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FEATURED ARTICLE

Brave New ~~World~~ Rules Revisited: This Year's Changes to the California Appellate Rules

Paul D. Fogel/Benjamin G. Shatz

Introduction

For the past four years, the Appellate Rules Project Task Force, chaired by California Supreme Court Associate Justice Joyce Kennard, has undertaken the mammoth project of rewriting California's appellate rules. The Judicial Council launched this project with the goals of making the rules easier to understand, weeding out antiquated provisions, eliminating ambiguities, and updating them to conform to modern practice. The enormity of this task has meant that the Judicial Council is approving the rules in installments. Last year, we outlined new Rules 1–18 in *Brave New ~~World~~ Rules: Changes to the First 18 California Appellate Rules,* 24 CEB Civ Litigation Rep 57 (Mar. 2002), and promised a sequel when the next batch had been approved; this is that sequel.

New Rules 19–29.9 took effect on January 1, 2003. Because they were rewritten, there is no substitute for a careful review. As with the first installment, advisory comments accompany the rules and provide helpful material for understanding the changes. The following are the

most significant revisions of which practitioners should be aware. Before starting with Rule 19, we discuss amendments to Rules 1 and 15, which also became effective on January 1, 2003.

Civil Case Information Statement

Under new Rule 1(f), after filing a notice of appeal, the court of appeal now will send appellants a newly created Judicial Council form (Form APP-001) entitled "Civil Case Information Statement." Appellants must complete, serve, and file this form within 10 days; the failure to do so will prompt the court to issue a notice (similar to a Rule 17 notice for the opening and respondent's briefs) with which the appellant must comply on pain of sanctions or dismissal.

The form is intended to assist the courts of appeal in processing civil appeals—primarily to identify jurisdictional defects or glaring record problems. Thus, it seeks information on appealability, timeliness of the appeal, prior appellate case history, bankruptcy or other stays that might affect the appeal, and information about the nature of the case and party and attorney information. Indeed, such forms already were in use in several of the six appellate districts, and the new statewide form was devised from them. See 1st Dist Local R 2; 4th Dist Local R 9. The new form supersedes inconsistent local district practices.

Stipulated Time Extensions

California Rules of Court 15 allows parties to accord each other extensions of up to 60 days to file each of the three principal briefs. Addressing a problem that complicated the stipulated extension process, amended Rule 15(b)(1) now requires only one signature to be an original; the others may be facsimile copies. Another problem was the often-overlooked requirement that the attorney deliver a copy of such stipulations to his or her client. Many practitioners met this requirement with a notation in the proof of service that delivery was made. Revised Rule 45(f) permits attorneys to continue that practice or simply certify in the stipulation or application seeking additional time that delivery has occurred.

Calendar Preference

Revised Rule 19 now requires a party seeking calendar preference (*i.e.*, expedited oral argument and possibly expedited briefing) to promptly file and serve a motion. Former Rule 19.3, which covered this topic, omitted a service requirement and precluded such motions any "later than the last day for filing the appellant's reply brief." This restriction was somewhat unfair to litigants because grounds for preference conceivably could arise after the filing of the reply brief, *e.g.*, a party's diagnosis of a terminal illness.

Abandoning and Voluntarily Dismissing an Appeal

An appellant wishing to voluntarily dismiss an appeal may file an abandonment in the superior court if the record has not yet been filed in the court of appeal; if the record has been filed, the appellant may file a request to dismiss or a stipulation signed by all parties, and the court generally will issue a dismissal order unless the appeal has been set for argument or argument has been held. See *Arden Group Inc. v Burk* (1996) 45 CA4th 1409, 1411 n1, 53 CR2d 492; *Lucich v City of Oakland* (1993) 19 CA4th 494, 23 CR2d 450. Under new Rule 20(c), any abandonment or request to dismiss must be served on all parties to the appeal; the former rule did not require such service. Also, when an appellant seeks to abandon or dismiss an appeal, new Rule 27(e)(2) allows a respondent to move for sanctions, provided the sanctions motion is filed before any order dismissing the appeal and no later than 10 days after the appellant's rely brief is due. This revision fills in a gap because the former rules set no deadline for such a motion when the appellant had requested dismissal.

Settlement Procedures

Several changes to Rule 21 are designed to encourage and streamline settlement. First, under Rule 21(a), the court may require a party to file and serve a prehearing conference statement; the former rule required only the appellant to do so, and service was not required. Second, new Rule 21(b) requires the parties to sign and file agreements reached at prehearing conferences, thus ensuring a written (and possibly enforceable) stipulation. This rule also endeavors to finalize settlements more quickly by deleting the requirement of judicial approval of a settlement agreement.

