9. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467); CAL. CIV. PROC. CODE § 2025.280 (amended by Chapter 467); CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467).

10. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467) (involving postmortem images); CAL. CIV. PROC. CODE § 2025.280 (amended by Chapter 467); CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467) (involving discovery of expert witness files).

11. Letter from Mike Belote, California Advocates, Inc., to Chair and Members, Senate Judiciary Committee (June 10, 2016).

## II. LEGAL BACKGROUND

Chapter 467 affects two issues in civil procedure: expert witness file production and access to postmortem images, and each of these issues have their own legal background.<sup>12</sup> The ban on postmortem images, and any alterations to that ban, must take into account the original rationalization for the ban.<sup>13</sup> Chapter 467's additions to discovery procedure for expert witness files is best understood through the lens of both the current rules regarding expert witness depositions and the rules regarding discovery of expert witness files enacted through the California Civil Discovery Act of 1986.<sup>14</sup>

### A. *Section 129 and the Ban on Reproduction of Postmortem Images*

Prior to Chapter 467's enactment, Section 129 of the California Code of Civil Procedure prohibited copying a coroner's photographs or video recordings of a deceased person's body unless an applicable exception applied.<sup>15</sup> The statute banned reproduction of "any kind of a photograph, negative, or print, including instant photographs and video recordings, of the body, or any portion of the body, of a deceased person, taken by or for the coroner."<sup>16</sup> This ban extended from images taken during the course of an autopsy to images taken at the scene of death.<sup>17</sup> However, there were three narrow exceptions to the ban.<sup>18</sup> Under Section 129, postmortem images could be reproduced (1) in a criminal action relating to the death of the deceased individual, (2) if the court found good cause was established for the images, or (3) if the images were to be used in furtherance of scientific or medical research.<sup>19</sup> Section 129 restricted a family's ability to obtain postmortem images by requiring that one of these exceptions be met to obtain the image or recording.<sup>20</sup> Under Section 129, a family member had to demonstrate good cause in order to obtain postmortem images.<sup>21</sup> If the family established good cause, the court could issue an order requesting the coroner's reproduction of the postmortem images.<sup>22</sup> Section 129 guaranteed that there was

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12. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467) (concerning postmortem images); CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467) (concerning expert witness file discovery).

13. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 1 (June 20, 2016), available at [file:///Users/April/Downloads/201520160AB2427\\_Senate%20Judiciary-%20\(3\).pdf](file:///Users/April/Downloads/201520160AB2427_Senate%20Judiciary-%20(3).pdf) (on file with *The University of the Pacific Law Review*).

14. *Id.* at 2.

15. CAL. CIV. PROC. CODE § 129(a) (West 2013).

16. *Id.*

17. *Id.*

18. CIV. PROC. § 129.

19. *Id.*

20. *Id.*

21. *Id.*

22. CIV. PROC. § 129(a)(2).

no legal way for a family member to obtain postmortem images from a coroner without first petitioning the court.<sup>23</sup>

### B. *The Privacy of Death*

The term “privacy of death” refers not to a deceased person’s privacy rights, but to the privacy rights of that person’s relatives.<sup>24</sup> Put another way, it is the family’s privacy right surrounding the images of a deceased loved one.<sup>25</sup> This concept transformed the traditional notion of privacy from an individual’s right “to control what others know about him” to “a relative’s ability to control what others see about the death of his or her late family members.”<sup>26</sup> The Supreme Court of the United States acknowledged that family members are entitled to privacy surrounding the death of a loved one.<sup>27</sup> In doing so, it explained there is a “well-established cultural tradition acknowledging a family’s control over the body and the death images of the deceased.”<sup>28</sup> The Court also acknowledged that this right has deep roots in the common law.<sup>29</sup> Justice Kennedy, supporting this cultural tradition, stated that families have a right to object to “unwarranted public exploitation that . . . tends to degrade the rites and respect they seek to accord to the deceased person.”<sup>30</sup>

Section 129’s ban on reproducing images of a deceased person’s body aligns with the cultural traditions and privacy concerns addressed by the Supreme Court of the United States.<sup>31</sup> The original justification for Section 129 was to protect a deceased person’s family from invasions of privacy that could result from the distribution of photographs taken of the deceased’s body.<sup>32</sup> Section 129 vindicated “the deceased’s family’s right to privacy to limit the reproduction of gruesome autopsy photographs.”<sup>33</sup> Its goal was to protect a deceased individual’s family members from possible privacy invasions that could result from the

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23. CIV. PROC. § 129.

24. Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 133–134 (2005/2006).

25. *Id.* at 134.

26. *Id.*

27. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004).

28. *Id.*

29. *Id.*

30. *Id.*

31. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 1 (June 20, 2016), available at [file:///Users/April/Downloads/201520160AB2427\\_Senate%20Judiciary-%20\(3\).pdf](file:///Users/April/Downloads/201520160AB2427_Senate%20Judiciary-%20(3).pdf) (on file with *The University of the Pacific Law Review*).

