Appeals, Writs, & Post-Trial Motions

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■ Developments in Appellate Law—2008

The following are among the most noteworthy developments in appellate law and procedure in 2008.

■ Rule Changes

Amicus curiae briefs

Rules 8.200(c)(3) and 8.520(f)(4) of the California Rules of Court

Effective January 1, 2009, amended rules 8.200(c)(3) and 8.520(f)(4) require an application to file an amicus brief in the Court of Appeal or the Supreme Court to disclose any party or counsel for a party who authored the brief. The application must also disclose any party or counsel for a party who made a monetary contribution for the amicus brief, as well as any other entity or person who made such a contribution. These rules align California's practice with the United States Supreme Court's practice.[1]

Motions for judicial notice on appeal

Rule 8.252(a)(2) of the California Rules of Court

Effective January 1, 2009, amended rule 8.252(a)(2) requires a motion for judicial notice in the Court of Appeal to explain how the matter to be noticed is relevant to the appeal. It also must disclose whether the matter was presented to the trial court and whether the matter relates to proceedings that occurred after entry of the judgment or order being appealed.

Certificates of interested entities or persons

Rules 8.208(e)(2)(C) and 8.488 of the California Rules of Court

As of January 1, 2009, amended rule 8.208(e)(2)(C) clarifies that a party's insurer "does not have a financial interest in the outcome of the proceeding solely on the basis of its status as insurer for that party." Therefore, the insurer need not be disclosed in the certificate of interested entities or persons.

Also effective January 1, 2009, rule 8.488 requires certificates of interested entities or persons be included in writ petitions in all civil matters other than family, juvenile, guardianship, and conservatorship cases.

Supreme Court reply briefs

Rule 8.520(c) of the California Rules of Court

Effective January 1, 2009, amended rule 8.520(c) increases the maximum length of a reply brief on the merits submitted in the Supreme Court from 4,200 words to 8,400 words.

Rules governing appeals to the Appellate Division of the Superior Court

Rules 8.800 to 8.966 of the California Rules of Court

Effective January 1, 2009, the rules governing appeals to the Appellate Division of the Superior Court, formerly found at rule 8.700 et seq., have been amended and renumbered. The rules are now found at rules 8.800 through 8.966.

Petitions for a writ of supersedeas in the Appellate Division

Rule 8.824 of the California Rules of Court

If the record has not been filed in the Appellate Division, any petition for writ of supersedeas filed in that division must now show that there are substantial issues on appeal, as well as summarize the facts, issues to be raised on appeal, and any oral statement by the trial court supporting its rulings.[2] The petitioner must also file copies of relevant documents—bound, tabbed, and indexed—with the petition, rather than

1. See Sup. Ct. R. 37.6.
2. Cal. R. Ct., rule 8.824(a)(4)(A).

merely summarizing them in the petition.[3] Any opposition must be served and filed within 15 days of the petition.[4] If a request for a temporary stay is filed separately, it now must be served on the respondent.[5]

Record designations in the Appellate Division

Rule 8.831(a) of the California Rules of Court

An appellant in the Appellate Division is now required to serve and file a notice designating the record on appeal, either with the notice of appeal or within 10 days of filing the notice of appeal.

Clerk's transcripts in the Appellate Division

Rule 8.832 of the California Rules of Court

A clerk's transcript in the Appellate Division must now include supporting and opposing memoranda and attachments connected to any motion for new trial, to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration.[6] The register of actions, if any, must also be included.[7] The notice of designation must now identify each document by its title and filing date, or, if unavailable, signing date.[8] The notice may also specify portions of documents not to be included.[9] A party wanting to include an exhibit admitted, refused, or lodged, must specify the exhibit in its designation.[10] These changes conform the requirements in the Appellate Division to the requirements in the Court of Appeal.[11]

Trial court files in lieu of clerk's transcripts in the Appellate Division

Rule 8.833 of the California Rules of Court

If the court has a local rule electing the use of an original trial court file rather than a clerk's transcript in the Appellate Division, this form of the record may be used.[12] The clerk must send notice to the appellant within 10 days after appellant has served the notice electing a clerk's transcript.[13] The clerk's notice must include an estimate of the cost, which the appellant must deposit within 10 days.[14] The clerk must then prepare the trial court file, including a chronological index, which is sent to all attorneys of record and unrepresented parties for their use in paginating their copies of the file.[15] If the appellant elected to use a reporter's transcript, the clerk must send the prepared file to the Appellate Division with the transcript; if the appellant elected to forego a reporter's transcript, the trial court file must be sent immediately to the Appellate Division.[16]

Unavailable reporter's transcripts in cases appealed to the Appellate Division

Rule 8.834(e)(2) of the California Rules of Court

When a transcription of any portion of the designated proceedings is unavailable for an appeal to the Appellate Division, the clerk must inform the designating party. The designating party must then inform the court within 10 days whether it elects to proceed without a record of oral proceedings; or whether it elects to proceed with an agreed statement, a statement on appeal (formerly known as a settled statement), or, if permitted by local rule, an official electronic recording of the proceedings.