New Rule 21(d) . . . tolls briefing and sets clear dates for when tolling begins and ends.

New Rule 21(d) provides that when a settlement conference is set, briefing is tolled from the date of the court of appeal's notice of the setting until the date it mails a notice that the conference has been concluded. Under the former rule, only the due date for filing an opening brief—-not any brief—-could be extended by a settlement conference; the new rule tolls briefing and sets clear dates for when tolling begins and ends.

Notice of Settlement

New Rule 20 codifies common sense on what should occur after the parties settle: If a matter settles after a notice of appeal has been filed, the appellant must immediately file notice of the settlement with the court of appeal and serve it on all parties; if a clerk's or reporter's tran-

script is outstanding, the appellant must also serve the superior court so that work on the transcripts will cease (Rule 20(a)(1)); if oral argument has been scheduled, the appellant "must immediately notify the court of appeal by telephone or other expeditious method." Rule 20(a)(2).

Appellate Factfinding

The courts of appeal typically review factual findings rather than make them. Although courts of appeal are empowered under CCP §909 to admit new evidence and make factual findings, they rarely do. Former Rule 23(a) permits a party to ask the court to do so by motion or in a brief; new Rule 22(b) now requires a motion. Revised Rule 22(c)(3) also makes clear that the court may admit a document into evidence without holding a hearing.

Oral Argument Notice

A favorite (and unfortunately too common) "war story" among appellate practitioners has been receiving an oral argument notice only days or a week before argument. Such tales should now become a thing of the past because new Rules 23(b) and 29.2(c) require the court of appeal and supreme court, respectively, to give parties at least 20 days' notice of oral argument. The 20-day requirement should ensure adequate preparation time, reduce calendaring conflicts, and promote consistency. The rules allow the courts to shorten that period for good cause, but when this occurs, the court "must immediately notify the parties by telephone or other expeditious method." The hope is that this will happen only when exceptional circumstances dictate short notice.

New Rule 23(a) also gives each court of appeal discretion over whether, when, and where to hold special argument sessions. Former Rule 21.5 allowed this through local procedures and required that there be enough cases set for at least one day of hearings. The new rule simplifies the process and gives each court of appeal wider discretion about holding argument within its district. Thus, for example, the rule now allows a court of appeal to schedule a single oral argument to occur at a local law school or other similar venue.

Finality of Decision

Sometimes the publication status of a court of appeal opinion affects a party's decision on whether to file a rehearing or review petition. Under the former rules, the court of appeal might issue a publication order after filing the opinion and only shortly before the opinion became final as to that court (*i.e.,* 30 days after filing). In such a circumstance, it would be too late for the parties to seek rehearing or modification, and a would-be supreme court petitioner would have only about 10 days within which to prepare and file a petition for review. New Rule 24(b)(5) changes this by providing that if the court of appeal certifies a previously unpublished opinion for publication, the 30-day finality period begins to run anew from the date of the publication order. This ensures that a party considering whether to file a rehearing or review petition will have the full period within which to do so. However, a party who previously has filed a rehearing petition may not file a new rehearing petition merely because the court of appeal has decided to publish its opinion. Rule 25(b)(1)(B).

[I]f the court of appeal certifies a previously unpublished opinion for publication, the 30-day finality period begins to run anew from the date of the publication order.

Rule 24(d), which governs finality in certain appeals from money judgments, also has been rewritten to provide that when a party consents to a modification of the judgment amount, finality "runs from the filing date of the consent." Former Rule 24(c), which dealt with this issue, did not address when the finality time-period would run.

Rehearing

In accord with the new finality rules, Rule 25(b) now states that a petition for rehearing may be filed and served within 15 days after an order to publish an opinion, an order modifying the appellate judgment, or the filing of a consent to change in the amount of a money judgment (all events that restart the 30-day finality period under revised Rule 24). As noted, however, parties are entitled to file only one such petition, and if they have already done so, a new finality date occasioned by a publication order does not give them the right to file another one. Rule 25(b)(1)(B).