32. Marsh v. County of San Diego, 680 F.3d 1148, 1156 (9th Cir. 2012).

33. Mahira Siddiqui, *Narrowly Restricting “Clearly Established” Civil Liberties: The Constitutional Ramifications of a Family Member’s [Under] Protected Federal Privacy Rights in the Dissemination of Postmortem Images in Marsh v. County of San Diego*, 44 GOLDEN GATE U. L. REV. 81, 92–93 (2014).

unauthorized reproduction and distribution of photographs of a deceased person's body.<sup>34</sup>

*C. The California Civil Discovery Act of 1986*

The California Civil Discovery Act of 1986 (Discovery Act) made sweeping changes to all phases of civil discovery.<sup>35</sup> Prior to its enactment, years of case law governed California civil discovery.<sup>36</sup> The Discovery Act defines discoverable material as any “matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>37</sup> The statute further defines discoverable material as any “document, electronically stored information, tangible thing, or land or other property” that may be relevant to a claim.<sup>38</sup> The Discovery Act lists various methods of obtaining discovery from an opposing party.<sup>39</sup> Some of the methods of discovery found in the Discovery Act include: oral and written depositions; interrogatories; physical and mental examinations; requests for admissions; simultaneous exchanges of expert witness information; and inspections of documents, things, and places.<sup>40</sup>

*D. The Exchange of Expert Witness Reports and Writings*

Section 2034.210 of the Discovery Act lays out the procedure for requesting expert witness information.<sup>41</sup> Pursuant to section 2034.210(c), a party may demand the production of all discoverable expert witness’ “reports and writings” in preparation for the witness’s testimony.<sup>42</sup> Section 2034.270 lays out the timeline for making such a request.<sup>43</sup> Under this section, the opposing party should produce discoverable reports and writings by the date specified in the demand for discovery.<sup>44</sup> Rather than establishing a universal timeline for the production of information, section 2034.270 allows the requesting party to specify the date that the information must be produced.<sup>45</sup>

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34. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 1 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*).

35. Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 MCGEORGE L. REV. 1051, 1052 (2001).

36. *Id.*

37. CAL. CIV. PROC. CODE § 2017.010 (West 2016).

38. *Id.*

39. CAL. CIV. PROC. CODE § 2019.010 (West 2016).

40. *Id.*

41. CAL. CIV. PROC. CODE § 2034.210(c) (West 2016).

42. *Id.*

43. CAL. CIV. PROC. CODE § 2034.270 (West 2016).

44. *Id.*

45. *Id.*

### III. CHAPTER 467

Chapter 467 improves judicial efficiency for civil litigants by instituting multiple changes to the California Code of Civil Procedure.<sup>46</sup>

First, Chapter 467 amends the California Code of Civil Procedure to ease current restrictions regarding the reproduction of postmortem images.<sup>47</sup> Chapter 467 aids families in deciding whether to pursue wrongful death suits by allowing families of a deceased person to obtain postmortem images of the deceased before initiating a civil lawsuit.<sup>48</sup> Chapter 467 allows the heirs or representatives of a deceased person to obtain postmortem images through two avenues: (1) by presenting the coroner with a declaration that the individual is the deceased's heir or representative, a valid form of identification, and a certified death certificate; or (2) having a civil subpoena issued for the image.<sup>49</sup>

Second, Chapter 467 requires an expert witness to produce any materials, reports, or writings demanded in a deposition notice at least three business days prior to the scheduled deposition.<sup>50</sup> The scope of materials to be produced includes "any materials or category of materials, including any electronically stored information."<sup>51</sup> Chapter 467 also includes a provision ensuring that electronic discovery must include password access to the electronic files.<sup>52</sup>

### IV. ANALYSIS

Chapter 467 attempts to improve judicial efficiency by making changes to two areas of civil procedure.<sup>53</sup> First, it makes postmortem images easier to obtain by easing restrictions that had previously limited their reproduction.<sup>54</sup> Chapter 467 seeks to reduce the number of meritless claims filed in civil court by giving potential claimants vital information prior to the claimant filing a civil lawsuit—thereby increasing judicial efficiency.<sup>55</sup> This goal is centered on the premise that at least some family members will view postmortem images and decide not to pursue litigation as a result.<sup>56</sup>

Second, Chapter 467 establishes a minimum amount of time before a deposition in which an expert witness' file must be produced to the deposing

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46. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467); CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467).

47. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467).

