Appeals, Writs and Post-Trial Motions

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Last year saw the first comprehensive overhaul of California's rules governing appeals since they were adopted almost sixty years ago. In the first part of this article, we summarize the most significant rule changes. In the second part, we discuss the noteworthy decisions from last year in the areas of appeals, writs and post-trial motions.

■ Rule Changes

Rules 1 to 18 of the California Rules of Court and other selected rules applicable to appeals were amended effective January 1, 2002. The revisions, several years in the drafting, were intended "to clarify the meaning of the rules and to facilitate their use by practitioners, parties, and court personnel." California Rules of Court introductory advisory comm. cmt. (West 2002). The revisions simplify wording, remove ambiguities, delete redundant and obsolete provisions, and restructure and reorder the rules "to promote readability and understanding." *Id*. The revisions are accompanied by extensive Advisory Committee Comments explaining the purpose and effect of the changes. These comments likely will prove to be invaluable interpretive aids for the courts when they are called on to construe and apply the amended rules.

The most significant changes are summarized below:

Rule 3. Extensions of Time to Appeal

Under former rule 3(a), when a party filed a motion for new trial, a motion for judgment notwithstanding the verdict (JNOV), or a motion to vacate the judgment, the time to appeal from the judgment was extended until 30 days after the date on which the motions were denied. As amended, the rule provides that the 30-day extension period begins to run when the superior court clerk *mails*, or a party *serves*, the order denying the motions or a notice of entry of that order. *See*, California Rules of Court, rules 3(a), 3(b) and 3(c). This amendment conforms the "trigger" for the time to appeal under rule 3 with that under rule 2, which governs the time to appeal from the judgment where no post-trial motion extends the time. Also, unlike the former rule, the amended rule provides for an extension if a party unsuccessfully moves for JNOV alone, without also moving for a new trial.

The wording of former rule 3(d) left it unclear whether appellant had 30 or 60 days to appeal from an order denying a motion for JNOV (which is separately appealable under California Code of Civil Procedure section 904.1(a)(4)) when the motion for JNOV was coupled with an unsuccessful motion for new trial. Amended rule 3(c)(2) eliminates this uncertainty by expressly providing that the time to appeal from an order denying a motion for JNOV is governed by rule 2 (60 days after the clerk mails, or a party serves, a file-stamped copy of the order or a notice of entry of the order), unless the time is extended beyond the 60 days by rule 3(e)(2) governing cross-appeals.

Finally, in a substantive change designed to encourage litigants first to seek relief from adverse appealable orders in the superior court, amended rule 3(d) provides for an extension of time to appeal from any appealable order where any party makes a procedurally proper motion for reconsideration of that order under Code of Civil Procedure section 1008. The rule, however, takes no position on the unsettled question of whether an order denying a motion to reconsider is itself appealable. *See, Hughey v. City of Hayward*, 24 Cal.App.4th 206, 208 (1994) ("There is a split of authority as to whether an order denying reconsideration is appealable."); *compare Santee v. Santa Clara County Office of Educ*., 220 Cal.App.3d 702, 710-11 (1990) (appealable), with *Rojes v. Riverside Gen. Hosp*., 203 Cal.App.3d 1151, 1160-61 (1988) (non-appealable).

Rule 4. Reporter's Transcript

In a substantive change designed to speed preparation of the reporter's transcript, amended rule 4(a)(1) requires an appellant who intends to proceed without a reporter's transcript to serve and file a notice so stating within ten days after filing the notice of appeal. An appellant who neglects to file either a "notice designating a reporter's transcript" or a notice of intent to proceed without one will receive a 15-day default notice from the superior court clerk under amended rule 8(a).

Like the former rule, amended rule 4 provides that a party may avoid depositing the estimated cost of the transcript by substituting a previously prepared, certified transcript of the designated proceedings.

California Rule of Court, rule 4(b)(3). In a significant omission, however, the amended rule does not assign responsibility for repaginating the previously prepared transcripts or for preparing the indices and new covers, as required under rule 9(d).[1] As a practical matter, however, when a party supplies transcripts of fewer than all the designated proceedings, the task of repaginating and indexing should fall on the reporter because only he or she will be in a position to integrate the previously prepared volume(s) into the entire transcript. If clerks or reporters nevertheless construe the rule to require the party to assume these tasks, the option of substituting previously prepared transcripts will be of little use in large-record appeals.

