APPEALS, WRITS AND POST-TRIAL MOTIONS

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The legal skirmishing that followed the 2000 presidential election thrust appellate lawyers and appellate courts into the national spotlight as never before. It is fitting, therefore, that the same year saw both the publication of the report of California's Appellate Process Task Force and a major pronouncement from the California Supreme Court on the right to appeal.

We begin this year's review of developments and trends of interest to appellate practitioners with a look at the Task Force's report and recommendations. We then examine 2000's noteworthy decisions in the areas of appeals, writs and post-trial motions. We conclude with a recap of the most important recent changes in the rules relating to appeals.

Appellate Process Task Force

In May 1997, Chief Justice Ronald M. George announced the formation of an Appellate Process Task Force charged with the task of examining all aspects of the appellate process in California and recommending reforms in the function, structure and work flow of the Courts of Appeal. In March 1999, the Task Force issued its Interim Report, which we reviewed in *California Litigation Review, 1998 Edition*, "Appeals, Writs and Post-Trial Motions" at 69-70.

In August 2000, the Task Force issued a Report updating its Interim Report to account for public comment on the Interim Report and to present "new material on which the Task Force has been working." *Report of the Appellate Process Task Force* at 1 (Aug. 2000) ("*Report*"). Though not a final report, the Report included a number of recommendations "now ready for Judicial Council or other consideration." *Id.* The *Report* recommended:

- that the stand-alone divisions of the Second District in Ventura and the Fourth District in San Diego, Riverside and Santa Ana be converted into independent appellate districts;
- that the Administrative Presiding Justices Advisory Committee "submit an annual report to the Chief Justice and the Supreme Court addressing the workload and backlog of each district and division to ease analysis of equalizing caseloads;"
- that a new rule of court be adopted to require civil appellants to file a standardized docketing statement to aid the court in evaluating jurisdiction on appeal;
- that a new rule of court be adopted "to encourage the use of memorandum opinions when an appeal or an issue within an appeal raises no substantial points of law or fact" and
- that Code of Civil Procedure section 906 be amended to require that claims of juror misconduct, accident or surprise, newly discovered evidence and excessive or inadequate damages be raised in a motion for new trial as a prerequisite to raising them on appeal.

Report at 5.

The Task Force reports that it will continue to study proposals to substitute writ review for appellate review of certain post-judgment orders in civil actions; to reallocate jurisdiction in certain cases from the Courts of Appeal to the appellate divisions of the Superior Courts, (*see id.*); to create a single, statewide Court of Appeal to allow for "greater coordination between districts[,] . . . greater flexibility in allocating workload and greater uniformity in procedures," (*id.* at 6); and to improve "processes involving the publication and non-publication of appellate decisions." *Id.*

The Task Force will also continue to study what may be its most controversial proposal to date: the proposal to establish "a pilot project in two appellate districts to explore the use of subordinate judicial officers on appeal." *Id.* at 6.

The Task Force will continue to consider ways to "[i]mprov[e] the quality of appellate practice in civil cases," such as by "doing more to recognize appellate specialists" and establishing "standards for minimum continuing legal education for attorneys practicing in the appellate courts." *Id.*

The Task Force reports that it has *rejected* a proposal to alter the current rule that one panel of the Court of Appeal is not bound to follow decisions by another panel and a proposal to create a statewide, en banc panel to resolve conflicting Court of Appeal decisions. *Id.*

Chapter 2 of the *Report*, titled "The Work and Workload of the California Courts of Appeal," includes an informative review of the history of the Courts of Appeal and their respective workloads since 1904, when they were established by constitutional amendment. *Id.* at 9-14. The chapter also includes an interesting and revealing discussion of the courts' current procedures for processing both appeals and writs, procedures that appear to vary widely from district to district and even between divisions within a single district. *Id.* at 15-29.

Supreme Court Decisions

No Constitutional Right to Appeal

On April 3, 2000, the Supreme Court filed its much-anticipated decision in *Leone v. Medical Board*, 22 Cal.4th 660 (2000), addressing the right to appeal in California. The case arose when two physicians challenged a disciplinary ruling of the Medical Board of California by filing mandamus actions in Superior Court. The physicians appealed from the judgments denying relief in each action. The Board moved to dismiss both appeals based on Business and Professions Code section 2337, which provides that, notwithstanding any other provision of law, review of a superior court's decision in a mandamus action challenging Board-imposed discipline "shall be pursuant to a petition for an extraordinary writ." (The distinction between review by appeal and review by writ petition is significant because an appellant, unlike a petitioner, is entitled to oral argument before the appellate court and a written opinion disclosing the bases for the court's decision in the case.)