48. CONSUMER ATTORNEYS OF CALIFORNIA, SUMMARY OF THE BILL, AB 2427.

49. CIV. PROC. § 129 (amended by Chapter 467).

50. CIV. PROC. § 2034.415 (enacted by Chapter 467).

51. *Id.*

52. CIV. PROC. § 2025.280 (amended by Chapter 467).

53. Yee, *supra* note 8.

54. CONSUMER ATTORNEYS OF CALIFORNIA, *supra* note 48.

55. *Id.*

56. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 8 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*).

attorney.<sup>57</sup> In an article requested by the California Law Revision Commission in 2001, Professor Gregory Weber of the University of the Pacific, McGeorge School of Law detailed possible innovations to discovery law for California courts.<sup>58</sup> In the article, Professor Weber targets “exchanges of expert witness information” as one of the areas most in need of reform.<sup>59</sup> Chapter 467 addresses this problem by establishing a timeline for expert witness file production; this will improve judicial efficiency by making expert witness’ depositions more productive.<sup>60</sup>

Chapter 467 potentially creates a fiscal impact on the civil system.<sup>61</sup> The fiscal analysis of Chapter 467 will focus on the postmortem image component of the law; opposition to the bill argues that easier access to postmortem images will create more demand for the images, thereby creating excessive work for coroners responsible for producing the images.<sup>62</sup> Chapter 467’s second provision is less controversial.<sup>63</sup> This portion of the bill has no known opposition.<sup>64</sup> However, in determining the effect Chapter 467 will have on the production of expert witness files and the depositions of expert witnesses, it is important to consider how the new legislation will interact with regulations already in place for the discovery of expert witness files.<sup>65</sup>

*A. How to Obtain Postmortem Images and the Privacy and Policy Concerns Motivating Section 129*

Chapter 467 attempts to improve judicial efficiency while still shielding family members of deceased individuals from the possible harm the dissemination of postmortem images could have.<sup>66</sup> Chapter 467’s proponents claim that it strikes the appropriate balance between these two goals.<sup>67</sup> Chapter 467 eases the ban on postmortem images by creating two additional avenues for family members to obtain these images.<sup>68</sup> Chapter 467 allows heirs or

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57. CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467).

58. Weber, *supra* note 35, at 1052.

59. *Id.* at 1053.

60. Belote, *supra* note 11.

61. Letter from Cory M. Salzillo, Legislative Director, California State Sheriffs’ Association, to the Honorable Ed Chau (June 13, 2016).

62. *Id.*

63. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 6–7 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*).

64. *Id.* at 1.

65. Letter from Elise R. Sanguinetti, President, Consumer Attorneys of California, to Assembly Member Ed Chau (Aug. 1, 2016).

66. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 8 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*).

67. Sanguinetti, *supra* note 65 (Sanguinetti wrote that AB 2427 ensures identity is verified before allowing families access to images without a court order).

68. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467).

representatives of a deceased person to obtain postmortem images by either presenting (1) a declaration that they are the deceased's heir or representative, a valid identification, and a valid death certificate or (2) obtaining a subpoena for the images.<sup>69</sup> Chapter 467 states that postmortem images should only be requested for potential use in a civil action or in determining whether to pursue an action that relates to the deceased individual's death.<sup>70</sup>

1. *The Privacy and Policy Concerns of Section 129*

*Catsouras v. Department of California Highway Patrol* demonstrates the privacy and policy concerns that spurred the creation of a ban on the dissemination of postmortem images.<sup>71</sup> In that case, highway patrol officers took pictures of 18-year-old Nicole's body at the scene of a car accident.<sup>72</sup> Images taken at the scene of the accident were gruesome—Nicole had been decapitated.<sup>73</sup> The accident occurred on October 31st, Halloween.<sup>74</sup> After photographing Nicole's decapitated body, highway patrol officers proceeded to send the images to friends and family for "pure shock value."<sup>75</sup> The pictures of Nicole spread quickly on the Internet; they were reposted on more than 2,500 web sites<sup>76</sup> and, at one point, a Google search of Nicole's name produced over 1.5 million hits.<sup>77</sup> To make matters worse, Internet users began taunting Nicole's family with the images from the accident.<sup>78</sup>

These horrific and malicious incidents included e-mails to Nicole's father with attached images of Nicole's body and the words "Hey Daddy I'm still alive."<sup>79</sup> On other occasions, the images were sent directly to her sister and cousin's personal cell phones.<sup>80</sup> Nicole's family was forced to endure not only the pain of losing a loved one, but also the suffering and trauma brought on by the public display of her death.<sup>81</sup> In *Catsouras*, Judge Moore wrote, "with her demise, the torment of her family members began. They endured not only her death, and the hideous manner of it, but also the unthinkable exploitation of the photographs of her decapitated remains."<sup>82</sup> The concurring opinion in *Catsouras*

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69. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467).

70. *Id.*

71. Christine M. Emery, *Relational Privacy—A Right to Grieve in the Information Age: Halting the Digital Dissemination of Death-Scene Images*, 26 RUTGERS L. J. 765, 766 (2011).

72. *Catsouras v. Department of California Highway Patrol*, 181 Cal.App.4th 856, 865, 104 Cal.Rptr.3d 352 (2010).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Emery, *supra* note 71, at 765.