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3. Cal. R. Ct., rule 8.824(a)(4)(B)-(C).
4. Cal. R. Ct., rule 8.824(b)(1).
5. Cal. R. Ct., rule 8.824(c)(2).
6. Cal. R. Ct., rule 8.832(a)(1)(D).
7. Cal. R. Ct., rule 8.832(a)(1)(F).
8. Cal. R. Ct., rule 8.832(b)(2).
9. *Id.*
10. Cal. R. Ct., rule 8.832(b)(3).
11. See Cal. R. Ct., rules 8.121 & 8.122.
12. Cal. R. Ct., rule 8.833(a).
13. Cal. R. Ct., rule 8.833(b)(1).
14. *Id.*
15. Cal. R. Ct., rule 8.833(b)(3)-(4).
16. Cal. R. Ct., rule 8.833(b)(5).

Electronic recordings in the Appellate Division
Rule 8.835 of the California Rules of Court

If the proceedings were officially recorded electronically under Government Code section 69957, a transcript from the recording may be prepared and certified and used in lieu of a reporter's transcript in the Appellate Division.[17] If the court has a local rule permitting it, the original of an electronic recording may be used, pursuant to a stipulation of the parties or court order.[18] If the appellant chooses to use a transcript of the recording or the recording itself, but some portion of the designated proceedings cannot be transcribed, the clerk must notify the appellant.[19] The appellant must then inform the court within 10 days whether it elects to proceed without a record of oral proceedings; or whether it elects to proceed with a reporter's transcript, an agreed statement, or a statement on appeal (formerly known as a settled statement).[20]

"Statements on appeal"
Rule 8.837 of the California Rules of Court

The "settled statement" has been renamed "statement on appeal" for purposes of appeals to the Appellate Division. The procedure for proposing and approving it remains unchanged, except that an unrepresented party must file the proposed statement on an official form titled Statement on Appeal (Limited Civil Case) (form APP-104) unless the court, for good cause, permits a statement that is not on that form.

Briefs in the Appellate Division
Rule 8.882 of the California Rules of Court

An appellant's opening brief in the Appellate Division must now be served and filed within 30 days, rather than 20 days, after the record is filed; the respondent brief must be filed within 30 days, rather than 20 days, after the opening brief is filed; and the reply brief within 20 days, rather than 10 days, after that.[21] No other briefs are allowed without permission from the presiding judge.[22] The sanctions for failure to file an opening brief or respondent's brief now track those in rule 8.220: notice that the brief must be filed within 15 days; and, if the appellant fails to file an opening brief within that period, possible dismissal of the appeal; if the respondent fails to file within that period, possible decision on the record, the opening brief, and any oral argument by appellant.[23]

The rules for amicus curiae briefs in the Appellate Division largely follow rules 8.200 and 8.520 for amicus briefs in the Court of Appeal and the Supreme Court. An application for permission to file an amicus brief, with the brief attached, may be filed with the presiding judge within 14 days after the reply brief was filed or was due, whichever is earlier.[24] The application must explain the applicant's interest and explain how the proposed brief will assist the court.[25]

Length and binding of briefs in the Appellate Division
Rule 8.883 of the California Rules of Court

Previously, briefs filed in the Appellate Division could not exceed 15 pages. Under the new rule, briefs produced on a computer may not exceed 6,800 words.[26] Also, briefs must be bound on the left, rather than on the top, unless local rules prescribe a different method.[27]

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17. Cal. R. Ct., rule 8.835(a)-(b).
18. Cal. R. Ct., rule 8.835(c).
19. Cal. R. Ct., rule 8.835(d)(1).
20. Cal. R. Ct., rule 8.835(d)(2).
21. Cal. R. Ct., rule 8.882(a)(1)-(3).
22. Cal. R. Ct., rule 8.882(a)(4).
23. Cal. R. Ct., rule 8.882(c).
24. Cal. R. Ct., rule 8.882(d)(1).
25. Cal. R. Ct., rule 8.882(d)(2).
26. Cal. R. Ct., rule 8.883(b)(1).
27. Cal. R. Ct., rule 8.882(c)(8).

