APPEALS, WRITS AND POST-TRIAL MOTIONS

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We begin this year's review of developments and trends of interest to appellate practitioners with an update on the progress of the Appellate Process Task Force, appointed by Chief Justice Ronald M. George in May 1997. We then examine noteworthy decisions and pending cases in the areas of appeals, writs and post-trial motions. We conclude with a recap of the most important recent changes in the statutes and rules relating to appeals.

Appellate Process Task Force

In March 1999, the Appellate Process Task Force presented its Interim Report to the Judicial Council. We discussed the task force's recommendations in last year's review. *See California Litigation Review, 1998 Edition*, "Appeals, Writs and Post-Trial Motions" at 69-70. The task force has collected public comment on its recommendations and is now preparing its final report.

As of this writing, despite widespread opposition, the task force still intends to recommend a pilot project in which appellate referees would be assigned to decide certain cases on appeal. The task force is also considering proposals to:

- Amend California Code of Civil Procedure section 904.1[1] to provide that a judgment is not final (and, thus, not appealable) until costs and attorney fees, if any, have been awarded. Such an amendment would eliminate the losing party's need to file two appeals in quick succession — one from the judgment and another from the postjudgment cost/fee order.
- Amend Code of Civil Procedure section 906 to preclude reversal on the grounds of jury misconduct, accident or surprise, newly discovered evidence, or excessive or inadequate damages, unless such grounds were raised in a valid motion for new trial. The purpose of the contemplated amendment would be to shift some of the review function from the Court of Appeal to the trial court in the post-trial phase. Whether the amendment is necessary to achieve that purpose in questionable. Case law already requires parties to raise claims of excessive or inadequate damages in a new trial motion if the issue is to be preserved for appeal. *Schroeder v. Auto Driveaway Co.*, 11 Cal.3d 908, 918-19 (1974). Further, as a practical matter, claims of jury misconduct and newly discovered evidence, which require supporting declarations, must first be presented to the trial count if the losing party intends to raise the claims on appeal.
- Amend the rules of court to permit citation of unpublished opinions, possibly as persuasive rather than binding authority.

Supreme Court Decisions and Pending Cases

Appealability of Consent Judgments

In *Norgart v. Upjohn Co.*, 21 Cal.4th 383 (1999), the Supreme Court expounded on the rule that a party may not appeal a "consent judgment," that is, "a judgment entered by a court under the authority of, and in accordance with, the contractual agreement of the parties . . .." *Id.* at 400. This rule "'proceed[s] on the theory that by consenting to the judgment or order the party expressly waives all objection to it, and cannot be allowed afterwards, on appeal, to question its propriety, because by consenting to it he has abandoned all opposition or exception to it.'" *Id.* (quoting *Mecham v. McKay*, 37 Cal. 154, 158-59 (1869)).

[1] Unless otherwise indicated, all statutory references in this article are to the Code of Civil Procedure.

The court noted, however, that the rule has an important exception, one with which all appellate practitioners should be familiar—a party may appeal from a judgment to which he consents when the record reflects that both sides understood the consent was given simply to facilitate an appeal following an adverse ruling on a critical issue. *Id.* at 400; accord *Connolly v. County of Orange*, 1 Cal.4th 1105, 1111 (1992); *Building Industry Assn. v. City of Camarillo*, 41 Cal.3d 810, 817 (1986).)[2]

To determine whether the rule or its exception applies, the court considers the evidence of the parties' intent as reflected in their stipulation or elsewhere in the record. "The rule covers cases in which the parties intended a full and final settlement of their dispute, and the exception covers those in which they intended merely a hastening of its trial-court to appellate-court transfer." *Norgart*, 21 Cal.4th at 401. The court will "'construe the stipulation according to the intention and understanding of the parties at the time, and give it effect accordingly.'" *Id.* at 402 (quoting *Mecham*, 37 Cal. at 159).

In view of the court's intent-based approach to the issue, a party consenting to a judgment for the purpose of facilitating an appeal should ensure that the record clearly reflects both parties' understanding that the consent is merely pro forma, that it is given simply to facilitate an appeal, and that the party intending to appeal does not waive objections to the judgment. The safest way to accomplish this is to include such recitals on the face of the stipulation by which the parties consent to entry of judgment.