78. *Catsouras*, 181 Cal.App.4th at 865.

79. *Id.*

80. Emery, *supra* note 71, at 766.

81. *Id.*

82. *Catsouras*, 181 Cal.App.4th at 863.

stated that Section 129 is a provision that naturally includes “the survivors’ privacy interest in preventing dissemination of gruesome autopsy and death scene photographs of their loved one.”<sup>83</sup>

Section 129 attempts to protect the deceased victim’s family members by making images of deceased individuals difficult to obtain.<sup>84</sup> The need to protect images of deceased individuals was codified by the California legislature in 1968.<sup>85</sup> As enacted in 1968, Section 129 only allowed images of deceased individuals to be reproduced for family members after a court order for the images was granted.<sup>86</sup> This statute was enacted to protect the family’s privacy surrounding images of deceased loved ones.<sup>87</sup> Chapter 467 changes the law by giving families of deceased individuals the right to postmortem images of the deceased without first filing a civil action.<sup>88</sup>

In *National Archives and Records Administration v. Favish*, the Supreme Court of the United States clearly established that the privacy rights of an individual transfer to that person’s family or heir upon their death.<sup>89</sup> This means that when a person dies, his or her right to privacy dies with him; however, a family’s right to privacy surrounding the deceased individual remains.<sup>90</sup> Chapter 467 is consistent with the holding in *Favish* because it respects that the decision to obtain postmortem images is in the hands of the deceased’s heirs who, according to *Favish*, hold the deceased’s privacy rights upon their death.<sup>91</sup> *Favish* did not institute a nation-wide postmortem images ban; it simply acknowledged that there is a “well established cultural tradition” that family members have the right of control over their loved one’s “body and death images.”<sup>92</sup> Chapter 467 does not diminish this right; it simply makes postmortem images accessible without a court order for family members of a deceased individual.<sup>93</sup>

The initial goal of Section 129 was to regulate the dissemination of postmortem images for the purpose of protecting the privacy of that person’s family.<sup>94</sup> However, this is not the goal of Chapter 467.<sup>95</sup> Chapter 467’s goal is to

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83. *Id.* at 908.

84. CAL. CIV. PROC. CODE § 129(a)(2) (West 2016).

85. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 1 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*).

86. CIV. PROC. § 129(a)(2).

87. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2427, at 1 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*).

88. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467).

89. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 167 (2004).

90. Catsouras v. Department of California Highway Patrol, 181 Cal.App.4th 856, 871, 104 Cal.Rptr.3d 352 (2010).

91. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467); *Favish*, 541 U.S. at 168.

92. *Favish*, 541 U.S. at 168.

93. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467)

94. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 1 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*).

increase judicial efficiency.<sup>96</sup> These differing motivations demonstrate the careful balancing act found in Chapter 467; that is, to make postmortem images more accessible while still maintaining privacy protections for a deceased person's family.<sup>97</sup>

2. *Obtaining Postmortem Images by Presenting a Declaration, Valid Identification, and a Valid Death Certificate*

Chapter 467 guards against unauthorized access to postmortem images by requiring that the individual requesting the images verify his or her identity.<sup>98</sup> Chapter 467 requires a party seeking postmortem images to verify their identity by making a declaration that they are the deceased's legal heir or representative, presenting valid identification to the coroner, and providing a valid death certificate for the deceased individual.<sup>99</sup>

Under Chapter 467, making a false declaration to obtain postmortem images from a coroner is a criminal offense; parties engaging in this activity are guilty of perjury.<sup>100</sup> The California Penal Code states that every person who takes an oath or makes a declaration before a "competent tribunal, officer, or person . . . [and] states as true any material which he or she knows to be false . . . is guilty of perjury."<sup>101</sup> The Penal Code also states, "perjury is punishable by imprisonment . . . for two, three or four years."<sup>102</sup> Therefore, under Chapter 467, making a false declaration to a coroner in order to receive postmortem images of a deceased individual is punishable by 2 to 4 years in jail.<sup>103</sup>

Chapter 467 requires individuals to present a valid death certificate to obtain postmortem images.<sup>104</sup> Whether or not an individual is entitled to a death certificate from the state or local registrar depends on whether or not the person is an authorized person as defined by the California Health and Safety Code.<sup>105</sup> The Health and Safety Code states that only an authorized person is entitled to a certified copy of a death certificate.<sup>106</sup> The term "authorized person" is defined as: (1) the legal parent or guardian of the deceased; (2) a party who is entitled via

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95. Yee, *supra* note 8.

96. *Id.*

97. SENATE JUDICIARY COMMITTEE, ANALYSIS OF AB 2427, at 8 (June 20, 2016), available at file:///Users/April/Downloads/201520160AB2427\_Senate%20Judiciary-%20(3).pdf (on file with *The University of the Pacific Law Review*) (the bill was amended to include "privacy safeguards to ensure that only legal heirs and representatives may obtain a copy of the images").