Rule 5. Clerk's Transcript

Under amended rule 5(a)(4), parties now have the ability to "specify portions of designated documents that are not to be included in the transcript." Thus, for example, a party may specify that lengthy exhibits to a document be omitted when another designated document includes the same exhibits. "This is a substantive change intended to simplify and therefore expedite the preparation of the clerk's transcript, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents." California Rules of Court, rule 5(a) advisory comm. cmt. (West 2002).

In recent years, many superior court judges have adopted the practice of returning trial exhibits to the parties at the conclusion of the trial. In recognition of this practice, amended rule 5(a)(5) provides that a party with custody of an exhibit designated for inclusion in the clerk's transcript "must promptly deliver it to the superior court clerk." "Promptly," however, is not defined.

Rule 5.1. Appendixes Instead of Clerk's Transcript

Rule 5.1 has been amended in several respects to reduce the cost of proceeding by appendix in lieu of a clerk's transcript, to facilitate preparation of the appendix, and to enhance its usefulness to the court and the parties. First, adapting a rule from the Ninth Circuit Court of Appeals, rule 5.1 now requires the superior court clerk to provide counsel with a copy of the register of actions, if any, listing all the pleadings and other filings in the case. California Rules of Court, rule 5.1(a)(3)(B). Counsel must include the register in the appellant's appendix or the joint appendix. California Rules of Court, rule 5.1(b)(1)(A).

In another change inspired by Ninth Circuit practice, rule 5.1 now forbids the parties from including in an appendix "documents or *portions* of documents filed in superior court that are unnecessary for proper consideration of the issues." California Rules of Court, rule 5.1(b)(2) (emphasis added). (This is the analog to amended rule 5, discussed above, which permits parties to specify portions of designated documents to be omitted from the clerk's transcript.) At the same time, the appellant must include in the appendix "any item that the appellant should reasonably assume the respondent will rely on." California Rules of Court, rule 5.1(b)(1)(B). It is left to the appellant to reconcile these two provisions when deciding whether to include in the appendix a document which is "unnecessary for proper consideration of the issues" but which the appellant assumes "the respondent will rely on."

Next, in recognition of the time and expense required to obtain conformed copies of, or to determine the filing dates of, documents filed by other parties, amended rule 5.1 no longer requires that all documents in the appendix be conformed to show their filing dates. California Rules of Court, rule 5.1(c). Documents necessary to show that the appeal is timely, however, must still reflect the dates relevant to determine timeliness under rules 2 and 3. *See*, California Rules of Court, rule 5.1(b)(1)(A).

Under former rule 5.1, a joint appendix was due at the same time as the respondent's brief. Consequently, appellants sometimes faced the problem of citing to an appendix that might undergo further changes before being filed. Amended rule 5.1 solves this problem by providing that a joint appendix is due at the same time as the appellant's opening brief. California Rules of Court, rule 5.1(d)(2). Unlike former rule 5.1, which required the parties to consult in an

[1] Curiously, the advisory committee comment to rule 5.1(b) states that revised rule 4(d)(3) requires the clerk to send previously prepared transcripts "to the reporter for repagination, indexing, cover preparation, and binding." But revised rule 4(d)(3) contains no such requirement. Apparently, rule 4(d)(3) as originally drafted included such a requirement, but the requirement was deleted in response to lobbying by the California Court Reporters Association. *See,* Donna Domino, *Forget the French; Court Rules Will Be Plain English*, S.F. Daily Journal, July 16, 2001, *available at* http://www.dailyjournal.com. The Advisory Committee neglected to delete the corresponding language from its comment to rule 5.1, subdivision (b).

effort to produce a joint appendix, amended rule 5.1 merely "encourage[s]" them to do so. California Rules of Court, rule 5.1(a)(4). In practice, the courts are likely to see fewer joint appendixes.

Finally, amended rule 5.1 forbids the parties from including in an appendix "transcripts of oral proceedings that may be designated under rule 4." California Rules of Court, rule 5.1(b)(3). "The prohibition is a substantive change intended to prevent a party filing an appendix from evading the requirements and safeguards imposed by revised rule 4 on the process of designating and preparing a reporter's transcript, or the requirements imposed by revised rule 9(d) on the use of daily or other transcripts instead of a reporter's transcript…." California Rules of Court, rule 5.1(b) advisory comm. cmt. (West 2002). The prohibition undoubtedly will result in more business for court reporters.

Rule 10. Record in Multiple or Later Appeals in Same Case

Former rule 11 provided for a single record when multiple appeals were taken from the same judgment or when there was a cross-appeal under rule 3. Amended rule 10 provides more broadly for a single record when "more than one appeal is taken from the same judgment *or a related order*." California Rules of Court, rule 10(a)(1) (emphasis added). Orders "related" to a judgment include orders denying a motion for JNOV and postjudgment orders granting or denying attorney fees. *See*, California Rules of Court, rule 10(a) advisory comm. cmt. (West 2002).