Cost Awards

Under the former rules, the court of appeal had to specify its award or denial of costs, even in decisions fully affirming or reversing, when it was clear who was the prevailing party. Revised Rule 27(a) relieves the court of the burden of specifying costs in such cases. Also, under new Rule 27(c), any party may recover the amount reasonably paid for any portion of the record, whether an original, copy, or both. The former rule inadvertently prevented a respondent from recovering costs incurred for an original record; this oversight presumably arose from the faulty assumption that a respondent would never order an original record (*i.e.,* forgetting that a respondent might counterdesignate original record material).

Petitions for Review

Under the former rules, the supreme court could review only "decisions" of the court of appeal and it was unclear whether a "decision" included an interlocutory appellate order. New Rule 28(a) clarifies that a party may

petition for review from any court of appeal decision or interlocutory order (*e.g.*, an order denying an extension of time or a motion to augment the record). In addition, new Rule 28(b)(4) specifies that one of the grounds for review is to seek a supreme court transfer to the court of appeal "for such proceedings as the Supreme Court may order." This provision fills a gap by recognizing the supreme court's long-standing practice of ordering review and transferring the matter to the court of appeal with instructions to conduct further proceedings.

New Rule 28.1(b)(4) now requires what always was good practice: Petitions for review must include not only a copy of the opinion from which review is sought but also any order modifying the opinion or directing its publication.

In accord with the shift from page limits to word counts, petitions for review and answers to such petitions are now limited to 8400 words, with replies limited to half that number. Rule 28.1(e). These limits roughly correspond to the former page limits. New Rule 28.1(b)(4) now requires what always was good practice: Petitions for review must include not only a copy of the opinion from which review is sought but also any order modifying the opinion or directing its publication.

Merits Briefs in the Supreme Court

Under the former rules, if a party chose not to file a new brief on the merits after a grant of review by the California Supreme Court but wanted to rely on a brief filed in the court of appeal, this previously filed brief was due in 15 days (together with a notice stating that the party wished to rely on it) rather than the 30 days permitted for a new brief on the merits. To simplify matters, revised Rule 29.1(a) creates a single 30-day deadline for the opening and answering briefs on the merits regardless of whether the briefs are newly drafted or merely copies of the court of appeal briefs. Furthermore, conforming to the shift from page limits to word counts, Rule 29.1(c)(1) provides that if the parties file new briefs on the merits, they must not exceed 14,000 words; reply briefs must not exceed 4200 words.

Certification of State Law Questions

Former Rule 29.5, allowing the U.S. Supreme Court, federal courts of appeal, and sister-state supreme courts to "certify" questions of law to the California Supreme Court, has been redrafted and renumbered as new Rule 29.8. Under the former rule, the foreign court (in practice, only the Ninth Circuit) needed to "certify" its question; the new rule deletes the unnecessary formality of "certification" (*i.e.*, documents stamped with the official court seal) and allows a mere "order" from the foreign court. Rule 29.8(b). To further simplify and expedite the process, any party wanting to support or oppose a request need no longer file a "brief" but now may file a letter. Rule 29.8(e). This change ends the double-briefing that occurred under the old rule, *i.e.*, filing briefs regarding whether the supreme court should accept the question, and then, if the question was accepted, filing briefs on the merits.

Remand From the Supreme Court

Under the former rules, when a matter was remanded from the supreme court to the court of appeal for further proceedings, renewed briefing in the latter court was limited to simultaneous briefing within 30 days after remand. Such briefing often was ineffective because the parties did not have the opportunity to respond to each other's new brief. Accordingly, new Rule 13(b) provides that within 15 days after finality of a supreme court decision remanding a cause to the court of appeal, any party may file a supplemental brief, and any other party has 15 days to file a supplemental responding brief. This preserves the 30-day time limit for supplemental briefing, but allows the parties to address the issues raised in opposing briefs. In this supplemental-briefing situation, submission occurs when the last supplemental brief is or could be filed under Rule 13(b), or if the parties stipulate to earlier submission. Rule 23(d)(2).

Other Important Appellate Law Changes for 2003

As if the new rules of court are not enough to keep appellate practitioners on their toes, there are several new statutes and federal rule changes affecting appellate practice that became effective January 1, 2003.

- **Encouraging Writ Review**. New CCP §166.1 provides that on written request of any party, or at the judge's discretion, a trial judge may express in any interlocutory order "a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." This statute is intended to encourage the court of appeal to consider a writ petition when the trial court believes that interlocutory appellate intervention is warranted. When a writ may be contemplated, practitioners may want to consider requesting §166.1 notations in orders; however, it remains to be seen whether such statements will persuade the courts of appeal to accept more writ petitions.
- **New Summary Judgment Law**. New CCP §437c(m)(2) alters appellate review of summary judgments. Now, before a court of appeal may affirm

summary judgment or summary adjudication on a ground not relied on by the trial court, it must "afford the parties an opportunity to present their views on the issue by submitting supplemental briefs." This is a significant change to appellate practice that concerns anyone involved in a summary judgment appeal.