98. Sanguinetti, *supra* note 65.

99. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467).

100. *Id.*

101. CAL. PENAL CODE § 118 (West 2016).

102. CAL. PENAL CODE § 126 (West 2016).

103. PENAL CODE § 126 (West 2016) (definition for the punishment of perjury); CAL. CIV. PROC. CODE § 129 (amended by Chapter 467) (falsely presenting a declaration to a coroner for the purpose of unlawfully receiving a postmortem image is punishable as perjury).

104. CIV. PROC. § 129 (amended by Chapter 467).

105. CAL HEALTH & SAFETY CODE § 103526(2)(c) (West 2016).

106. CAL HEALTH & SAFETY CODE § 103526(a)(1) (West 2016).

a court order; (3) law enforcement or government agency conducting official business; (4) a child, grandchild, sibling, spouse, domestic partner, or grandparent of the deceased; and (5) an agent or employee of a funeral establishment who orders death certificates.<sup>107</sup> Chapter 467 does not amend who is defined as an authorized person for the purpose of requesting a death certificate.<sup>108</sup> This means that all parties entitled to a death certificate under the Health and Safety Code have access to postmortem images of a deceased individual as long as they present a valid I.D. and make a declaration that they are the deceased's heir or legal representative.<sup>109</sup> This portion of Chapter 467 broadens the group of individuals that can legally request postmortem images.<sup>110</sup> Under Chapter 467, a wide range of family members can obtain postmortem images, and there is no requirement to show good cause for the images.<sup>111</sup> However, Chapter 467 specifies that the images must be requested for the purpose of determining if the surviving heir or representative should pursue a civil claim concerning the death of the deceased individual.<sup>112</sup> Easing the ban on postmortem images will likely increase the number of individuals who access these images, possibly inviting a greater chance for misuse of the images.<sup>113</sup> And, as demonstrated by *Catsouras*, once the images have been released to improper and possibly irresponsible parties, the damage can be irreparable.<sup>114</sup>

#### *B. Easier Access to Postmortem Images and Judicial Efficiency*

Chapter 467's goal is to improve judicial efficiency.<sup>115</sup> Proponents of Chapter 467 argue that making postmortem images available to a deceased individual's heirs and representatives, prior to their filing a civil claim, will improve judicial efficiency by giving these individuals important information needed to decide if they should pursue litigation.<sup>116</sup> Prior to Chapter 467's enactment, Section 129 of

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107. HEALTH & SAFETY § 103526(2)(c).

108. CIV. PROC. § 129 (amended by Chapter 467).

109. HEALTH & SAFETY § 103526(2)(c) (defines the term "authorized person").

110. CIV. PROC. § 129 (amended by Chapter 467) (extends parties that can request postmortem images to all "authorized persons").

111. CIV. PROC. § 129 (amended by Chapter 467) (good cause is no longer necessary because a court order is no longer necessary to obtain postmortem images); HEALTH & SAFETY § 103526(2)(c) (authorized persons are all who are entitled to the images under Chapter 467).

112. CIV. PROC. § 129 (amended by Chapter 467).

113. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2427, at 5 (June 20, 2016), available at [file:///Users/April/Downloads/201520160AB2427\\_Senate%20Judiciary-%20\(3\).pdf](file:///Users/April/Downloads/201520160AB2427_Senate%20Judiciary-%20(3).pdf) (on file with *The University of the Pacific Law Review*) (stating that problems could possibly arise from multiple heirs accessing the images and disagreeing about how to use them. Previously, heirs would have to demonstrate good cause to the court in order to obtain the images. Under Chapter 467, presenting the required documentation is enough to obtain the images, and there is no need to petition the court; therefore, heirs that may not have wanted to navigate the legal system under the old restrictions may seek out such images under Chapter 467's new provisions, thus increasing the number of individuals that could potentially access the images.)

114. *Catsouras v. Department of California Highway Patrol*, 181 Cal.App.4th 856, 871, 104 Cal.Rptr.3d 352 (2010).

115. Yee, *supra* note 8.

116. CONSUMER ATTORNEYS OF CALIFORNIA, *supra* note 48.

the Code of Civil Procedure mandated that there was only one time that an individual's family member could access a coroner's images of a deceased person.<sup>117</sup> Under the prior law, a coroner's postmortem images could not be copied unless good cause had been shown and a court order was issued for the images.<sup>118</sup> As a result, prior to Chapter 467's enactment, a family member had to begin legal proceedings in order to obtain postmortem images of a deceased family member, even if the image was for the purpose of deciding whether or not to pursue a civil claim.<sup>119</sup>