The Court of Appeal declined to dismiss the appeals. Citing article VI, section 11 of the California Constitution, which states that (with the exception of death penalty cases) the "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction," the Court of Appeal held section 2337 impermissibly limited the court's jurisdiction and the appellants' constitutional right to appeal. *Leone*, 22 Cal.4th at 664. (For a discussion of the Court of Appeal's decision in *Leone*, *see California Litigation Review, 1997 Edition*, "Appeals, Writs and Post-Trial Motions" at 63-64.)

The Supreme Court reversed the judgment of the Court of Appeal. In an opinion authored by Justice Kennard, joined by Justices Baxter, Werdegar and Chin, the court held article VI, section 11 does not guarantee litigants the right to appeal from judgments entered in all Superior Court actions. The court cited the plurality opinion in *Powers v. City of Richmond*, 10 Cal.4th 85 (1995) (also authored by Justice Kennard, joined by Justices Baxter and Werdegar), which concluded that the state constitution does not define or guarantee a right to appeal but simply "'serves to establish and allocate judicial authority . . . .'" *Leone*, 22 Cal.4th at 666 (quoting *Powers*, 10 Cal.4th at 91). "[T]he appellate jurisdiction vested in the Courts of Appeal by article VI, section 11, . . . encompasses review by extraordinary writ as well as review by direct appeal." *Leone*, 22 Cal.4th at 665.

The court expressly affirmed the power of "the Legislature to enact laws, such as section 2337, specifying that an extraordinary writ petition shall be the method for obtaining appellate review of a superior court judgment . . . ." *Id.* at 668. But the court added a caveat: "Because the appellate jurisdiction clause is a grant of *judicial* authority, the Legislature may not restrict appellate review in a manner that would 'substantially impair the constitutional powers of the courts, or practically defeat their exercise.'" *Id.* If a litigant can demonstrate that, in a given class of cases, the appellate courts are, for any reason, unable effectively to exercise their constitutionally derived "'power of appellate review by an extraordinary writ proceeding, then such a proceeding could not constitutionally be made the exclusive mode of appellate review.'" *Id.* (quoting *Powers*, 10 Cal.4th at 110). The court concluded this caveat had no application to the present case because "nothing in section 2337 substantially impairs a Court of Appeal's ability to effectively exercise its power to review and correct error in superior court administrative mandate decisions in physician discipline matters." *Id.* at 669.

The court added that, where a writ petition is the only authorized mode of appellate review, the Court of Appeal may properly exercise its jurisdiction by summarily denying the writ if it is procedurally or substantively deficient, and such a ruling is necessarily on the merits. *Id.* at 669-70. "An appellate court that summarily denies a writ petition for lack of substantive merit or for procedural defect thereby fulfills its duty to exercise the appellate jurisdiction vested in it by the state Constitution's appellate jurisdiction clause." *Id.* at 670.

Chief Justice George concurred in the majority opinion, noting "the extensive protections afforded physicians at the administrative level and, most particularly, at the superior court level, and . . . the important public interest in imposing timely discipline upon physicians . . . ." *Id.* at 674 (George, C.J., concurring). However, echoing his concurring opinion in *Powers*, he "cautioned against any holding that would permit the Legislature to undertake wholesale replacement of direct appeal with review by extraordinary writ, thereby 'restructur[ing], in a fundamental manner, the operation of the state's appellate process.'" *Id.* at 671 (George, C.J., concurring) (citation omitted) (quoting *Powers*, 10 Cal.4th at 117).

In separate opinions, Justices Mosk and Brown dissented. Justice Mosk stated: "For reasons fully articulated by the dissent in *Powers*, I continue to be persuaded that a right of direct appeal – including oral argument and a written opinion – is what the drafters of article VI, section 11 of the California Constitution and its predecessor sections had in mind by 'appellate jurisdiction.'" *Id.* at 675 (Mosk, J., dissenting). Justice Mosk emphasized that "writ review lacks those basic components of ordinary appellate review – oral argument and a written opinion – that ensure the merits of an appeal will be fairly considered." *Id.* (Mosk, J., dissenting).