- **Serving the State Solicitor General.** Last year, the California Attorney General's office created a new position, the State Solicitor General. This year, several new statutes require service of appellate briefs on the State Solicitor General in matters involving particular areas of the law, most notably civil rights cases (*e.g.,* Unruh Act claims, cases involving discrimination (including disability discrimination, hate crimes, sexual harassment)). See CC §§51.1, 55.2; Govt C §4461; Health & S C §§19954.5, 19959.5. These statutes apply to appellate briefs filed in the supreme court, the court of appeal, or the appellate division of the superior court.
- **Federal Practice Rules.** Although beyond the scope of this article, practitioners who handle federal appeals should be aware that this year brings many changes to Ninth Circuit practice: the Federal Rules of Appellate Procedure and the Ninth Circuit's Local Rules were amended December 1, 2002.

What's Next?

More new rules are coming. Stay tuned for next year's article!

SUPREME COURT WATCH

As Big Punitive Awards Get Bigger, a Flurry of Activity in the Courts

Christina J. Imre

With increasing regularity, headlines seem to report yet another blockbuster punitive damages verdict. California has certainly had its share. For example, in 1999, a San Bernardino jury awarded $116 million in punitive damages against an HMO for bad faith, five times the company's statutory net worth. See http://www5.cnn.com/ALLPOLITICS/time/1999/01/25/hmos.html. The case later settled on appeal. A Los Angeles jury assessed $4.9 billion in punitive damages against General Motors in a products liability case in which death and injury resulted from a fire, caused when a drunk driver rear-ended plaintiffs' Chevy Malibu. The trial court reduced the number to $1.09 billion, and the case later settled. See *GM Appeals $1.09 Billion Judgment in Fire Case,* Products Liability 3 (Jan. 2001).

And Southern California is not alone. In 2001, a Fresno jury assessed Ford Motor Company $290 million in punitive damages in a rollover "crashworthiness" case, finding that Ford's SUV, with its partly fiberglass roof, was particularly susceptible to causing injury or death in rollover accidents. *Romo v Ford Motor Co.* (2002) 99 CA4th 1115, 122 CR2d 139. The trial judge ordered a new trial due to jury misconduct during deliberations, but the Fifth District Court of Appeal reversed the new trial order, reinstating the verdict. Ford petitioned the California Supreme Court for review, supported by an avalanche of amicus curiae letters—from product manufacturers, insurers, and business organizations concerned with the escalation of punitive verdicts—urging that review be granted. The state high court rejected the petition. Three justices, Brown, Baxter, and Kennard, voted to grant review. http://www.appellatecases.courtinfo.ca.gov/search/mainCaseScreen.cfm?dist=5&doc_id=22673&rc=1.

As support for review, Ford and its amici argued that the award was grossly excessive and that the California high court has not issued a major opinion on punitive damages since 1991, even though in the interim, the U.S. Supreme Court has been unusually active in this area. See *BMW v Gore* (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589 (establishing "guideposts" for courts to use in deciding when punitive award is "grossly excessive" in violation of defendant's constitutional rights). See also *Cooper Indus., Inc. v Leatherman Tool Group, Inc.* (2001) 532 US 424, 149 L Ed 2d 674, 121 S Ct 1678 (breaking with its own precedent, court established de novo standard to review constitutional excessiveness claim). For analysis, see Imre, *U.S. Supreme Court Changes Punitive Damages Standard of Review: De Novo Review Required for Claims of Constitutional Excessiveness,* 23 CEB Civ LR 120 (June 2001) and Imre, *Punitive Damages in the Aftermath of Cooper: Unanswered Questions,* 23 CEB Civ LR 274 (Dec. 2001). Despite all this activity from the U.S. high court, the California Supreme Court has never applied these federal standards or evaluated their interaction with California's own rules for appellate review of punitive verdicts.

By rejecting review, the state high court let stand a new California record for the highest punitive verdict ever affirmed on appeal in a published decision, at least for the moment. The supreme court's rejection of Ford's *Romo* petition for review is also noteworthy for another reason—who voted for review. In early 2000, a concurring opinion authored by Justice Brown, joined by Justice