Chapter 467 eases the previous restriction imposed on family members seeking postmortem images and adds that an heir or representative can obtain the images from a coroner without first obtaining a court order if that person is considering a civil action.<sup>120</sup> The author and sponsors of the bill assert that this will improve judicial efficiency by reducing the number of people filing complaints in civil court because: (1) family members can obtain the images without first filing a lawsuit, and (2) some individuals will choose not to pursue litigation based upon the images they receive from the coroner.<sup>121</sup>

However, there is a possibility that Chapter 467 could have a negative effect on judicial efficiency.<sup>122</sup> Under the requirements set forth in Chapter 467 and the California Health and Safety Code, surviving children, grandchildren, parents, siblings, spouses, and domestic partners can all access postmortem images by presenting the required documentation to the coroner.<sup>123</sup> With such a large group of individuals allowed access to these images, two foreseeable problems arise. First, different family members may disagree about the need for the images.<sup>124</sup> This could lead to litigation that may not have been an issue prior to Chapter 467's enactment.<sup>125</sup> Second, since the images are easier to obtain, the potential for improper dissemination of the images is more likely.<sup>126</sup> An unintended effect of Chapter 467's lower standard for obtaining postmortem images is that there could be an increase in lawsuits due to the misuse of these images.<sup>127</sup> In addition, the party requesting the images is not required to present any material to the coroner to verify that the images are for the purpose of determining whether civil

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117. CAL. CIV. PROC. CODE § 129 (West 2013).

118. CAL. CIV. PROC. CODE § 129(a)(2) (West 2013).

119. CIV. PROC. § 129.

120. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467).

121. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2427, at 8 (June 20, 2016), available at [file:///Users/April/Downloads/201520160AB2427\\_Senate%20Judiciary-%20\(3\).pdf](file:///Users/April/Downloads/201520160AB2427_Senate%20Judiciary-%20(3).pdf) (on file with *The University of the Pacific Law Review*).

122. *Id.* at 5.

123. CIV. PROC. § 129 (amended by Chapter 467) (a party can obtain postmortem images upon production of a valid death certificate); CAL. HEALTH & SAFETY CODE § 103526(2)(c) (listing parties entitled to a death certificate).

124. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2427, at 5 (June 20, 2016), available at [file:///Users/April/Downloads/201520160AB2427\\_Senate%20Judiciary-%20\(3\).pdf](file:///Users/April/Downloads/201520160AB2427_Senate%20Judiciary-%20(3).pdf) (on file with *The University of the Pacific Law Review*).

125. *Id.*

126. *Id.* at 6.

127. *Id.*

litigation pertaining to the death of the photographed individual should proceed.<sup>128</sup>

Chapter 467 offers no way of ensuring that individuals who request postmortem images are provided the images for the purpose of determining if they will pursue a civil action.<sup>129</sup> This means that individuals, who also happen to be heirs or representatives of the deceased, could obtain postmortem images for nefarious purposes.<sup>130</sup> It is undisputed that Chapter 467's changes to the postmortem image ban will decrease the amount of individuals seeking a court order for postmortem images simply because there will be no need for families to seek the court's approval to obtain the images.<sup>131</sup> However, will the potential misuse of the images lead to more lawsuits? And if it does, will these lawsuits burden the civil system more than claims seeking postmortem images would have?

### *C. The Fiscal Impact of the Bill*

Opposition to Chapter 467 focuses mainly on the bill's fiscal impact.<sup>132</sup> The California State Sheriffs' Association opposed Chapter 467, stating that, "existing law strikes the appropriate balance among appropriate access to postmortem photographs via a court order, family privacy, and coroner workload."<sup>133</sup> The California State Sheriffs' Association opposed Chapter 467 because it feared that easing restrictions to obtain postmortem images would overburden coroners' offices across the state.<sup>134</sup> Chapter 467 widens the scope of individuals that can potentially request postmortem images, which could increase coroners' workloads.<sup>135</sup>

Apprehension surrounding coroner workload is justifiable.<sup>136</sup> At least one major county's coroner office is in current financial crisis.<sup>137</sup> Recently, a civil grand jury attributed problems in the Los Angeles County Coroner's Office to understaffing, as a result of underfunding.<sup>138</sup> The report indicates that underfunding in the LA County Coroner's Office is responsible for "too few

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128. CIV. PROC. § 129 (amended by Chapter 467).

129. *Id.*

130. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2427, at 5 (June 20, 2016), available at [file:///Users/April/Downloads/201520160AB2427\\_Senate%20Judiciary-%20\(3\).pdf](file:///Users/April/Downloads/201520160AB2427_Senate%20Judiciary-%20(3).pdf) (on file with *The University of the Pacific Law Review*).

131. CIV. PROC. § 129 (amended by Chapter 467).

132. Salzillo, *supra* note 61.

133. *Id.*

134. *Id.*

135. CIV. PROC. § 129 (amended by Chapter 467); Salzillo, *supra* note 61.

136. Abbey Sewell, *Grand Jury Report Blames Underfunding for Problems at Coroner's Office*, L.A. TIMES (Apr. 21, 2016), available at <http://www.latimes.com/local/lanow/la-me-ln-coroner-grand-jury-20160421-story.html> (on file with *The University of the Pacific Law Review*).

