

## Understanding the 90-Day Rule

**NEWS STORIES ABOUT BACKDATING** often relate to corporate scandal, but the backdating of judicial decisions has recently received attention in the legal press too.<sup>1</sup> Every California judge is familiar with the requirement to issue timely decisions under a constitutional provision (Article VI, Section 19) that sets a deadline for judicial decisions: 90 days after the matter is submitted for decision. This constitutional provision also includes a penalty: "A judge of a court of record may not receive...salary...while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision."

In other words, a judge's paycheck is contingent on timely decision making. This is why judges typically end hearings or oral arguments with a variation of the phrase "the matter stands submitted." This is the trigger for a decision. But how does the state controller (who issues judicial paychecks) know whether a judge has had an undecided pending matter on the court's docket for more than 90 days? The "constitutional and statutory scheme for prompt decisions is largely self-enforcing. It depends on the good faith and industry of the judges."<sup>2</sup>

More specifically, the legislature implements the directive through Government Code Section 68210, which requires judges to "make and subscribe...an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision." Thus, to be paid, judges must sign a salary affidavit shortly before the end of each month. A judge that falls behind does not forfeit pay for the delay; rather, payment is postponed until overdue matters are decided.<sup>3</sup>

For several reasons, however, this does not mean that a decision is guaranteed to issue on or before the 90th day after submission. First, if the 90th day falls on a weekend or holiday, the deadline moves to the next business day by operation of law.<sup>4</sup> Second, as a practical matter, judges are paid at the end of each month and only have to sign their salary affidavits shortly before then. Therefore, if the 90th day falls near the beginning or middle of the month, the judge still could have several days or weeks before having to sign the affidavit. In effect, the 90-day rule is not a strict 90 days but a practical deadline at the end of the month in which the 90th day falls.

Third, judges have the ability to vacate submission and resubmit cases—thereby restarting the 90-day period.<sup>5</sup> That means judges have the power to grant themselves an extension. Exercising this power, however, is fairly unusual and requires a valid reason (e.g., a court is awaiting a decision from a higher court that will control the pending matter).<sup>6</sup> Finally, it is possible—albeit rare—that a judge simply may fail to comply with the 90-day rule.<sup>7</sup>

A superior court judge in Alameda County recently was publicly censured for "willful misconduct" based on his "reckless submission of erroneous salary affidavits at times when he was aware he had overdue rulings, with disregard for whether they were true or false."<sup>8</sup> Similarly, a superior court judge from Riverside County recently faced charges that he backdated orders to make it appear that he had not violated the 90-day rule.<sup>9</sup> In one instance, a judgment apparently

was backdated to nearly a year earlier, and when one of the parties appealed, the court of appeal dismissed the appeal as untimely since the notice of appeal was filed over a year after entry of judgment.<sup>10</sup>

At the appellate level, the 90-day rule has an effect on the scheduling of oral arguments. Ninety days may not be enough time to carefully analyze complicated legal issues, draft a well-reasoned opinion (especially one for publication), and obtain a majority of justices to sign the opinion. As a result, California's appellate courts typically ensure timely compliance by entertaining oral argument only after they have a tentative decision.

Although undue delay may provide a basis for a writ of mandate to compel a judge to make a decision, it seems unwise to take that step except in the most drastic circumstances.<sup>11</sup> Fortunately, judicial misconduct of this sort is very rare. Indeed, from 1990 to 1999 the Commission on Judicial Performance imposed discipline only 50 times for misconduct categorized as "decisional delay/tardiness/attendance/other dereliction of duty."<sup>12</sup>

Clearly, the overwhelming majority of judges comply with their constitutional and ethical duties to issue timely decisions. Nevertheless, lawyers should understand the 90-day rule, if for no other reason than to answer the client's inevitable question: "When can we expect a ruling?" ■

<sup>1</sup> *Judge's Behavior Is Prejudicial Misconduct*, L.A. DAILY J. (Feb. 15, 2007); *Judge Quizzed about Blown Deadlines*, L.A. DAILY J. (Nov. 16, 2006); *Judge Denies He Backdated Orders*, L.A. DAILY J. (Oct. 5, 2006); *Watchdog Agency Charges Judge with Misconduct*, L.A. DAILY J. (May 4, 2006).

<sup>2</sup> *Hassanally v. Firestone*, 51 Cal. App. 4th 1241, 1246 (1996).

<sup>3</sup> *Id.* at 1244-45.

<sup>4</sup> *Id.* at 1243 (citing CODE CIV. PROC. §12a).

<sup>5</sup> See, e.g., CAL. R. CT. 2.900(b); CAL. R. CT. 8.256(e)(2), 8.524(h)(2) (Supreme court or court of appeal may vacate submission only by an order stating the court's reasons and setting a timetable for resubmission.); see also INT. OP. PRAC. & PROC. OF THE CAL. SUPREME CT. §VII, X ("Unless good cause to vacate submission appears, the opinions are filed on or before the 90th day after submission.").

<sup>6</sup> *Hassanally*, 51 Cal. App. 4th at 1241 (improper to "resubmit" a case unless justified by "unusual circumstances").

<sup>7</sup> See *Mardikian v. Commission on Judicial Performance*, 40 Cal. 3d 473 (1985); *McCullough v. Commission on Judicial Performance*, 49 Cal. 3d 186, 197 (1989); *In re Jensen*, 24 Cal. 3d 72 (1978).

<sup>8</sup> See <http://cjp.ca.gov/CNCensure/Freedman%20Severe%20Censure%206-26-07.pdf>

<sup>9</sup> See *Lawyer Says Messiness Delayed Judge*, L.A. DAILY J. (Jan. 23, 2007); <http://cjp.ca.gov/Notice%20of%20FP/Spitzer%207-18-06.pdf> (8/2/2006).

<sup>10</sup> See [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=42&doc\\_id=669624&doc\\_no=E036521](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=42&doc_id=669624&doc_no=E036521) and <http://cjp.ca.gov/Notice%20of%20FP/Spitzer%207-18-06.pdf>.

<sup>11</sup> *Hassanally*, 51 Cal. App. 4th at 1245-46 ("Only the boldest of counsel is likely to protest while the case remains undecided in the hands of the trial judge.").

<sup>12</sup> See COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990-1999, app. tbl. 6-B, available at <http://cjp.ca.gov/publicat.htm>.