Appeals to the Appellate Division when a party is both appellant and respondent

Rule 8.884 of the California Rules of Court

In cases in which a party is both appellant and respondent in an appeal to the Appellate Division, the parties must submit a proposed briefing sequence within 20 days after the second notice of appeal is filed.[28] The proposal may be joint or, if the parties cannot agree, separate.[29] A party who is both appellant and respondent must combine its respondent's brief with its opening brief or reply brief, if any, whichever is appropriate under the approved briefing sequence.[30]

Calendaring, notice of oral argument, and oral argument in appeals in the Appellate Division

Rule 8.885 of the California Rules of Court

Under the amended rule, if the last reply brief is filed (or the time for filing expires) 45 or more days before the date of a regular session of the court, the appeal must be calendared for that session.[31] Formerly, an appeal was calendared if the record was filed 50 or more days before the end of a regular session. The clerk must send notice immediately after the appeal is fully briefed (rather then after the record files) and notice must be sent at least 20 days before the date of oral argument.[32] Argument will be held as in the Court of Appeal, with the appellant or petitioner having the right to argue first and last; however, each side is allowed 10 minutes for argument, unless the time is differently apportioned or extended.[33]

Finality of decisions of the Appellate Division

Rule 8.888 of the California Rules of Court

An Appellate Division judgment is now final 30 days, rather than 15 days, after it is filed.[34] If the decision is certified for publication, the 30 days runs from the filing date of the order for publication.[35] There are exceptions to this 30-day finality rule for denials of writs of supersedeas and requested or stipulated dismissals, all of which are final upon filing.[36] If an affirmance of a money judgment is conditioned on a party's consent to increase or decrease the amount of that judgment, the judgment is reversed unless the party files its consent in the Appellate Division before the decision is final.[37] If such consent is filed, the decision is final 30 days after the filing date of the consent.[38]

Writ proceedings in the Appellate Division

Rules 8.931, 8.932, 8.893, 8.894, 8.895, and 8.896 of the California Rules of Court

Rules 8.931 and 8.932, governing the content and form of documents supporting a writ petition as well as of service of the petition, are identical in most relevant respects to Rule 8.486, governing content, form, and service of writ petitions in the Court of Appeal and Supreme Court. There are a few significant differences: (1) unrepresented parties filing writ petitions in the Appellate Division must use an official form;[39] (2) represented parties may use the form but are not required to use it;[40] (3) the record filed in the Appellate Division may be in the form of an electronic recording;[41] (4) only one set of supporting documents needs

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28. Cal. R. Ct., rule 8.884(a)(1).
29. *Id.*
30. Cal. R. Ct., rule 8.884(b)(1).
31. Cal. R. Ct., rule 8.885(a).
32. Cal. R. Ct., rule 8.885(b).
33. Cal. R. Ct., rule 8.885(d)(1)-(2).
34. Cal. R. Ct., rule 8.888(a)(1).
35. Cal. R. Ct., rule 8.888(a)(2).
36. Cal. R. Ct., rule 8.888(a)(3)(A)-(C).
37. Cal. R. Ct., rule 8.888(c).
38. *Id.*
39. Cal. R. Ct., rule 8.931(a).
40. Cal. R. Ct., rule 8.931(b)(1).
41. Cal. R. Ct., rule 8.931(b)(1)(D).

to be filed, unless a court order or local rule specifies otherwise;[42] and (5) the length of the petition and memorandum cannot exceed 6,800 words.[43]

Rule 8.933, governing opposition to a writ petition in the Appellate Division, tracks exactly Rule 8.487, governing opposition in the Court of Appeal and Supreme Court, except that there is no provision for an amicus brief from the Attorney General. Likewise, Rule 8.934, governing notice to the trial court if a writ or order issues, tracks exactly Rule 8.489, governing notice to the trial court in the Court of Appeal and Supreme Court.

Rule 8.935, governing finality and remittitur for writ proceedings in the Appellate Division, tracks Rule 8.490, governing finality and remittitur in the Court of Appeal and Supreme Court, except that there are no separate provisions governing finality when a decision is certified for publication or when an order modifying an opinion changes the judgment.