137. *Id.*

138. *Id.*

budgeted positions. . . worker fatigue, and burnout.”<sup>139</sup> As a result of these problems, the office has a lengthy backlog of autopsies to complete and regularly stores human remains longer than appropriate<sup>140</sup> In addition to the storage issues that accompany a lengthy backlog, the National Association of Medical Examiners’ regulations state that a coroner must complete an autopsy report within 90 days of receiving the remains.<sup>141</sup> As a result of its heavy workload and underfunding, the LA County Coroner’s Office frequently exceeds the 90-day limit.<sup>142</sup> Consequently, the coroner’s office is in danger of losing its accreditation.<sup>143</sup> Loss in accreditation could be fatal to some criminal cases using reports generated by the LA County Coroner’s Office.<sup>144</sup> Underfunding could call into question the credibility of any coroner’s reports made by the LA County Coroner’s Office.<sup>145</sup> This is the second time that a grand jury has called for the LA County Coroner’s Office to do something about its underfunding issues.<sup>146</sup> A similar report was made in 2010.<sup>147</sup> The LA County Coroner’s Office recently requested over 80 positions be added to the office’s budget; however, only two were added in the proposed budget following the request.<sup>148</sup>

The underfunding and lengthy backlog issues present in the LA County Coroner’s Office exemplifies why the California State Sheriffs’ Association’s was opposed to Chapter 467.<sup>149</sup> An increased workload will directly affect most counties’ sheriffs’ departments as “50 of California’s 58 counties have a combined sheriff-coroner office.”<sup>150</sup> In counties where the sheriff and coroner’s office are combined, the coroners’ offices are required to “conduct autopsies to determine the cause of death . . . transport and remove bodies; verify the cause of death and sign death certificates; appear at unattended deaths.”<sup>151</sup> The California State Sheriff’s Association fears that “allowing access to these records prior to the filing of an action and without the consideration of a judge will result in increased workload and fishing expeditions for wrongful death actions that may never ultimately be filed.”<sup>152</sup> Furthermore, an increased workload without an increased budget could create a huge problem for counties that share sheriff and

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139. LOS ANGELES COUNTY CIVIL GRAND JURY, WHO CARES FOR THE DEAD WHEN THE DEAD DON’T VOTE? 2 (2015–2016), available at <http://grandjury.co.la.ca.us/pdf/CORONER%20FINAL%20REPORT.pdf> (on file with *The University of the Pacific Law Review*).

140. Sewell, *supra* note 136.

141. LOS ANGELES COUNTY CIVIL GRAND JURY, *supra* note 139, at 2.

142. *Id.*

143. *Id.*

144. *Id.* at 1.

145. *Id.* at 18.

146. Sewell, *supra* note 136.

147. *Id.*

148. *Id.*

149. Salzillo, *supra* note 61 (the Association fears the increased workload Chapter 467 could create).

150. *Id.*

151. SHERIFF-CORONER, CALIFORNIA STATE ASSOCIATION OF COUNTIES, <http://www.counties.org/county-office/sheriff-coroner> (last visited Aug. 8, 2016).

152. Salzillo, *supra* note 61.

coroner offices.<sup>153</sup> However, several of the legislature's committee reports state that the fiscal impact of the legislation will be negligible.<sup>154</sup> This indicates that the legislature predicts that the increased workload to coroners as a result of Chapter 467's enactment will not cause the issues experienced by the LA County Coroner's Office.<sup>155</sup>

*D. Chapter 467: Judicial Efficiency and the Expert File*

Prior to Chapter 467's enactment, the California Code of Civil Procedure allowed for an attorney to request production of "materials, reports and writings" that an expert witness will rely on in his or her testimony.<sup>156</sup> However, there was no express time limit for the expert's files to be produced.<sup>157</sup> The expert file would simply need to be given to the deposing party prior to the expert witness' deposition.<sup>158</sup> In practice, it was not uncommon for an attorney to receive the expert witness' file at the deposition of the expert witness, sometimes in electronic format, which would be inaccessible without a computer.<sup>159</sup> This process was inefficient.<sup>160</sup> It caused frequent depositions in which the deposing attorney would attempt to look through the unfamiliar material during or after the deposition, making the deposition less productive and wasting time and money.<sup>161</sup> Chapter 467 mandates that an expert file must be produced at least three days prior to the expert witness' deposition, and that passwords to electronically stored files must be disclosed at that time as well.<sup>162</sup> This deadline will give the deposing attorney the chance to review the materials in the expert file, making the deposition more productive.<sup>163</sup>

Lawyers should not feel unfamiliar with the time restraint Chapter 467 places on expert witness file disclosure.<sup>164</sup> Under the California Code of Civil Procedure, parties must make a demand for designations of experts at least 70 days before trial<sup>165</sup> and expert lists at least 50 days prior to a trial.<sup>166</sup> Chapter

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153. LOS ANGELES COUNTY CIVIL GRAND JURY, *supra* note 139, at 2.