The *Norgart* court also considered whether the doctrine of "invited error" foreclosed the plaintiffs' appeal, given that they had stipulated to entry of summary judgment for the defendant in the wake of new law that appeared to be dispositive. *Id.* at 393-94, 402. The court explained that the doctrine of "invited error" rests on principles of estoppel. *Id.* at 403. It applies to prevent a party who has *misled* the trial court from profiting therefrom on appeal. *Id.* "[T]he doctrine has not been extended to situations wherein a party may be deemed to have induced the commission of error, but did not in fact mislead the trial court in any way—as where a party endeavor[s] to make the best of a bad situation for which [it] was not responsible." *Id.* (quoting *Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 213 (1991)) (internal quotation marks omitted). The court held the doctrine did not bar the plaintiffs' appeal because they "simply did not mislead the superior court in any way. It was apparent to all that the [plaintiffs] entered into the stipulation relating to the superior court's order in order to hasten review in the Court of Appeal." *Id.* They were attempting to "make the best of a bad situation" for which they were not responsible – the publication of adverse and potentially dispositive new law.

Oral Argument in Writ Proceedings

In February 1999, the Supreme Court held "that in the limited situations in which an appellate court may issue a peremptory writ of mandate or prohibition in the first instance, the court may do so without affording the parties an opportunity for oral argument." *Lewis v. Superior Court*, 19 Cal.4th 1232, 1237 (1999). For a complete discussion of *Lewis*, *see California Litigation Review, 1998 Edition*, "Appeals, Writs and Post-Trial Motions" at 70-71.

Constitutional Right to Appeal

On January 6, 2000, the Supreme Court heard argument in *Leone v. Medical Board*, 57 Cal.App.4th 1240 (1997), *rev. granted* December 23, 1997 (S065485). The issue in *Leone* is whether the state constitution guarantees litigants the right to appeal from an adverse judgment in a civil case, or may the Legislature relegate aggrieved parties in certain classes of cases to review of final judgments solely by means of a petition for extraordinary writ.[3]

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[2] In *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.*, 60 Cal.App.4th 79, 83 n.5 (1997), the Court of Appeal expressed the view that *Morehart v. County of Santa Barbara*, 7 Cal.4th 725 (1994) implicitly overruled *Building Industry Assn.* to the extent the latter authorized an appeal from a consent judgment. *Norgart*, however, cited *Building Industry Assn.* with approval on this very point. *Norgart*, 21 Cal.4th at 400. It, thus, appears the *Four Point* court was mistaken in concluding that *Building Industry Assn.* is no longer good law and that a consent judgment is never appealable.

[3] On April 3, 2000 the Supreme Court filed its opinion in *Leone*, 66 Cal.4th 660. The majority upheld as valid under the state constitution a legislative scheme that relegated physicians in certain licensing matters to appellate review solely by means of a writ petition, rather than by a direct appeal. *Id.* at 670. A complete analysis of *Leone* will be provided in next year's *California Litigation Review*.

Other Decisions

"One Final Judgment" Rule

A fundamental principle of appellate practice is that every suit has but one final judgment from which an appeal may be taken. 9 B.E. Witkin, California Procedure section 58, at 113 (4th ed. 1997) (characterizing "one final judgment" rule as a "fundamental principle of appellate practice in the United States"). Interlocutory orders, however denominated, are not appealable as judgments. *Id.* section 57, at 113. Indeed, because a judgment is, by definition, the *final* determination of the parties' rights (*Id.*), "'it is essentially redundant to speak of a "*final* judgment" . . .'" *Rubin v. Western Mutual Ins. Co.*, 71 Cal.App.4th 1539, 1546 (1999) (quoting *Sullivan v. Delta Air Lines, Inc.*, 15 Cal.4th 288, 304 (1997)).

In 1999, several courts had occasion to revisit this fundamental principle in the course of disposing of improper appeals from nonappealable orders. The most comprehensive analysis appeared in *St. Joe Minerals Corp. v. Zurich Ins. Co.*, formerly published at 75 Cal.App.4th 261 (1999).[4] There, an insurer defendant purported to appeal from a minute order summarily adjudicating that it owed its insured a defense to certain administrative actions. The order left several of the insured plaintiff's causes of action unresolved. The Court of Appeal directed the parties to brief the appealability issue. Both parties argued the case was appealable under the "collateral matter" exception to the one final judgment rule. The insured also argued the order was appealable as an injunction under Code of Civil Procedure section 904.1(a)(6). *Id.* at 271.