Rule 8.936, governing costs in the Appellate Division, is an exact replica of Rule 8.493, governing costs in the Court of Appeal and Supreme Court, except that the procedure for recovering costs is governed by Appellate Division rules.

■ Significant Cases

A trial court may extend a limited duration injunction while the case is on appeal.

City of Hollister v. Monterey Insurance Company, 165 Cal. App. 4th 455 (2008)

As a general rule, trial court proceedings are automatically stayed during the pendency of an appeal. The general rule has been applied even in cases where a trial court attempts to modify the terms of a permanent injunction after a notice of appeal has been filed.[44] In City of Hollister v. Monterey Insurance Company, however, the Sixth Appellate District held that a trial court had the power to extend a limited duration injunction pending disposition of the appeal as long as doing so served the "ends of justice."[45] The Court of Appeal explained that justice is served where the extension furthers the same purpose as the automatic stay, which is to "preserve the parties' positions pending the outcome of the appeal."[46]

Deferential standard of review applies to appeals from attorney disqualification rulings, even when involving issues of first impression.

Haraguchi v. Superior Court, 43 Cal. 4th 706 (2008)

California courts have uniformly held that a motion to recuse is directed to the sound discretion of the trial court, and the trial court's decision to grant or deny the motion is reviewed only for an abuse of discretion. In *Haraguchi v. Superior Court*, a criminal defendant moved for recusal of the lead prosecutor and her office because she had written a novel about a prosecutor's decision to try a case resembling the defendant's case.[47] The trial court denied the motion because it found no conflict of interest.[48] The Court of Appeal reversed and ordered recusal based on the unusual and distinctive facts of the case.[49] The California Supreme Court granted review in this and a capital case, *Hollywood v. Superior Court*,[50] to determine the extent to which an attorney's involvement in literary or cinematic endeavors may give rise to conflicts requiring the attorney's recusal.[51] Primarily, the Supreme Court had to determine

42. Cal. R. Ct., rule 8.931(c)(3).
43. Cal. R. Ct., rule 8.932(b)(6); see also Cal. R. Ct., rule 8.883(b).
44. E.g., *People v. Bhakta*, 162 Cal. App. 4th 973, 981 (2008).
45. 165 Cal. App. 4th at 482.
46. *Id.*
47. 43 Cal. 4th at 709.
48. *Id.*
49. *Id.*
50. 43 Cal. 4th 721 (2008).
51. *Haraguchi*, 43 Cal. 4th at 709.

the appropriate standard for reviewing a trial court's decision on the existence of a disqualifying conflict.[52]

The Court reaffirmed the long-standing rule that recusal motions are reviewed under a deferential abuse of discretion standard.[53] It rejected the Court of Appeal's application of a de novo standard, reasoning that "[w]e review rulings on motions to recuse only for abuse of discretion precisely because trial courts are in a better position than appellate courts to assess witness credibility, make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case, a case they inevitably will be more familiar with than the appellate courts that may subsequently encounter the case in the context of a few briefs, a few minutes of oral argument, and a cold and often limited record."[54] Applying the deferential standard, the Supreme Court concluded that recusal was unnecessary in either case.[55]

Independent review applies to a First Amendment challenge to a discovery order.

Krinsky v. Doe 6, 159 Cal. App. 4th 1154 (2008)

Appeals from discovery orders, when available, normally are reviewed under the deferential abuse of discretion standard. In *Krinsky v. Doe 6*, the Sixth District addressed whether the abuse of discretion standard applies when reviewing the denial of a motion to quash a plaintiff's subpoena that sought records from an Internet service provider revealing the identities of anonymous Internet commentators who had allegedly defamed the plaintiff and interfered with her business relationships.[56] The Court of Appeal resolved the issue by recognizing an exception allowing for "independent review" because the appellant invoked the protection of the First Amendment.[57] The appellate court reversed the trial court's discovery order based on its view that the First Amendment right to speak anonymously on the Internet outweighed the plaintiff's interest in pursuing her claims.[58] The Court of Appeal explained that independent review is not equivalent to de novo review of a final judgment, in which a reviewing court appraises all of the evidence to decide whether the judgment should have been entered.[59]

A reviewing court is not required to consider objected-to evidence despite a party's failure to obtain a ruling on the objection.