Justice Brown agreed with Justice Mosk's reading of the drafters' intent (*see id.* at 676-77 (Brown, J., dissenting)), and she decried the court's acceptance of incremental legislative encroachments on the courts' jurisdiction, encroachments that she viewed as endangering the fundamental structural divisions of government and the individual liberties those divisions are designed to protect. *Id.* at 677-78 (Brown, J., dissenting). In comments responsive to Chief Justice George's concurrence, Justice Brown explained: "In my view, where the Legislature has asserted control over the right of appeal – a subject central to the judicial function – a case-by-case inquiry into the likelihood of adverse effects in the wake of a separation of powers breach is ill-conceived . . . for the simple reason that no effective method exists of making that inquiry until it is too late to avoid the danger it represents." *Id.* at 678-79 (Brown, J., dissenting). Also, contrary to the majority, Justice Brown concluded that, where a writ petition is the sole authorized means of obtaining appellate review, "the summary denial of writ relief by the Court of Appeal denies a benefit the Constitution itself confers." *Id.* at 679 (Brown, J. dissenting).

Standards for Reviewing Order Granting Motion for New Trial

In *Lane v. Hughes Aircraft Co.*, 22 Cal.4th 405 (2000), the Supreme Court expounded on the standards the Courts of Appeal should apply in reviewing an order granting a motion for new trial on the grounds of insufficient evidence or excessive damages. The court reaffirmed the prevailing rule that, where the evidence is in conflict and the jury could have returned a verdict for either side, a "properly constructed" order granting a new trial (i.e., an order that specifies reasons supported by evidence in the record) must be upheld. *Id.* at 414; *see id.* at 411-12. The reason for this deference to the trial court's ruling is evident: "'[T]he trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." *Id.* at 412 (citation omitted).

With respect to the trial court's procedural obligations when granting a new trial motion, the Supreme Court held (1) the trial court may cross-reference factual findings set forth in a different part of the order (e.g., the part granting a motion for JNOV) and need not "burden a new trial order by reiterating what it has already said at length with respect to another issue before it," (*id.* at 413) and (2) though the trial court may not direct an attorney to prepare the order granting the new trial motion (*see* Code of Civil Procedure section 657 (West 1976)), the trial court may adopt whatever it chooses from the moving party's briefs. *Lane*, 22 Cal.4th at 415. "Indeed, if a court could *not* rely on the reasons advanced in the briefs, their utility would be undermined and they would serve little purpose. The

'critical factor . . . is whose mental processes are being used, not whose language is being employed.'" *Id.*

Reopening Discovery after Reversal and Remand

In *Fairmont Insurance Co. v. Superior Court*, 22 Cal.4th 245 (2000), the Supreme Court resolved a conflict in the Court of Appeal decisions over whether the parties must seek permission from the trial court to conduct further discovery following a reversal on appeal and a remand for a new trial. The court held the parties may pursue further discovery without seeking leave of court, and "the last date for completing discovery is 15 days before the date initially set for the new trial of the action." *Id.* at 247. (For further discussion of *Fairmont Insurance Company*, see "Discovery," page 38.)

Other Decisions

Rules Governing Publication of Opinions

The simmering controversy over California's rules governing publication and depublication of Court of Appeal opinions (California Rules of Court 976-979) revolves around two key questions: Should all Court of Appeal decisions be published? If not, should all Court of Appeal opinions (including nonpublished opinions) nevertheless constitute precedent on which parties or courts may rely in later cases?

The court confronted both these questions in *Schmier v. Supreme Court*, 78 Cal.App.4th 703 (2000), an action to enjoin the Supreme Court and the Courts of Appeal from enforcing the rules governing publication and to compel them to publish all Court of Appeal opinions. The trial court sustained a demurrer to the complaint without leave to amend and dismissed the action on the ground the Supreme Court, alone, is vested with responsibility over publication of appellate opinions. *Id.* at 706-07.

The Court of Appeal affirmed. The court first held plaintiff lacked standing to bring the action because the complaint did "not identify any specific injury [he] or those he purports to represent have suffered or will suffer due to the nonpublication or depublication of an appellate opinion." *Id.* at 708. Though the court could have disposed of the appeal on that ground alone, it proceeded to explain why, in any event, the plaintiff could not state a viable cause of action.