The Court of Appeal disagreed, and took the opportunity to reflect on the underpinnings of the one final judgment rule. The court noted that the rule is not *essential* "to a functioning system of justice which provides for appellate review of trial court decisions." *Id.* at 265. One could certainly design a functional system in which a litigant is entitled to appellate review of every trial court decision. Rather, the purpose of the one final judgment rule is practical — it forestalls "the oppressiveness and cost of 'piecemeal' disposition and review" (*Id.* at 266), a cost that is borne not only by the parties to the litigation (who might be willing to bear it), but also by the "taxpayers and other litigants." *Id.* at 267. To permit interlocutory appeals, in addition to appeals from judgments, as a matter of right, would dramatically increase the workload of the appellate court and "the commitment of resources necessary to do that work. The one final judgment rule, then, represents the outcome of what is, quintessentially, a *legislative* policy decision to limit access to the Courts of Appeal in the context of finite limits on the tax dollars which the state can devote to its appellate court system." *Id.* The court characterized the rule as "a statutorily based system of rationing access to the appellate courts" (*Id.* at 264), which was designed not only to prevent a well-heeled party from oppressing a poorer one but also to protect the public fisc. *Id.* at 267.

The minute order adjudicating the defendant's duty to defend was not a judgment. Nor was it an appealable collateral order; it did not require the defendant to pay money or perform an act, and it was integral (not collateral) to the merits of the ongoing litigation. *Id.* at 271-74. The court easily disposed of the plaintiff's argument that the order was appealable as an injunction, noting that the order did not require the defendant to do anything and that the plaintiff had not even sought an injunction. *Id.* at 274. After explaining why it would not "save" the infirm appeal by treating it as a petition for writ of mandate (*see* below), the court dismissed the appeal. *Id.* at 281.

The appeal met a similar fate in *Rubin*, 71 Cal.App.4th at 1539. There, an insured sued her insurer for breach of contract, "bad faith," and other causes of action based on the insurer's failure to investigate or pay the insured's claim for earthquake damage. *Id.* at 1541-42. The matter was assigned to an arbitrator, who decided only the amount of damage the insured's home had sustained. The plaintiff filed a petition to confirm the award, which was granted. The defendant purported to appeal from the order granting the petition, notwithstanding "the merits of all issues in the complaint except the amount of damage to plaintiff's residence await[ed] a trial." *Id.* at 1543. The trial court thereafter filed a document titled "Judgment Re Petition For Confirmation Of Appraisal Award." *Id.*

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[4] On March 1, 2000, the Supreme Court ordered that the opinion in *St. Joe Minerals* not be published in the official reports. No. S083919, 2000 Daily Journal D.A.R. 2355 (March 1, 2000). Accordingly, the opinion may no longer be cited as authority. Cal.R.Ct. 977(a).

The Court of Appeal held the "Judgment" was not final and, therefore, was not appealable. A judgment entered after confirmation of an arbitration award is treated like any other civil judgment and is, thus, subject to the same "finality requirement before an appeal may proceed . . .." *Id.* at 1547. The court noted that, under Code of Civil Procedure section 906, "the issues raised by defendant in the trial court concerning the legitimacy of the appraisal award can be raised in an appeal from a final judgment after the trial." *Id.* at 1548. Section 906 provides that intermediate rulings and orders involving the merits or substantially affecting a party's rights may be reviewed on appeal from the judgment. Section 906 makes intermediate rulings reviewable, not appealable. "[T]he fact that the judgment and the issues pertaining to the order confirming the award may ultimately be reviewed on appeal does not mean they are appealable now." *Id.* at 1545-46.

In *Doran v. Magan*, 76 Cal.App.4th 1287 (1999), the court invoked the one final judgment rule in dismissing an appeal from an order denying a motion to enforce a settlement pursuant to Code of Civil Procedure section 664.6.[5] *Id.* at 1292-93. "If no issues in the action remain for further consideration, the decree is final and appealable. But if further judicial action is required for a final determination of the rights of the parties, the decree is interlocutory." *Id.* at 1293. An order denying a motion for judgment under section 664.6 "rather than finally disposing of the action, expressly leaves it open." *Id.* Thus, the order is not appealable but, under Code of Civil Procedure section 906, is reviewable on appeal from judgment.