Mamou v. Trendwest Resorts, Inc., 165 Cal. App. 4th 686 (2008)

The procedural principles governing an appeal from an order granting summary judgment require an independent review of all the evidence set forth in the moving and opposition papers, except evidence to which an objection has been made and sustained. In accordance with these principles, courts have held that objections to evidence in summary judgment proceedings are deemed waived and not preserved for appeal where counsel fails to obtain a ruling from the trial court.[60]

In *Mamou v. Trendwest Resorts, Inc.*, the Sixth Appellate District addressed whether it must consider certain summary judgment evidence on account of the trial court's failure to rule on a meritorious objection directed to that evidence. The appellate court held that, under such circumstances, it is not required to consider such evidence and it may independently evaluate the objection to determine whether the evidence is admissible.[61] The appellate

52. *Id.*
53. *Id.*
54. *Id.* at 713.
55. *Id.* at 719-20.
56. 159 Cal. App. 4th at 1160-61.
57. *Id.* at 1161-62.
58. *Id.* at 1179.
59. *Id.* at 1162 n.5.
60. E.g., *Kasparian v. AvalonBay Cmty.*, 156 Cal. App. 4th 11, 23 (2007).
61. *Mamou*, 165 Cal. App. 4th at 711-12.

court recognized that its directive enunciated in a previous case—to consider "'all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained'"[62] —constituted "mischievous dicta" because it has been interpreted to mean that a reviewing court is required to grant conclusive effect to a trial court's treatment of the evidence before it, no matter how patently erroneous that treatment may be.[63] The appellate court thus abandoned this dictum and held that in reviewing summary judgment, as in any other appeal, if a party's position depends on inadmissible evidence admitted over a proper objection, a reviewing court is obliged to acknowledge the error and disregard the evidence.[64] (Note: The California Supreme Court is currently considering a similar question in *Reid v. Google, Inc.*, review granted (January 30, 2008) (Case No. S158965), discussed below.)

California Supreme Court to determine whether objections to summary judgment evidence are preserved for appeal when the trial court does not expressly rule on them. Reid v. Google, Inc., review granted (January 30, 2008) (Case No. S158965)

In *Biljac Associates v. First Interstate Bank of Oregon, N.A.*, the First Appellate District, Division Two, ruled that it is not necessary for trial judges to issue written rulings on evidentiary objections in summary judgment proceedings in light of a presumption that the trial judge "has not relied on irrelevant or incompetent evidence."[65] Since *Biljac* was decided, confusion has grown over the issue of what lawyers must do to ensure that their evidentiary objections are preserved for appellate review when trial court judges decide summary judgment motions. In fact, *Biljac* has been disapproved by the same court that decided it.[66]

On January 30, 2008, the California Supreme Court granted review in *Reid v. Google, Inc.*, an employment age discrimination suit reinstated by the Sixth Appellate District based on evidence to which the defendant had objected notwithstanding the trial court's failure to render formal rulings on the objections in granting summary judgment for the defendant. The case has been briefed and awaits the scheduling of oral argument. The Supreme Court's grant of review is limited to the following questions: "(1) Should California law recognize the 'stray remarks' doctrine, which permits the trial court in ruling on a motion for summary judgment to disregard isolated discriminatory remarks or comments unrelated to the decision-making process as insufficient to establish discrimination? (2) Are evidentiary objections not expressly ruled on at the time of decision on a summary judgment motion preserved for appeal?"[67]

Appellate courts must remand for a new trial, rather than modify an excessive punitive damages award, when the error in awarding punitive damages is rooted in both constitutional excessiveness and the plaintiff's non-entitlement to punitive damages. Holdgrafer v. Unocal Corp., 160 Cal. App. 4th 907 (2008)

A leak in defendant Unocal Corporation's subterranean oil pipelines contaminated the plaintiffs' property.[68] Unocal immediately admitted it was responsible; worked with local officials and the plaintiffs to monitor the site and ensure there was no danger from the contamination; and provided the plaintiffs with financial assistance necessitated by the contamination.[69] The plaintiffs subsequently brought suit for various

62. *Reeves v. Safeway Stores*, 121 Cal. App. 4th 95, 106-07 (2004).
63. *Mamou*, 165 Cal. App. 4th at 711.
64. *Id.* at 711-12.
65. 218 Cal. App. 3d 1410, 1420 (1990).
66. See *Demps v. San Francisco Hous. Auth.*, 149 Cal. App. 4th 564, 578 (2007) (holding that if a trial court failed to rule on an evidentiary objection in a summary judgment setting, "the objections are deemed waived and the objected-to evidence included in the record").
67. Summary of Cases Accepted During the Week of January 28, 2008, http://www.courtinfo.ca.gov/courts/supreme/summaries/WS012808.PDF (last visited Mar. 12, 2009).
68. 160 Cal. App. 4th at 914-16.
69. *Id.* at 917-18.