Rule 13. Briefs by Parties and Amici Curiae

Rule 13 has been amended to provide that an amicus curiae's proposed brief must accompany its application for permission to file the brief. California Rules of Court, rule 13(b)(3). The amendment conforms amicus curiae practice in the court of appeal with that in the supreme court.

Rule 14. Contents and Form of Briefs

Rule 14 has been amended to adopt the federal practice of measuring briefs by words rather than by pages. Briefs produced on a computer are now limited to 14,000 words, including footnotes and excluding tables. California Rules of Court, rules 14(c)(1) and (3). A combined brief by a party who is both an appellant and a respondent, *see*, California Rules of Court, rule 16(b)(1), may include up to 28,000 words. California Rules of Court, rule 14(c)(4). Every brief must include a certificate "stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief." California Rules of Court, rule 14(c)(1). The 50-page limit, however, will continue to apply to briefs produced on a typewriter. California Rules of Court, rule 14(c)(2).

Amended rule 14 also unifies the formerly divergent practices of various districts concerning attachments to, and signatures on, briefs. Briefs may now include up to 10 pages of "copies of exhibits or other materials in the appellate record," California Rules of Court, rule 14(d), and briefs need not be signed. California Rules of Court, rule 14(b)(9).

Rule 15. Service and Filing of Briefs

Rule 15 has been amended to clarify that the parties may extend the period for filing any brief "by up to 60 days by filing one or more stipulations in the reviewing court before the brief is due." California Rules of Court, rule 15(b)(1). A stipulation is effective on filing, and the stipulated extension may not be shortened by the court. *Id.* Also, adopting a local practice of the First Appellate District, amended rule 15 requires a party seeking an extension from the court to show that (1) he or she unsuccessfully sought (or it would have been futile to seek) a stipulated extension, or (2) the parties have already stipulated to 60 days of extensions. California Rules of Court, rule 15(b)(2). "This is a substantive change intended to reduce the burden on reviewing courts by encouraging parties to proceed by stipulation whenever possible." California Rules of Court, rule 15(b) advisory comm. cmt. (West 2002).

Finally, amended rule 15 clarifies that a party need not seek an extension if it is able to file the brief during the 15-day grace period afforded by rule 17. California Rules of Court, rule 15(b)(3). The rule expressly requires the clerk to accept an otherwise-conforming brief submitted during the grace period. *Id.* Rule 15 thus resolves the former uncertainty of whether an appeal was vulnerable to dismissal during the interval between the date the brief was due and the date it was actually filed during the grace period. *See, also*, California Rules of Court, rule 17(a), advisory comm. cmt. (West 2002).

Rule 16. Appeals in Which Party Is Appellant and Respondent

The former rules failed to prescribe a briefing sequence for cases (other than those involving cross-appeals under rule 3) where a party was both an appellant and a respondent. This situation arises, for

example, when two parties appeal from the same judgment, or when one appeals from the judgment and another appeals from a post-judgment attorney fees order. Amended rule 16 fills the gap by requiring the parties in such a case to submit to the court a proposed briefing sequence within 20 days after the second notice of appeal is filed. California Rules of Court, rule 16(a)(1). The parties must submit the proposal jointly if they are able to agree. *Id.* This requirement gives the reviewing court "the benefit of the parties' views on what is the most efficient briefing sequence in the circumstances of the case." California Rules of Court, rule 16(a) advisory comm. cmt. (West 2002). After considering the parties' proposal(s), "the reviewing court must order a briefing sequence and prescribe briefing periods consistent with rule 15(a)." California Rules of Court, rule 16(a)(2). A party that is both an appellant and a respondent must combine its respondent's brief with either its appellant's opening brief or its appellant's reply brief, whichever is appropriate given the briefing sequence set by the court. California Rules of Court, rule 16(b)(1).

Rule 17. Failure to File Brief

Former subdivisions (a) and (b) of rule 17, which prescribed the 15-day grace period for filing appellant's opening briefs and respondent's briefs, respectively, have been combined into a single subdivision. *See*, California Rules of Court, rule 17(a). In addition, the rule has been amended to clarify that the grace period for filing a respondent's brief applies to a combined respondent's brief and appellant's reply brief. California Rules of Court, rule 17(b).