Even the United States Supreme Court chimed in on the one final judgment rule last year. In *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999), the court held an order imposing discovery sanctions on an attorney is not appealable, even where the attorney no longer represents a party to the action. *Id.* at 1918, 1923. The court explained that 28 U.S.C. section 1291, which codifies the one final judgment rule as it applies to federal courts, has been repeatedly interpreted "to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case."[6] *Id.* at 1919. The court identified the rule's "salutary purposes":

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.

Id. at 1919-20 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). (For further discussion of *Cunningham*, see "Attorneys," page 17.)

Treating Infirm Appeals As Writ Petitions

In recent years, the appellate courts have shown varying degrees of willingness to "save" infirm appeals by treating them as petitions for extraordinary writs. *See California Litigation Review, 1997 Edition*, "Appeals, Writs and Post-Trial Motions" at 67-68; *California Litigation Review, 1996 Edition*, "Appeals, Writs and Post-Trial Motions" at 64. As their workloads burgeon, however, the appellate courts appear to be increasingly reluctant to relax the one final judgment rule for the benefit of a party or attorney who burdens the court with an appeal from a nonappealable order.

In *St. Joe Minerals Corp. v. Zurich Ins. Co.*, *supra*, formerly published at 75 Cal.App.4th 261 (1999), the defendant attempted to appeal from a nonappealable order summarily adjudicating its duty to defend. When the court alerted the parties to its concern that the order was not appealable, both parties asked that, if the appeal was infirm, it be treated as a writ petition. *Id.* at 271. The court refused the request.

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[5] Code of Civil Procedure Section 664.6 provides for entry of judgment in accordance with the terms of a settlement in a pending case.

[6] 28 U.S.C. section 1291 states: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States [and certain other courts], except where a direct review may be had in the Supreme Court."

The court noted the "strong presumption" *against* treating an infirm appeal as a writ petition, "lest the jurisdictional nature of appealability be subverted by causing the exception to swallow the rule." *Id.* at 277. The court made clear it was not prepared to grant the parties any special dispensation simply because they had invested enormous resources in the litigation and the infirm appeal:

> Wealthy litigants (like both sides here) who can afford to hire law firms which become virtual billable hour machines chewing up whole forests of paper should not receive precedence over poorer litigants whose attorneys conduct their cases with enforced, spartan economy . . .. The one final judgment rule is a way of *rationing* entitlement to the appellate courts. It would be a perverse circumlocution of the Legislature's allocation of resources to routinely allow an indirect entitlement just because the lawyers for the parties can generate a massive quantity of paper. *Id.*

The court then identified seven factors, extracted from the case law, bearing on the decision whether to save an infirm appeal:

(1) Whether the defectiveness of the appeal was clear in advance . . .

(2) The degree to which the parties might have been misled by case law into believing that the order was appealable . . .

(3) The degree to which treatment as a writ petition facilitates judicial economy . . .

(4) The need to treat the proceeding as a writ petition because of the *in*adequacy of a remedy by appeal . . .

(5) The degree to which the case presents a public interest issue of statewide importance . . .

(6) The degree to which the briefing, already completed, covers the dispositive issues in the case . . .

(7) Whether the interests of justice and the need to "prevent unnecessary delay" require treatment as a writ petition.

Id. at 278-79; *see Doran v. Magan*, 76 Cal.App.4th 1287, 1294 (1999) (declining to treat defective appeal as writ petition where appellant "has not shown any unusual or compelling circumstances . . ., nor is he without adequate remedy").

The *St. Joe Minerals* court emphasized it would *not* consider the parties' willingness to stipulate that the appeal be treated as a writ petition: "While the *objection* of one party might be important in declining to so treat a defective appeal, the fact that the parties both want to have it treated as a writ is of no consequence . . .." *St. Joe Minerals Corp.*, formerly published at 75 Cal.App.4th at 279; compare *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 1831 (1996) (noting that all parties agreed infirm appeal should go forward).

Though the *St. Joe Minerals* opinion is no longer citable as authority (*see* note 3, *supra*), attorneys may nevertheless find the court's seven-factor test useful in navigating the somewhat murky law governing treatment of infirm appeals as writ petitions.