claims and sought punitive damages.[70] To support their punitive damages claim, plaintiffs introduced evidence of Unocal's response to other oil spills.[71] Unocal objected that its conduct in response to the other spills was dissimilar to its conduct toward the plaintiffs and proposed a jury instruction informing the jury that Unocal should not be punished for its conduct toward non-parties.[72] The trial court, however, permitted the evidence and rejected the instruction.[73] The jury ruled in the plaintiffs' favor and awarded roughly $2.5 million in compensatory damages and $10 million in punitive damages, which the trial court remitted to $5 million.[74]

Relying on the United States Supreme Court's proscription of evidence of dissimilar conduct to prove the amount of punitive damages,[75] the Second Appellate District, Division Six, reversed the punitive damages award. The court ordered a new trial on both liability for punitive damages and the amount, if any, of punitive damages because evidence of the defendant's dissimilar acts toward others was improperly introduced to show entitlement to punitive damages, and the jury was not instructed that it could consider similar harm to others only in determining the amount of punitive damages.[76] The Court of Appeal held that it could not simply reduce the punitive damages award to its constitutional limit due to the inherently prejudicial nature of the evidence that produced a fatally flawed verdict awarding punitive damages.[77]

Indispensible real party in interest must be named in the caption of a writ petition.

Tracy Press, Inc. v. Superior Court, 164 Cal. App. 4th 1290 (2008)

When a petition for writ of mandate is filed in a Court of Appeal and names a trial court as the respondent, the petition must name and be served on the real party in interest.[78] In *Tracy Press, Inc. v. Superior Court*, the Third District applied the rule without carving out an exception for a claimed clerical error. After the trial court denied a newspaper's petition for a writ of mandate compelling a city and a city councilmember to produce public records, the newspaper sought writ review from the appellate court.[79] The newspaper neglected to name the city councilmember in the caption of its writ petition, instead naming only the city as a real party in interest.[80] The appellate court dismissed the writ petition because the newspaper named the city councilmember in its trial court writ petition, making her an indispensible party.[81] Having lost that petition, the newspaper could not obtain a conflicting order against the city from the appellate court.[82]

Federal procedural rules on enforcement and execution of federal court judgments trump conflicting California statutes, even those against public entities.

Leuzinger v. County of Lake, 253 F.R.D. 469 (N.D. Cal. 2008)

As stated by the United States Supreme Court, "federal courts are to apply state substantive law and federal procedural law" in diversity cases.[83] Thus, federal district courts, sitting in diversity, must apply an applicable Federal Rule of Civil Procedure, even if it directly conflicts with state procedural rules.

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70. *Id.* at 918-19.
71. *Id.* at 920.
72. *Id.* at 920, 933.
73. *Id.*
74. *Id.* at 925.
75. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).
76. *Holdgrafer*, 160 Cal. App. 4th at 933-34.
77. *Id.*
78. Cal. R. Ct., rule 8.486(a)(2), (e)(1).
79. *Tracy*, 164 Cal. App. 4th at 1294.
80. *Id.* at 1294-95.
81. *Id.* at 1297-1300, 1302.
82. *Id.* at 1301.
83. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

In *Leuzinger v. County of Lake*, a judgment creditor sought a writ of mandate from the United States District Court for the Northern District of California to compel satisfaction of her federal court judgment against a California county.[84] She contended Federal Rule of Civil Procedure 62 allowed her to enforce the judgment while the county's appeal was pending before the Ninth Circuit Court of Appeals because the county failed to file a supersedeas bond.[85] Rule 62(a) provides that "no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry," and Rule 62(d) allows an appellant to stay execution on a judgment by posting a supersedeas bond once an appeal is taken. In addition, Rule 69(a)(1) states that a money judgment is enforced by a writ of execution in accord with the procedure of the state where the court is located, "but a federal statute governs to the extent it applies." The judgment creditor argued that Rule 62 preempted California Code of Civil Procedure sections 916(a), 917.1(a), and 995.220, which do not require a county to post a bond to stay enforcement of a judgment pending appeal.[86]

The district court issued the writ of mandate because the judgment was enforceable after the county failed to request a stay or post a supersedeas bond pursuant to Rule 62.[87] Rules 62(d) and 69(a)(1) preempt California's procedures for enforcing the judgment, including California Code of Civil Procedure sections 916(a), 917.1(a), and 995.220, because those statutes conflict with federal procedural law and federal policy against unsecured stays.[88]

The proper dollar amount for a bond to stay enforcement of a money judgment pending appeal is 1.5 times the present value of the entire judgment even for a judgment that is to be paid in monthly installments.