Rule 18. Transmitting Exhibits

Under former rule 10(d), the parties could not ask the superior court to transmit original exhibits to the Court of Appeal until the Court of Appeal notified the parties that the appeal had been scheduled for oral argument. By that late date in the progress of the appeal, however, the reviewing court had already completed much of its work. That anomaly has been corrected. Rule 18 now permits any party to file in the superior court a notice designating exhibits to be transmitted to the reviewing court "[w]ithin 10 days after the last respondent's brief is filed or could be filed under rule 17." California Rules of Court, rule 18(a)(1). Within 10 days after such a notice is filed, any other party may file a notice designating additional exhibits to be transmitted to the reviewing court. California Rules of Court, rule 18(a)(2). If any notice designates an exhibit in the custody of another party, that party must send the exhibit to the court of appeal. California Rules of Court, rule 18(b)(2). After the periods for designating and counter-designating exhibits have expired, "a party may apply to the reviewing court for permission to send an exhibit to that court." California Rules of Court, rule 18(c). These changes are "intended to increase the likelihood that when the reviewing court begins its work on the appeal it will have before it the exhibits that the parties believe are necessary to support their positions." California Rules of Court, rule 18(a) advisory comm. cmt. (West 2002).

■ Noteworthy Decisions

The following were among last year's noteworthy decisions in the areas of appeals, writs and post-trial motions.

Peremptory Challenge to Judge after Reversal of Dismissal Order

Code of Civil Procedure section 170.6, subdivision (2), grants an appellant the right to disqualify a trial judge "following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." The courts have accorded section 170.6 a broad reading to effectuate the statute's purpose, which is to allow an appellant to avoid the possible bias of a trial judge whose ruling has been reversed on appeal.

This trend continued with *People v. Superior Court (Maloy)*, 91 Cal.App.4th 391 (2001). There, the trial judge twice dismissed a complaint on the ground its allegations established that the statute of limitations had expired and that the court lacked jurisdiction. *Id.* at 393-94. Twice the judge was reversed on appeal. After the second reversal, the People challenged the judge under section 170.6. The judge rejected the challenge, reasoning that because the matter had yet to be tried, the matter had not been remanded for "a new trial" within the meaning of section 170.6. *Id.* at 396.

In response to the People's petition, the Court of Appeal issued a writ of mandate directing the trial judge to accept the peremptory challenge. The appellate court explained that, to effectuate the purpose of section 170.6, "new trial" should be construed

broadly to include cases in which a trial judge's dismissal order has been reversed and the matter has been remanded for a first trial. The court found support for its ruling not only in the cases that have broadly construed section 170.6, but in those that have broadly construed Code of Civil Procedure sections 656 and 657 to permit motions for "new trial" where no trial has yet been held; e.g., after "a judgment entered on a motion for summary judgment, a dismissal after a demurrer, or a motion to dismiss." *Id.* at 397.

Clerk's Mailing of Minute Order Does Not Trigger Time to Appeal

Former rule 2(a) stated that the notice of appeal "shall be filed on or before the earliest of the following dates: (1) 60 days after the date of mailing by the clerk of the court of a document entitled 'notice of entry' of judgment; (2) 60 days after the date of service of a document entitled 'notice of entry' of judgment by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal; or (3) 180 days after the date of entry of the judgment." California Rules of Court, rule 2(a) (West 1996).

In *Cuenllas v. VRL International, Ltd.*, 92 Cal.App.4th 1050 (2001), the court held that, though an unsigned minute order granting a motion to quash service of summons for lack of personal jurisdiction can form the basis for an appeal, the 60-day period for filing a notice of appeal from such a minute order under rule 2(a) was not triggered when the clerk mailed the parties a copy of the order. The court reasoned that this was because the order was not *titled* "notice of entry." *Id.* at 1051-52. For the same reason, plaintiff's service of a document *titled* "'Judgment of Dismissal,'" stating that the court had granted defendant's motion to quash, did not trigger the 60-day period under rule 2(a). *Id.* at 1052 & 1054.

Although the court was construing former rule 2(a), its ruling should apply as well to rule 2(a) as amended effective January 1, 2002, under which the 60-day period for filing a notice of appeal still is triggered by the court clerk's mailing, or a party's service, of a document titled "'Notice of Entry'" of judgment or a file-stamped copy of the judgment itself. *See*, California Rules of Court, rule 2(a)(1) & (2).