The court noted that the California Constitution requires the Legislature "to provide for the prompt publication of such opinions of the Courts of Appeal 'as the Supreme Court deems appropriate.'" *Id.* In compliance with that directive, the Legislature enacted Government Code section 68902, which requires publication of those opinions of the Courts of Appeal "as the Supreme Court may deem expedient" and vests the Supreme Court with general supervision over the official reports. *Id.*

> These constitutional and statutory authorities evince a policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) "the expense, unfairness to many litigants, and chaos in precedent research," if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions.

Id. The rules governing publication of opinions are faithful to this policy and are "consistent with the statutory scheme they were intended to implement." *Id.* at 709. Accordingly, the rules are lawful. *Id.* at 709, 712.

The plaintiff also contended the rules governing publication conflict with Civil Code section 22.2, which provides that English common law supplies the rule of decision in California courts to the extent that law is not inconsistent with the federal or state Constitutions or California laws. The Court of Appeal found no common law rule concerning publication or citation of opinions. Moreover, any common law rule that all appellate decisions must be published and may be cited as authority would be:

> inconsistent with the Constitution and laws of this state, including the rules of court, which have the force of positive law . . .. By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts.

Id. at 709-10.

Finally, in what may be the most vulnerable portion of its analysis, the Court of Appeal rejected the argument that the rules governing publication "contravene the doctrine of stare decisis, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction." *Id.* at 710. The court explained that stare decisis "is a principle of judicial policy, not a rule of constitutional or statutory dimension. Therefore, the Supreme Court—California's highest court—is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the stare decisis doctrine." *Id.* (citation omitted). The court found support for its conclusion in the rules governing the federal court system. For example, rules of the United States Court of Appeals for the Ninth Circuit allow the court not to publish certain dispositions and provide that those dispositions "are not precedent and may not be cited except as relevant to law of the case, res judicata or collateral estoppel." *Id.* at 711 (citing 9th Cir. R. 36-1, 36-2, 36-3). (For further discussion of *Schmeir*, see "Pretrial Motions," page 50.)

But a system that forbids citation to nonpublished dispositions is a system that permits courts to reach divergent results in cases involving the same facts and issues. For this very reason, six months after *Schmier* was decided, the Court of Appeals for the Eighth Circuit *invalidated* that circuit's publication rules to the extent they prohibited citation to nonpublished dispositions. *See Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated*, No. 99-3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000).

In contrast to the *Schmier* court, the *Anastasoff* court examined the historical development of the doctrine of precedent and concluded "the judge's duty to follow precedent derives from the nature of the judicial power itself." *Id.* at 901. The judge's function and obligation is to determine what the law is, not to invent it. "Because precedents are the 'best and most authoritative' guide of what the law is, the judicial power is limited by them." *Id.* This limitation is crucial to the separation between the judicial and legislative branches of government. "If judges had the legislative power to 'depart from' established legal principles, 'the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions . . ..'" *Id.* (quoting 1 Blackstone, Commentaries 258-59).

The framers of the federal Constitution understood and accepted this limitation on judicial power, with its implicit doctrine of precedent. Accordingly, the court concluded, "8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional." *Id.* at 900.

> At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." . . . [S]uch a statement exceeds the judicial power, which is based on reason, not fiat.

Id. at 904 (emphasis omitted).

The *Anastasoff* court hastened to add it was not holding that all opinions must be published; rather, that all opinions must be considered precedent binding on the court in later cases until disapproved. *Id.* at 904-05.

Four months later, the Eighth Circuit, sitting en banc, vacated the panel's opinion in *Anastasoff*, not because it disagreed with the opinion but because later events had mooted the case. *See Anastasoff v. United States*, No. 99-3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000). Accordingly, "[t]he constitutionality of that portion of [Eighth Circuit] Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question . . .." *Id.*

The issue will surely arise again the next time a litigant unearths a non-published opinion favorable to and dispositive of his or her position. The rationale of the *Anastasoff* panel does not apply directly to California's rules governing publication and precedential value of appellate opinions, because California's appellate courts are not creatures of Article III of the federal Constitution. Nevertheless, our own courts and our Appellate Process Task Force would do well to consider the Eighth Circuit's observations on the nature of the judicial function.