Leung v. Verdugo Hills Hospital, 168 Cal. App. 4th 205 (2008)

A bond must be posted to stay a money judgment pending appeal, with the amount of the bond, if provided "by an admitted surety," to be "one and one-half times the amount of the judgment."[89] In *Leung v. Verdugo Hills Hospital*, a medical malpractice case, the trial court calculated the amount of the appeal bond based on a lump sum present value of the approximately $14.8 million judgment against the hospital, which was entered as a periodic payments judgment requiring monthly payments.[90] Specifically, the trial court required the posting of a bond in the amount of more than $22 million (or 1.5 times the $14.8 million present value of the judgment).[91] The hospital petitioned the Court of Appeal for a writ of supersedeas directing the trial court to reduce the amount of the bond.[92]

The Second Appellate District, Division Four, addressed the issue of whether the amount of the bond should be calculated based on the lump sum $14.8 million judgment or only on that portion of the judgment currently due or likely to come due during the appeal. The appellate court resolved the issue by determining that the lump sum present value of the judgment against the hospital is the "amount of the judgment"[93] for the purpose of calculating the bond required to stay the judgment.[94]

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84. 253 F.R.D. at 470.
85. *Id.*
86. *Id.* at 471.
87. *Id.* at 473.
88. *Id.* at 474-75.
89. Cal Civ. Proc. Code § 917.1(b).
90. *Leung*, 168 Cal. App. 4th at 210.
91. *Id.*
92. *Id.* at 211.
93. Cal Civ. Proc. Code § 917.1(b).
94. 168 Cal. App. 4th at 213, 217.

The time for commencing an appeal from an appealable order runs from the time the clerk mails a file-stamped copy even if the order calls for a proposed judgment which is never submitted.

Russell v. Foglio, 160 Cal. App. 4th 653 (2008)

Where the trial court's minute order directs the preparation of a written order, the deadline for commencing an appeal is dependent on the filing date of the trial court's signed written order.[95] In *Russell v. Foglio*, the trial court signed and served a file-stamped written order granting a motion to strike a plaintiff's complaint under the anti-SLAPP (strategic lawsuit against public participation) law, which is an appealable order.[96] The order directed the defendant to submit a proposed judgment within fifteen days, but the defendant never complied.[97] The court eventually entered judgment eight months later, and plaintiff appealed four months after that.[98]

The Second Appellate District, Division Eight, held that it did not have jurisdiction to review the order granting the anti-SLAPP motion because the plaintiff failed to timely appeal.[99] The Court of Appeal held service of the written order started the 60-day time to appeal.[100] It also determined that California Rules of Court, rule 8.104(d)(2) — which provides that "the date the signed order is filed" is the date of entry of an appealable order "if the minute order directs that a written order be prepared" — did not apply because the written order directed submission of a proposed judgment; it was not a minute order directing preparation of a formal written order.[101]

E-mail service of a judgment by the clerk does not trigger the 60-day appeal period under California Rules of Court, Rule 8.104(a)(1).

Citizens for Civic Accountability v. Town of Danville, 167 Cal. App. 4th 1158 (2008)

California Rules of Court, rule 8.104(a) establishes the time within which a party may file a notice of appeal and, thus directly affects a litigant's right to appeal as well as the appellate court's jurisdiction over the case. The rule requires a notice of appeal to be filed on or before "60 days after the superior court clerk mails the party filing the notice of appeal a... file-stamped copy of the judgment, showing the date [it] was mailed."[102] The rule and these principles were the focus in *Citizens for Civic Accountability v. Town of Danville.*[103] The trial court designated the matter complex and ordered electronic filing and service consistent with its local rules, which required the court to serve all orders electronically.[104] The clerk electronically filed and served the parties notice that judgment had been filed.[105] Nine days later, the plaintiff served a notice of entry of judgment.[106] Sixty days after serving the notice, the plaintiff filed its notice of appeal.[107] The defendant moved to dismiss the appeal on the basis that the clerk's e-mail service of the judgment triggered the 60-day period for filing a notice of appeal.[108]

The First District, Division Five, denied the motion to dismiss, concluding that the clerk's electronic service of the file-stamped judgment did not trigger the 60-day period.[109] The