Review of Order Fixing Amount of Preliminary Injunction Bond

An order fixing the amount of a preliminary injunction bond is not independently appealable. *County of Los Angeles v. City of Los Angeles*, 76 Cal.App.4th 1025, 1028 (1999). The bond amount is usually fixed when the injunction is issued and, thus, is reviewable on appeal from the injunction order. *Id.* at 1027-28; California Code of Civil Procedure section 906 (West 1980). In *County of Los Angeles*, on appeal from the order granting the injunction, the Court of Appeal reviewed and vacated the order setting the bond amount. *County of Los Angeles*, 76 Cal.App.4th at 1026. Following remand, the injunction having been upheld, the trial court reset the amount of the bond. The order resetting the amount was not itself appealable because such an order "is not listed in section 904.1," which specifies appealable judgments and orders. *Id.* at 1027 (footnote omitted). Of course, the appellant could have challenged the order resetting the bond amount by means of a petition for writ of mandate.

Review of Order on Motion for Reconsideration

In *In re Marriage of Burgard*, 72 Cal.App.4th 74, 78-79 (1999), the appellant attempted to appeal from an order denying her motion for reconsideratrion of a sanctions order. The Sixth District Court of Appeal observed that "[m]ost of the recent cases

consider a motion for reconsideration never appealable" (*Id.* at 81), though the Sixth District itself has held "'[a]n order denying a motion for reconsideration . . . which raises new facts is . . . appealable.'" *Id.* at 81 n.7 (quoting *Santee v. Santa Clara County Office of Education*, 220 Cal.App.3d 702, 710 (1990)). The court sidestepped the question whether *Santee* can be reconciled with the more recent cases, holding that the appellant had failed to present new facts in her motion for reconsideration and, thus, even under *Santee*, the order denying the motion was not appealable. *Id.* at 81-82.

The court likewise found no need to choose between the competing lines of authority on the question whether a motion for reconsideration, like a motion for new trial or to vacate a judgment, extends the time to appeal by 30 days under Rule 3 of the California Rules of Court. "More recent cases . . . have held that Rule 3 does not extend time for filing since that rule applies *only* to motions for new trial and to vacate a judgment and not to postjudgment motions for reconsideration." *Id.* at 79; *see California Litigation Review, 1998 Edition*, "Appeals, Writs and Post-Trial Motions" at 75 (discussing *Conservatorship of Coombs*, 67 Cal.App.4th 1395 (1998)). The *Burgard* court held the appeal from the sanctions order was untimely even if the appellant's motion for reconsideration triggered a 30-day extension, because the appeal was not filed before the extension period expired. *In re Marriage of Burgard*, 72 Cal.App.4th at 80.

No Jurisdiction to Grant Reconsideration Motion after Entry of Dismissal Order

In *APRI Ins. Co. v. Superior Court*, 76 Cal.App.4th 176 (1999), the plaintiff filed a motion for reconsideration of an order granting the defendant's motion to quash service of process. Before ruling on the reconsideration motion, the court signed and entered a formal order granting the motion to quash and dismissing the defendant from the action. The court later granted reconsideration, vacated its order quashing service of process and dismissing the defendant, and denied the motion to quash. *Id.* at 180. On the defendant's petition, the Court of Appeal issued a writ of mandate directing the trial court to vacate its order granting reconsideration and denying the motion to quash. *Id.* The Court of Appeal held "[o]nce the trial court has entered judgment, it is without power to grant reconsideration. The fact that a motion for reconsideration may have been pending when judgment was entered does not restore this power to the trial court." *Id.* at 182. This rule applies to both judgments and signed dismissal orders, which are functionally equivalent to judgment. California Code of Civil Procedure section 581d (West Supp. 2000).

The plaintiff argued "the trial court could have treated her motion for reconsideration as a motion to vacate the judgment or for a new trial, each of which is a proper avenue for a direct attack on a judgment." *APRI Ins. Co.*, 76 Cal.App.4th at 182. The Court of Appeal rejected this argument, explaining that the trial court, in fact, treated the motion as one for reconsideration and that the appellate court generally will follow the trial court's lead in characterizing a motion:

> [T]he trial court granted the motion for reconsideration on its merits as such and did not treat it either as a motion to vacate or as a motion for new trial. We agree with the reasoning of the court in *Passavanti v. Williams*, [225 Cal.App.3d 1602 (1990),] at page 1608, that ". . . generally, appellate courts should not construe a motion expressly identified as being a particular motion to be an entirely different motion in the appellate court." *Id.* at 183.