Time for Ruling on Motion for New Trial

Under Code of Civil Procedure section 660, the court's power to rule on a motion for new trial expires "60 days from and after service on the moving party by any party of written notice of the entry of the judgment . . .." It is well settled that this.60-day period "is mandatory and jurisdictional." *Dodge v. Superior Court*, 77 Cal.App.4th 513, 517 (2000).

In *Dodge*, the court addressed several issues arising under section 660 and held:

- "Delivery of a conformed copy of the judgment, albeit not a document with the label 'notice of entry of judgment,' constitutes proper service of notice of entry of judgment under section 660." *Id.* at 518.
- The date on which the serving party files its proof of service is irrelevant for purposes of calculating the 60-day period under section 660: "The triggering event . . . is 'service on the moving party,' *not* filing the proof of service." *Id.* at 520; *compare People ex rel. Dept. of Transp. v. Cherry Highland Properties*, 76 Cal.App.4th 257, 262-63 (1999) (Where same party submitted judgment under Code of Civil Procedure section 664.5, mailed notice of entry of judgment under that section and moved for new trial, 60-day period for court to rule commenced when party filed proof of service; "section 660 requires that service must be 'on' the moving party. The party moving for a new trial cannot serve the notice on itself."), *discussed in California Litigation Review, 1999 Edition*, "Appeals, Writs and Post-Trial Motions" at 78.
- Section 660 states that a new trial motion "is not determined within the meaning of this section until an order ruling on the motion (1) is entered in the permanent minutes of the court or (2) is signed by the judge and filed with the clerk." Section 657 adds the requirement that, if the motion is granted, the order "must state the ground or grounds relied upon by the court . . .." Thus, a letter to counsel, signed by the judge, stating simply that the court "'grant[ed] the Motions for New Trial brought by counsel for the defendants'" (*Dodge*, 77 Cal.App.4th at 516), was ineffective to grant a new trial because it was not entered in the minutes or file-stamped, and because it did not state the ground or grounds on which the new trial was granted. *Id.* at 523.
- The moving party must make sure the court is aware of and acts before the 60-day statutory deadline for ruling on a motion for new trial. If the court does not act by the deadline, the motion is deemed denied. *See* Code of Civil Procedure section 660 (West 1976). The courts recognize no exceptions for mistake, neglect or other equitable considerations. "Fairness has little to do with it. With jurisdictional deadlines, the rule, like the song, is what a difference a day makes. If the statute is to provide exceptions, the job is for the Legislature, not the courts, to carve them out." *Dodge*, 77 Cal.App.4th at 524; *see also In re Marriage of Eben-King*, 80 Cal.App.4th 92, 108 n.10 (2000) (time for filing notice of appeal is absolutely jurisdictional, and cannot be extended by a trial or appellate court without statutory authorization, even for reasons of mistake, estoppel, or other equitable considerations).

(For further discussion of *Dodge*, see "Trials," page 70.)

In *Westrec Marina Management, Inc. v. Jardine Insurance Brokers Orange County, Inc.*, No. G023980, 01 Daily Journal D.A.R. 13 (Cal. Ct. App. 2000), the court considered whether Code of Civil Procedure section 1013(a), which extends certain deadlines to act when service is accomplished by mail, can apply to extend the 60-day period for the court to rule on a motion for new trial under section 660. The question had been answered negatively in *Meskell v. Culver City Unified School District*, 12 Cal.App.3d 815, 823-24 (1970). The *Westrec* court held that, notwithstanding amendments to section 1013(a) in 1980, the *Meskell* holding remains sound.

The *Westrec* court explained that the extensions provided for in section 1013(a) apply only to the party who is served, and only when service triggers that party's right or duty to perform an act or make a response. Notice of entry of judgment is not served on the court, nor does service of the notice on a party trigger the court's right or duty to perform any act. Consequently, the court's 60-day deadline to rule on a motion for new trial is not extended when notice is served on the moving party by mail.