154. ASSEMBLY FLOOR, FLOOR ANALYSIS OF AB 2427 at 1 (Aug. 26, 2016), *available at* file:///Users/April/Downloads/201520160AB2427\_Assembly%20Floor%20Analysis-%20(9).pdf (on file with *The University of the Pacific Law Review*).

155. SENATE FLOOR, FLOOR ANALYSIS OF AB 2427, at 1 (Aug. 22, 2016), *available at* file:///Users/April/Downloads/201520160AB2427\_Senate%20Floor%20Analyses-%20(12).pdf (on file with *The University of the Pacific Law Review*).

156. Belote, *supra* note 11.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467); CAL. CIV. PROC. CODE § 2025.280 (amended by Chapter 467).

163. Belote, *supra* note 11 (Chapter 467 will create more meaningful depositions by allowing attorneys to receive an expert file at least three days before a deposition).

164. CONSUMER ATTORNEYS OF CALIFORNIA, *supra* note 48.

165. CAL. CIV. PROC. CODE § 2034.220 (West 2016).

467's requirement that the expert file be produced at least three days prior to the expert witness' deposition is in line with the concept that there are timelines for elements of discovery.<sup>167</sup> Chapter 467 creates a timeline for when the parties must produce an expert file to the opposing party.<sup>168</sup> Chapter 467 does not affect what material an expert witness produces.<sup>169</sup> Chapter 467 increases judicial efficiency by making expert witness' depositions more productive, saving clients' money, and saving attorneys' time.<sup>170</sup>

*E. Discovery Reform and Chapter 467*

Discovery in the civil system is one of the most widely recognized inhibitors of judicial efficiency.<sup>171</sup> Discovery expenses make up a large portion of pre-trial expenses.<sup>172</sup> A report by the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers addressed areas of concern within the discovery process, stating that "there is a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases."<sup>173</sup> Attempts to increase judicial efficiency through reforming deposition practices are a popular goal among civil procedure reformers; one scholar stated, "by far, deposition practice presented the most potential opportunities for California's consideration. Nevertheless, each of the other discovery devices—interrogatories, inspection demands, medical examinations, exchanges of expert witness information, and admission requests—also presented a few possible innovations."<sup>174</sup> The same scholar also stated, "of all the discovery devices, deposition practice has by far received the most extensive attention [concerning areas with the greatest potential for innovation] by federal and state courts across the country."<sup>175</sup>

Because of these realities, procedural reform has become a popular way to reform the civil court system.<sup>176</sup> By creating a timeline for expert witness file production, Chapter 467 fulfills three of the stated goals of discovery reform: (1) to reduce discovery costs; (2) to "reduce the time spent on discovery"; and (3) to "improve the quality of information produced in response to discovery."<sup>177</sup>

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166. *Id.*

167. CONSUMER ATTORNEYS OF CALIFORNIA, *supra* note 48.

168. CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467).

169. *Id.*

170. Belote, *supra* note 11

171. Weber, *supra* note 35, at 1052.

172. *Id.*

173. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT: ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS 1 (Aug. 1, 2008) (on file with *The University of the Pacific Law Review*).

174. Weber, *supra* note 35, at 1053.

175. *Id.* at 1074.

176. Scheiber, *supra* note 2, at 2052.

177. *Id.*

Chapter 467 represents the Legislature's continued attempt to improve the discovery process in California's courts, thereby increasing judicial efficiency as a whole.<sup>178</sup>

## V. CONCLUSION

In response to both public and legal opinion that the civil court system is inefficient and too expensive, reformers strive to make the civil system more efficient.<sup>179</sup> Chapter 467 is a result of that goal.<sup>180</sup> Chapter 467 attempts to improve efficiency by: (1) easing the ban on postmortem images, thereby decreasing the amount of meritless claims filed in civil court seeking these images; and (2) creating new guidelines in the area of discovery.<sup>181</sup> Chapter 467 is significant because it represents a successful attempt by both the California Defense Counsel and the Consumer Attorneys of California, typical opponents in the courtroom, to work together towards the goal of increasing judicial efficiency.<sup>182</sup>

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178. Yee, *supra* note 8.

179. Kourlis & Kauffman, *supra* note 6, at 877.

180. CONSUMER ATTORNEYS OF CALIFORNIA, *supra* note 48 (stating the goal of Chapter 467).

181. CAL. CIV. PROC. CODE § 129 (amended by Chapter 467); CAL. CIV. PROC. CODE § 2034.415 (enacted by Chapter 467).

182. Yee, *supra* note 8.