95. Cal. R. Ct., rule 8.104.
96. 160 Cal. App. 4th at 657; see also Cal. Civ. Proc. Code § 425.16 (anti-SLAPP statute).
97. *Russell*, 160 Cal. App. 4th at 657.
98. *Id.* at 658-59.
99. *Id.* at 659.
100 *Id.*; see Cal. R. Ct., rule 8.104(a).
101. *Russell*, 160 Cal. App. 4th at 660.
102. Cal. R. Ct., rule 8.104(a)(1).
103. 167 Cal. App. 4th 1158.
104. *Id.* at 1160-61.
105. *Id.* at 1161.
106. *Id.*
107. *Id.*
108. *Id.* at 1160.
109. *Id.* at 1162.

appellate court explained that the term "mail," as used in California Rules of Court, rule 8.104(a)(1), refers only to "physical delivery by the United States Postal Service."[110]

Service of notice of entry of order on only one of a party's multiple attorneys is sufficient to trigger the time to file a notice of appeal.

Adaimy v. Ruhl, 160 Cal. App. 4th 583 (2008)

Following entry of a judgment, the plaintiff moved for a new trial.[111] The trial court denied the motion and the clerk mailed notice of entry of the order that same day.[112] Thirty-one days later, the plaintiff filed a notice of appeal from the judgment and the order denying a new trial.[113] The Second Appellate District, Division One, dismissed the appeal for lack of jurisdiction because the notice of appeal was filed after the expiration of the 30-day period to appeal.[114] The plaintiff claimed that the clerk's service of the notice of entry of the order was invalid, and thus the 30-day period to appeal never began, because the clerk served just one of the two law firms representing the plaintiff.[115]

The Court of Appeal rejected this argument, holding that service on only one of multiple attorneys provides a party sufficient notice to trigger the time period in which to file a notice of appeal, and thus the plaintiff filed his notice of appeal a day late.[116] The court also rejected the plaintiff's other arguments that the order itself was defective because it did not bear a file stamp and because it was titled "Ruling on Submitted Matter" instead of "Notice of Entry of Order."[117]

It is important for all counsel to be aware of the jurisdictionally significant holdings in this case, and to take steps to avoid problems that may result, for example, from an opposing party's service only on co-counsel. It should also be noted that the issue of what constitutes proper notice of entry of an order denying a new trial motion is pending before the Supreme Court in Silverbrand v. County of Los Angeles, *review granted August 16, 2006 (Case No. S143929) (oral argument held February 3, 2009).*

California Supreme Court to address permissibility of "suggestive Palma notice."

Brown, Winfield & Canzoneri, Inc. v. Superior Court, review granted (Dec. 12, 2007) (Case No. S156598)

In *Palma v. U.S. Industrial Fasteners, Inc.* (*Palma*), the California Supreme Court required the Courts of Appeal, when considering issuance of a peremptory writ of mandate in the first instance, to notify the respondent court and the real party in interest that such a procedure is being considered or requested and to give the real party in interest an opportunity to file a response on the merits, before issuing the writ.[118] In recent years, some Courts of Appeal have begun issuing a so-called "suggestive *Palma* notice," which discusses the merits of a writ petition with citation to authority, determines that the trial court ruling was erroneous, and gives the trial court the power and jurisdiction to change its order.

On December 12, 2007, the California Supreme Court granted review in *Brown, Winfield & Canzoneri, Inc. v. Superior Court.* The case has been briefed and awaits the scheduling of oral argument. The Supreme Court's grant of review is limited to the following questions: "(1) May a Court of Appeal issue a 'suggestive *Palma* notice'—that is, a notice that discusses the merits of a writ petition with

110. *Id.*
111. *Adams*, 160 Cal. App. 4th at 586.
112. *Id.*
113. *Id.*
114. *Id.*; see Cal. R. Ct., rule 8.108(a).
115. *Adams*, 160 Cal. App. 4th at 586-87.
116. *Id.* at 587-88.
117. *Id.* at 588.
118. 36 Cal. 3d 171 (1984).

citation to authority, determines that the trial court ruling was 'erroneous,' and gives the trial court the 'power and jurisdiction' to change its order? (2) If such an order is proper, absent exceptional circumstances, may it be issued without giving the real party in interest an opportunity to file opposition?"[119]

119. Summary of Cases Accepted During the Week of December 10, 2007, http://www.courtinfo.ca.gov/courts/supreme/summaries/WS121007.PDF (last visited Mar. 12, 2009).