Relationship between Rules 2 and 3 on Time for Filing Notice of Appeal

Rule 2 provides that, "[e]xcept as otherwise provided by Code of Civil Procedure section 870 or other statute or rule 3," a notice of appeal must be filed within 60 days after the clerk mails notice of entry of judgment, 60 days after any party serves notice of entry of judgment on the party filing the notice of appeal, or 180 days after entry of judgment, whichever is earlier. (California Rules of Court 2(a). Rule 3(b)) provides that, when any party serves and files a timely and valid notice of intention to move to vacate a judgment, the deadline for filing a notice of appeal specified in rule 2 is extended "until the earliest of 30 days after entry of the order denying the motion to vacate; or 90 days after filing the first notice of intention to move to vacate the judgment; or 180 days after entry of the judgment." California Rules of Court 3(b).

A motion under Code of Civil Procedure section 473 to set aside the judgment for mistake, inadvertence, surprise or excusable neglect qualifies as a motion to vacate the judgment for purposes of Rule 3(b). *See In re Marriage of Eben-King*, 80 Cal.App.4th at 108. But the motion will trigger an extension for filing the notice of appeal under Rule 3(b) only if the motion is served and filed "within the time in which, under rule 2, a notice of appeal may be filed" (California Rules of Court 3(b)), ordinarily 60 days after a party serves notice of entry of judgment. A section 473 motion filed after that time, even if timely under section 473, will not trigger an extension of time for filing the notice of appeal under Rule 3(b). *See In re Marriage of Eben-King*, 80 Cal.App.4th at 108-09.

In *Maides v. Ralphs Grocery Co.*, 77 Cal.App.4th 1363, 1368 (2000), the court faced the question "whether the 90-day provision of rule 3(b) can shorten the 60-day period of rule 2(a)." The question arose under the following circumstances. The plaintiffs filed a notice of intent to move to vacate the judgment on January 16, 1998, *before* the judgment had been entered. The court later entered judgment for the defendant, and the defendant served notice of entry of judgment on March 17, 1998. The plaintiffs filed a notice of appeal from the judgment on May 7, 1998, within 60 days after service of notice of entry of judgment but more than 90 days after they had filed their notice of intent to move to vacate the judgment. The defendant moved to dismiss the appeal, arguing that under Rule 3(b), the plaintiffs were required to file their notice of appeal within 90 days after they had filed their notice of intent to move to vacate the judgment.

The Court of Appeal rejected the defendant's position, holding "that the extension provision of rule 3(b) cannot be used to truncate the 60-day period of rule 2(a)." *Id.* at 1369. The court noted that "Rule 3(b) provides that the rule 2(a) periods shall be 'extended' under enumerated circumstances. Moreover, the title of rule 3 is 'Extension of time and cross-appeal.' An 'extension,' of course, denotes 'an additional period of time given one to meet an obligation.' Rule 3(b) unambiguously operates only to expand the ordinary time within which an appeal must be brought . . .." *Id.* (citation & footnote omitted).[1]

Protective Cross-Appeal When JNOV Granted?

An order granting a motion for new trial is appealable. Code of Civil Procedure section 904.1(a)(4). When the party who opposed the new trial appeals from the order granting it, the other party must file a protective cross-appeal from the "suspended" judgment to preserve his or her right to challenge that judgment if the order granting a new trial is reversed. *Beavers v. Allstate Ins. Co.*, 225 Cal.App.3d 310, 330 (1990). The appellate courts will not permit successive appeals from the order granting a new trial and from the reinstated judgment.

The rule is otherwise, however, when the trial court grants a motion for judgment notwithstanding the verdict (JNOV). An appeal lies from the newly entered judgment, and no protective cross-appeal from the original, now-vacated judgment is required or permitted. *Lippert v. AVCO Community Developers, Inc.* 60 Cal.App.3d 775, 777-78 (1976). If the JNOV is reversed and the original judgment reinstated, the party aggrieved by the original judgment may appeal from it. *Id.* at 779. This procedure has been upheld, despite the fact it results in successive appeals, because Rule 3(c) expressly provides for protective cross-appeals from the judgment when a motion for new trial is granted but not when a motion for JNOV is granted.

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[1] Division Five of the First District Court of Appeal reached a contrary result in *Kressler v. Troup*, formerly published at 66 Cal.App.4th 96, 805-08 (1998), but on December 22, 1998 the Supreme Court ordered that opinion not be published.

Id. at 778; *see* California Rules of Court 3(c).