(For further discussion of *APRI*, see "Judgments and Costs," page 60.)

"Good Faith" Settlement Determination Not Reviewable on Appeal from Final Judgment

California Code of Civil Procedure section 877.6 prescribes procedures by which settling parties may secure a judicial determination that their settlement is in good faith. Such a determination "shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." Code of Civil Procedure section 877.6(c) (West Supp. 2000). Any party aggrieved by such a determination "may petition the proper court to review the determination by writ of mandate." *Id.* section 877.6(e).

The issue in *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency*, 73 Cal.App.4th 1130 (1999), was whether a nonsettling defendant may forego challenging a good faith determination by writ petition but still raise the issue later on appeal from judgment. In

other words, is a good faith determination reviewable *solely* by means of a writ petition?

The court answered "yes." The court based its decision on the Legislature's apparent intent, evident from the legislative history of section 877.6, the strict statutory time limits and other statutory language, that good faith determinations receive prompt and conclusive review before trial. *Id.* at 1135-36.

> The same policy reasons which prompted the Legislature to afford parties aggrieved by good faith determinations the right to review by writ of mandate also militate in favor of a construction of the statute which renders a pretrial petition for a writ of mandate the *exclusive* means of review. A contrary construction, permitting an aggrieved party to postpone review of the good faith determination until after the balance of the claims were tried and a final judgment issued months or years later, would prevent the very finality and certainty that writ review was intended to promote. *Id.* at 1135 (emphasis added).

Thus, Code of Civil Procedure section 877.6 represents an exception to the general rule, embodied in Code of Civil Procedure section 906, that interlocutory rulings substantially affecting a party's rights may be reviewed on appeal from final judgment.

Order Setting Aside Code of Civil Procedure Section 998 Settlement Reviewable on Appeal from Judgment

In contrast to *Main Fiber Products*, discussed above, the court in *Premium Commercial Services Corp. v. National Bank of California*, 72 Cal.App.4th 1493 (1999), held an aggrieved party need not seek an extraordinary writ to challenge an order setting aside a settlement under Code of Civil Procedure section 998, but may challenge the order on appeal from judgment.

In *Premium*, the plaintiff accepted the defendant's settlement offer under section 998. *Id.* at 1495. Before judgment was entered, however, the defendant successfully moved to set aside the settlement on the ground that the defendant had mistakenly omitted from its offer a provision that each party would bear its own costs and fees. *Id.* The matter proceeded to trial. The jury returned a verdict for the plaintiff, but the court granted the defendant's motion for judgment notwithstanding the verdict and for new trial. *Id.* On appeal, the plaintiff contended that the trial court had erred in setting aside the settlement. *Id.* The defendant responded that, having failed to seek writ review of the order setting aside the settlement, the plaintiff was foreclosed from raising the issue on appeal. *Id.* at 1497.

The Court of Appeal rejected the defendant's argument. The court cited Code of Civil Procedure section 906, which, as noted above, provides that on appeal from judgment, the appellate court may review any interlocutory order involving the merits, necessarily affecting the judgment, or substantially affecting the rights of a party. *Id.* at 1498-99. An order setting aside a settlement under section 998 is such an interlocutory order. *Id.* at 1499. The *Premium* court found unpersuasive the decision in *Reid v. Balter*, 14 Cal.App.4th 1186 (1993), where the court stated that a defendant who failed to seek writ review of an order denying its motion to dismiss for failure to prosecute could not later challenge the order on appeal from judgment. "[A]lthough *Reid* would require a party dissatisfied with a trial court ruling to seek writ review as a prerequisite to appeal, we do not believe that appellate courts may impose such a condition where the Legislature has not seen fit to do so. *Premium Commercial Services Corp.*, 72 Cal.App.4th at 1498. The court concluded: "Since no statute required [the plaintiff] to seek writ of review of the trial court ruling at issue as a prerequisite to appeal, and since there is no persuasive authority to that effect, we find that the trial court order setting aside the section 998 settlement may properly be raised on this appeal." *Id.* at 1499. (For further discussion of *Premium*, see "Judgments and Costs," page 60.)