No Automatic Stay Pending Appeal of Order Denying Motion to Disqualify Counsel

Code of Civil Procedure section 916(a) provides that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby." In *Reed v. Superior Court*, 92 Cal.App.4th 448 (2001), the court held "an appeal from a pretrial order denying a motion to disqualify opposing counsel for a conflict of interest does *not, automatically*, stay all trial proceedings pursuant to Code of Civil Procedure section 916, subdivision (a)." *Id.* at 450 (emphasis in original). The court reasoned that, according to supreme court authority, an order denying a motion to disqualify counsel is appealable either because it is collateral to the merits or because it "is, in effect, an order refusing to grant an injunction to restrain counsel from participating in the case." *Id.* at 452-53 (citing *Meehan v. Hopps*, 45 Cal.2d 213, 215 (1955)). If the order involves a collateral matter, "then by definition the trial is not 'embraced [in] or affected [by]' the order appealed from, within the meaning of section 916, subdivision (a)." *Id.* at 453. Alternatively, if an order denying a motion to disqualify counsel is akin to an order denying a preliminary injunction, then there is no automatic stay because an "appeal of an order denying a preliminary injunction does not automatically stay the trial." *Id.* at 453-54. The court added: "To hold that an appeal from an order denying disqualification automatically stays the trial proceedings would encourage the use of such motions and appeals merely to delay the trial." *Id.* at 456.

The *Reed* court recognized that, under certain circumstances, an appellant will be prejudiced if an attorney is permitted to continue representing an adverse party while the appellant challenges on appeal the trial court's refusal to disqualify that attorney. The solution for the appellant is to seek a stay in the first instance from the trial court, which will exercise its discretion in the matter. If the trial court refuses to stay the proceedings, the appellant may seek a stay from the Court of Appeal — either by petition for writ of supersedeas in connection with the appeal from the order denying disqualification or, if the appellant has also filed a writ petition alleging the appellate remedy is inadequate, then by a stay request ancillary to the writ petition. *Id.* at 455. "If the party's petition for a writ of supersedeas is reasonably persuasive that the claim of disqualification likely has merit, the appellate court will probably be inclined to grant a stay of the underlying proceedings pending resolution of the disqualification issue. The Court of Appeal understands and recognizes that prejudice occurs if the trial is not stayed pending an appeal from a denial of an arguably meritorious

claim of disqualification." *Id.* (citing *People v. Hull*, 1 Cal.4th 266, 275 (1991); *Meehan*, 45 Cal.2d at 218).

No Judicial Notice of Facts Recited in Appellate Opinion

In *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, 91 Cal.App.4th 875 (2001), defendant law firm supported a demurrer to a complaint for legal malpractice by asking the court to take judicial notice of a statement in an earlier appellate opinion to the effect that the law firm did not represent plaintiff in negotiating a certain settlement agreement. The trial court took judicial notice of the statement in the appellate opinion, sustained the demurrer without leave to amend, and dismissed the action. *Id.* at 880.

The Court of Appeal reversed the dismissal, holding that the trial court erred by taking judicial notice of the truth of the factual statement contained in the earlier appellate opinion. The court explained that judicial notice is reserved for matters that are "assumed to be indisputably true and thus require no formal proof." *Id.* at 886. An appellate court's factual recitals are not "indisputably true." Consequently, though a trial court may take judicial notice of the indisputable facts that an appellate opinion was delivered, and that the opinion included factual findings, the trial court may not take judicial notice that those findings are true. *Id.* at 885.

Court of Appeal Has Inherent Power to Impose Sanctions for Frivolous Motion

California Code of Civil Procedure section 907 and California Rule of Court, rule 26(a)(2) both authorize a reviewing court to impose sanctions on a party who pursues a frivolous appeal. Neither provision, however, addresses the reviewing court's power to impose sanctions on a party who files a frivolous *motion*. Code of Civil Procedure section 128.5 empowers the trial courts to impose sanctions against a party who engages in "bad-faith actions or tactics that are frivolous," but that section does not speak to the power of reviewing courts.

Nevertheless, in *Dana Commercial Credit Corp. v. Ferns & Ferns*, 90 Cal.App.4th 142 (2001), the Court of Appeal held that the rationale of section 128.5 applies equally to appellate proceedings. *Id.* at 146-47. In addition, the court's "inherent power to control its own proceedings" encompasses the power to sanction not only frivolous appeals but also frivolous motions. "Consequently, this court has the inherent authority to impose sanctions for the filing of a frivolous *motion* on appeal, and will exercise its discretion to do so upon an appropriate showing." *Id.* at 147 (emphasis in original). The court suggested that the Judicial Council amend the rules to explicitly recognize the reviewing court's power to impose sanctions for filing a frivolous motion. *Id.* at 147 n.9.