Division Three of the Fourth District Court of Appeal caused a stir last year when it filed an opinion disagreeing with *Lippert* and holding that a party against whom JNOV is entered *must* file a protective cross-appeal from the now-vacated original judgment and may *not* appeal from the judgment if it is reinstated following reversal of the JNOV. *McFetters v. Amplicon, Inc.*, 82 Cal.App.4th 200, 225-28 (2000). The stir was short-lived, however. On November 15, 2000, the Supreme Court ordered the *McFetters* opinion not to be published in the official reports.

Accordingly, as the law now stands, when a JNOV is granted, the litigants face the prospect of successive appeals: one from the JNOV, and (if the JNOV is reversed) another from the reinstated judgment. It appears an amendment to Rule 3(c) will be required to conform the procedures governing protective cross-appeals when a new trial is granted and when a JNOV is granted.

Time for Filing Writ Petition

"'Where there is otherwise no statutory authority or time limit in filing a writ, it must usually be filed within 60 days'" after the ruling or order being challenged. *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal.App.4th 347, 356 (2000) (quoting *People v. Superior Court (Brent)*, 2 Cal.App.4th 675, 682 (1992)). However, except where the writ is governed by a statutory deadline, the court retains discretion to hear a writ petition filed after the 60-day period. *Id.* Lawyers seeking writ relief after the 60-day period should be prepared to explain to the appellate court why it should exercise its discretion to hear what appears to be an untimely petition.

In *Planned Parenthood Golden Gate*, the court agreed to hear a petition filed seven months after one of the orders it purported to challenge. The court explained that the order "implicates important privacy rights of third parties and we will not punish them for any possible failing by [petitioner]." *Id.* at 356-57. (For further discussion of *Planned Parenthood Golden Gate*, see "Discovery," page 41.)

Review of "Good Faith" Settlement Determination

A "good faith" settlement determination under Code of Civil Procedure section 877.6 is a nonappealable, interlocutory order, but the code expressly permits review of the determination by petition for writ of mandate. Code of Civil Procedure section 877.6(e) (West Supp. 2001). Suppose the Court of Appeal summarily denies the writ petition without considering the merits of the trial court's determination. May the aggrieved party obtain review of the determination when the party later appeals from the judgment?

In *Main Fiber Products, Inc. v. Morgan & Franz Insurance Agency*, 73 Cal.App.4th 1130, 1135 (1999), the court held a litigant cannot *forego* a writ petition then seek review of the good faith settlement determination for the first time on appeal after judgment. The court, however, declined to decide whether a litigant who *does* seek writ review, but whose petition is summarily denied, may later seek review on appeal. *Id.* at 1137 n.4 ("One authority has opined that 'if the writ petition is denied, review of a section 877.6 determination should lie by appeal from the ultimate judgment.' Because [appellants] never petitioned for a writ at all, we need not consider that possible exception to the rule just announced." (citation omitted)).

The question left open in *Main Fiber Products* was answered in *Maryland Casualty Co. v. Andreini & Co. of Southern Cal.*, 81 Cal.App.4th 1413 (2000). The court in *Maryland Casualty Co.* held that, when the Court of Appeal summarily denies a litigant's writ petition challenging a trial court's "good faith" settlement determination, the litigant may later challenge the determination on appeal after judgment. The court noted that section 877.6(e) on its face does not purport to bar review by way of postjudgment appeal and that the legislative history showed the Legislature did not intend to bar such review:

> [W]hile the Legislature viewed a writ petition *before* trial as a *preferable* means of reviewing good faith settlement determinations, section 877.6(e) does not foreclose postjudgment review. . ..
>
> . . . [W]ith knowledge that postjudgment appeals were already allowed by law, the Legislature enacted a statute so that 'any party aggrieved by the [good faith] determination *may* petition the proper court. . . [for a] writ of mandate.' (§ 877.6(e), italics added.) We fail to see how such permissive language could shut the door on postjudgment appeals.

Id. at 1424.

This holding is sound. A contrary ruling would have left aggrieved parties with no *right* to appellate review of a trial court's "good faith" settlement determination.