Enforcement Stayed without Bond Where Appellant Challenges Only Cost Portion of Judgment

Code of Civil Procedure section 917.1(a)(1) provides that an appeal from a judgment or order for "[m]oney or the payment of money" does not operate to stay enforcement of the judgment unless an undertaking is given. On the other hand, section 917.1(d) provides that "no undertaking shall be required pursuant to this section solely for costs awarded under Chapter 6 (commencing with Section 1021) of Title 14." The issue in *Ziello v. Superior Court*, 75 Cal.App.4th 651 (1999) was "whether a judgment debtor, who pays and does not appeal the amount of a judgment for damages, but who does

appeal from the trial court's order after judgment assessing costs and attorney fees, is required to file an appeal bond to stay execution on the unpaid amounts." *Id.* at 652.

The court held the defendant's appeal stayed enforcement, without the need for a bond. *Id.* The court rejected the plaintiff's contention "that the requirement of an undertaking to stay enforcement of a judgment for money cannot be avoided by paying the damages portion of the judgment and appealing only as to costs." *Id.* at 655. The court explained: "Since the appeal is limited to the order awarding costs, including attorney's fees, it is within the exclusion of the final provision of section 917.1(d) . . . [T]hat provision eliminates the requirement of an undertaking when the appeal is solely from an award of costs." *Id.* (For further discussion of *Ziello*, see "Judgments and Costs," page 63.)

Trigger of 60-Day Period for Trial Court to Rule on Motion for New Trial

Code of Civil Procedure section 660 provides that the trial court's jurisdiction to rule on a motion for new trial expires 60 days after either "service on the moving party by any party of written notice of the entry of the judgment" or, absent such notice, 60 days from the "filing of the first notice of intention to move for a new trial." When the moving party itself serves notice of entry of the judgment, does the 60-day jurisdictional period begin to run? In *People ex rel. Dept. of Transportation v. Cherry Highland Properties*, 76 Cal.App.4th 257, 262-63 (1999), the court held that because section 660 requires service "'on' the moving party," service *by* the moving party does not trigger the 60-day jurisdictional period. "The party moving for a new trial cannot serve the notice 'on' itself." *Id.* at 263.

Note that the result would be different under Rule 2 of the California Rules of Court, which governs the time for filing notices of appeal. Rule 2(a) provides that the period within which a party may file a notice of appeal expires "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* . . ." Cal.R.Ct. 2(a) (emphasis added).

A related problem sometimes arises under Code of Civil Procedure section 437c(l), which governs the time for filing a writ petition to challenge an order denying a motion for summary judgment or summary adjudication. That section provides that a party may file the writ petition challenging the order "within 20 days after *service upon him or her* of a written notice of entry of the order . . .." California Code of Civil Procedure section 437c(l) (West Supp. 2000) (emphasis added). Under the reasoning of *Cherry Highland Properties*, service of notice of entry *by* the party intending to challenge the order should not trigger the 20-day period for filing a writ petition. (For further discussion of *Cherry Highland Properties*, see "Trials," page 52.)

Motion for New Trial Based on Juror Misconduct

In two cases last year, the Court of Appeal reversed orders denying motions for new trial, holding the motions should have been granted on the ground of juror misconduct. In each case, the court took the opportunity to review the principles governing new trial motions based on juror misconduct.

Juror declarations recounting statements and conduct occurring during deliberations (as distinguished from declarations describing the mental processes of the jurors) are admissible to support a motion for new trial on the ground of juror misconduct. *Enyart v. City of Los Angeles*, 76 Cal.App.4th 499, 506-07 (1999); *McDonald v. Southern Pacific Transportation Co.*, 71 Cal.App.4th 256, 263 (1999); *see* California Evidence Code section 1150 (West 1995). Proof of juror misconduct raises a presumption of prejudice that, if not rebutted, requires a new trial. *Enyart*, 76 Cal.App.4th at 507; *McDonald*, 71 Cal.App.4th at 265. The presumption may be rebutted "'by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.'" *McDonald*, 71 Cal.App.4th at 265 (quoting *Hasson v. Ford Motor Co.*, 32 Cal.3d 388, 417 (1982)). Also, "[w]here the misconduct is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside." *Enyart*, 76 Cal.App.4th at 507.

Whether demonstrated misconduct was prejudicial "'is a mixed question of law and fact subject to an appellate court's independent determination.'" *Id.* at 508 (quoting *People v. Nesler*, 16 Cal.4th 561, 582 (1997)). If the appellate court determines it is

"reasonably probable that in the absence of misconduct the jury would have arrived at a different verdict, the moving party is entitled to a new trial." *Id.*; *see McDonald*, 71 Cal.App.4th at 266 (where verdict in civil case was nine to three, appellate court's finding of "a substantial likelihood that one juror was adversely affected" mandates new trial).

Applying the foregoing principles, the *McDonald* court held a motion for new trial should have been granted where the supporting declarations established (and the opposing declarations did not deny) that one of the jurors had injected his own expert opinion into the deliberations on a pertinent issue. "[The juror's] opinion not only derived from sources outside the evidence, but also rebutted a significant element of plaintiff's proof, which was otherwise undisputed. It was clearly misconduct." *McDonald*, 71 Cal.App.4th at 264. Based on "the entire record, as well as the closeness of the [nine to three] verdict" (*Id.* at 267), the court concluded "the presumption of prejudice [arising from the proof of misconduct] has not been rebutted." *Id.* at 266.

In *Enyart*, the court likewise held a motion for new trial should have been granted where the supporting declarations established (and the opposing declarations did not deny) that at least two majority jurors had expressed the view that the defendants (a city and a police officer) routinely "screw over" people, hide the truth, lie, and cannot be trusted. *Enyart*, 76 Cal.App.4th at 510-11. The plaintiff argued the negative attitudes these jurors expressed were based solely on the evidence in the case and, thus, were not a product of bias. The court disagreed, noting that "*generalizations* about the conduct and veracity of [the defendants], by definition, are not limited to the evidence adduced at trial . . . [I]t is clear the negative attitudes expressed by certain majority jurors were based on bias." *Id.* at 511. (For further discussion of *Enyart* and *McDonald*, see "Trials," pages 53 and 54.)

Amendments to Statutes and Rules

The following statute and rules of interest to appellate lawyers were amended in 1999. All changes took effect January 1, 2000.

Stipulated reversals – Code of Civil Procedure section 128(a)(8) was added to nullify the Supreme Court's controversial decision in *Neary v. Regents of the University of California*, 3 Cal.4th 273 (1992). The court in *Neary* held that, where the parties settle their dispute pending appeal and as part of the settlement stipulate that the judgment be reversed, the Court of Appeal should honor the stipulation "absent a showing of extraordinary circumstances that warrant an exception to this general rule." *Id.* at 284. Section 128(a)(8) effectively reverses the general rule from one favoring stipulated reversals to one disfavoring them. Under section 128(a)(8), the Court of Appeal "shall not reverse or vacate" an appealed judgment pursuant to a stipulation unless the court finds (A) there is "no reasonable possibility" the stipulated reversal will adversely affect the public interest or the interest of a nonparty, and (B) the parties' reasons for requesting reversal "outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement." Section 128(a)(8) places significant obstacles in the path of parties seeking to stipulate to a reversal, but the obstacles will not be insurmountable under appropriate circumstances. *See, e.g., In re Rashad H.*, No. B133778 (Cal.Ct.App. February 17, 2000) [2000 Daily Journal D.A.R. 1795] (accepting stipulated reversal under section 128 (a)(8)).

Briefs of amicus curiae in Supreme Court – Rule 14(b) was amended to authorize submission of letters supporting or opposing a request that the Supreme Court answer a certified question under Rule 29.5. If the court accepts the request, an amicus curiae may file a brief "on permission first obtained from the Chief Justice," as in any other case before the court.

Briefs of parties supporting or opposing request for answer to certified question – Rule 29.5 was amended to provide a procedure by which parties may support or oppose a request that the Supreme Court answer a certified question. Within 20 days after the request is filed in the Supreme Court, any party may file a brief supporting or opposing the request. Cal.R.Ct. 29.5(e)(1). "The brief may request that the California Supreme Court restate the certified question . . .." Cal.R.Ct. 29.5(e)(2). If the brief so requests, it must propose a restatement of the question. *Id.* Any party may reply to another party's brief within 10 days after the brief is filed. Cal.R.Ct. 29.5(e)(4).