Review of Order Granting Nonsuit

When a defendant moves for nonsuit on multiple grounds and the trial court grants the motion on one ground, may the Court of Appeal review and affirm the order on any of the other grounds, on which the trial court did not rely? In *Alpert v. Villa Romano Homeowners Ass'n*, 81 Cal.App.4th 1320, 1328 n.8 (2000), the court noted a split of authority on the question. The court suggested that, where the alternative ground was that plaintiff's proof was deficient in some respect but the trial court did not rely on that ground in granting nonsuit, the appellate court should not consider it. "[T]he theory . . . [is] that we only need examine those grounds which a plaintiff may have been able to correct had they been called to its attention . . . ." *Id.* On the other hand, where the ground is that the *law* precludes the plaintiff from recovering, the appellate court should consider the ground as an alternative basis for affirming the nonsuit, whether or not the trial court relied on it. *Id.* at 1329 n.8. (For further discussion of *Alpert*, see "Pleadings," page 30.)

This approach is consistent with the general rule that an appellant may raise a new theory for the first time on appeal if it involves purely legal issues but not if it involves unlitigated or disputed facts. *See Richmond v. Dart Indus.*, 196 Cal.App.3d 869, 879 (1987) (Unfair to allow party to raise new theory on appeal where opposing party was not "reasonably put on notice to present all its evidence" pertinent to new theory.); *see generally* Jon B. Eisenberg, Ellis J. Horvitz & Howard B. Wiener, *California Practice Guide: Civil Appeals and Writs*, sections 8:229-8:243 (Rutter 2000).

Jurisdiction to Review Postjudgment Attorney Fees Award

When a judgment declares that the prevailing party is entitled to attorney fees and simply leaves the amount to be determined, an appeal from the judgment subsumes the issues of both entitlement and amount. *See Grant v. List & Lathrop*, 2 Cal.App.4th 993, 997 (1992).

In *DeZerega v. Meggs*, 83 Cal.App.4th 28 (2000), the judgment was silent on the subject of attorney fees. The plaintiffs appealed from the judgment. The defendants thereafter sought and obtained an order awarding them attorney fees. The plaintiffs did not appeal from the postjudgment order, which was separately appealable under Code of Civil Procedure section 904.1(a)(2). The Court of Appeal held it lacked jurisdiction to review the order:

> [T]he initial judgment said nothing about fees. The entire litigation of that issue occurred after the entry of the judgment from which the appeal was taken. Accordingly the judgment cannot be said to 'subsume' the later fee award. It follows that the exception adopted in *Grant* cannot be held to apply, and jurisdiction over the fee award cannot be found.

Id. at 44; *see Roth v. Parker*, 57 Cal.App.4th 542, 551 (1997) (Court of Appeal lacked jurisdiction to review discretionary postjudgment award of expert witness fees as costs, where notice of appeal was filed before fees were awarded); *California Litigation Review, 1997 Edition*, "Appeals, Writs and Post-Trial Motions" at 65.

Amendment to Rules

The following rules of interest to appellate lawyers were added or amended in 2000. Unless otherwise indicated, all changes took effect July 1, 2000.

Sealed records — Rule 12.5 was adopted to establish procedures for sealing and unsealing records on appeal and in original proceedings under rule 56. Subdivision (e) was added to rule 56 to cross-reference new rule 12.5. (Effective January 1, 2001.)

Amicus curiae briefs – Rules 14(b) and (c) were amended to allow the Attorney General to file amicus curiae briefs in the Supreme Court and the Courts of Appeal without first obtaining permission from the Chief Justice or Presiding Justice, except where the Attorney General is presenting the brief on behalf of another state agency or officer. These amendments were prompted by certain divisions' practice of refusing all amicus curiae briefs on appeal.

Judicial notice on appeal – Rule 14.5 was adopted to establish procedures for asking the Supreme Court or the Courts of Appeal to take judicial notice under Evidence Code section 459. The rule requires a motion separate from the brief.

Unfair competition cases – Rules 15(h), 16(d), 28(e)(7) and 56(b) were amended to require that briefs and petitions in an unfair competition proceeding under Business and Professions Code section 17200 be so identified on the cover and be served on the Attorney General and the local district attorney.

Writ petitions – Rule 24(d) was amended to grant the Court of Appeal discretion to order early finality if the court denies a writ petition after having issued an alternative writ or an order to show cause. Rule 56(a) was amended to require that, insofar as practicable, writ petitions comply with the formal requirements governing briefs under rule 15, unless rules 56-60 specifically provide otherwise. Rule 56(d) was amended to impose a 300-page limit on each volume of documents supporting a writ petition and to require that supporting documents in multiple volumes must be consecutively paginated.