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 Judicial Council's Appellate Process Task Force. We then examine the noteworthy judicial 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 May 1997, Chief Justice Ronald M. George announced the formation of an Appellate Process Task Force charged by the Judicial Council with 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 presented its Interim Report to the Judicial Council. "The Interim Report is a snapshot of a work-in-progress and does not represent the final views of the Task Force. It is, however, a fair representation of progress made to date on a number of issues being studied." (Interim Report of the Appellate Process Task Force, p. 1.)

The most significant — and controversial — interim recommendation is that two appellate districts conduct a three-year pilot project in which appellate referees would be assigned to decide certain cases on appeal. The task force proposes that referees be employed "where (1) the issues are clearly controlled by settled law; (2) the issues are factual and the evidence is clearly sufficient or clearly insufficient; or (3) the issues are matters of judicial discretion and the decision was clearly within the discretion of the trial court or clearly an abuse of discretion." (*Id.* at 4.) In cases assigned to a referee, the parties would be entitled to oral argument, and the referee's opinion would not be published. At any party's request, the appeal must be heard *de novo* by a three-judge panel of the court. "Absent a request for *de novo* review, the Referee's opinion would stand as the opinion for the Court of Appeal . . . ." (*Id.* at 48.)

Among the task force's other recommendations are the following:

1. The task force recommends that the stand-alone divisions in Ventura, San Diego, San Bernardino, and Orange Counties be converted into separate appellate districts. (*Id.* at 4.)
2. The task force recommends adoption of "a statewide docketing statement in civil appeals that can be used . . . to help identify jurisdiction and issues on appeal." (*Id.*)
3. The task force recommends that no change be made to California's rule that one Court of Appeal panel is not bound by the decisions of other panels.[1] (*Id.* at 5.)
4. The task force recommends enactment of a rule encouraging use of memorandum opinions "when an appeal or an issue within an appeal raises no substantial points of law or fact." (*Id.* at 4.) The memorandum opinion should "identify the issue or issues presented" and "include a succinct, straight-forward statement of only the relevant facts and a concise statement of controlling precedent and rationale." (*Id.* at 46.)

The task force continues to study proposals to substitute writ review for appellate review of certain postjudgment orders in civil cases and to

[1] In light of the recommendation that appellate panels retain their authority to disagree with one another, the task force's recommendation that appellate referees handle cases where "the issues are clearly controlled by settled law" is problematic. So long as one panel of the Court of Appeal remains free to disagree with another, the law probably cannot be regarded as "settled" absent a Supreme Court decision on point.

"[r]eallocat[e] jurisdiction in some cases from the Courts of Appeal to the appellate divisions of the superior court . . . ." (*Id.* at 5.) The task force opposes, at least for now, creation of a statewide en banc panel to resolve conflicts between the Courts of Appeal. (*Id.*)

The task force will now receive and evaluate comments on its Interim Report. The task force expects to issue its final report by Spring 2000.

Supreme Court Decisions and Pending Cases

Oral Argument in Writ Proceedings; Opinions in Writing with Reasons Stated

The most significant Supreme Court decision on appellate procedure in the past year was *Lewis v. Superior Court* 19 Cal.4th 1232 (1999). The decision addressed two distinct issues: (1) whether the real party in interest has a right to present oral argument before the court may issue a peremptory writ of mandate in the first instance, i.e., without first issuing an alternative writ or an order to show cause; and (2) whether the Court of Appeal's terse opinion satisfied article VI, section 14 of the California Constitution, which requires that decisions of the "courts of appeal that determine causes shall be in writing with reasons stated."

In an opinion authored by Chief Justice George and joined by Justices Mosk, Baxter, Werdegar, and Chin, the 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." (*Id.* at 1237.) The court found nothing in either the statutory scheme governing prerogative writs or the state constitution that required the court to hear oral argument before issuing a peremptory writ in the first instance. (*See Id.* at 1245-53 [discussing statutory scheme]; *Id.* at 1253-58 [discussing constitution].) The majority went to some length to explain why statutory language requiring that the petition be "heard" (*see Cal. Civ. Proc. Code* § 1088), construed in context, did not require the court to hear oral argument but only to "consider and evaluate the petition before granting the relief requested, even if the adverse party does not respond to the petition." (*Lewis v. Superior Court, supra*, 19 Cal.4th at 1250.)

The court emphasized that the judicial power to issue a peremptory writ in the first instance (*see Code Civ. Proc.*, § 1088), and thus the power to adjudicate the merits of the petition without first hearing oral argument, is a limited power to be exercised "only in extremely narrow circumstances." (*Lewis v. Superior Court, supra*, 19 Cal.4th at 1261.) The power is confined to cases where "petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue — for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts — or where there is an unusual urgency requiring acceleration of the normal process. . . .' [Citation.]" (*Id.* at 1241, quoting *Alexander v. Superior Court* 5 Cal.4th 1218, 1223 (1993).) In these narrow circumstances, "requiring oral argument would serve no practical purpose" and "needlessly would add to the workload of already overburdened appellate courts."[2] (*Id.* at 1260, fn. omitted.) Where these narrow circumstances are *not* present, i.e., where there is any reasonable argument the applicable law is unsettled "and there is no compelling need for an expedited decision, the court must follow the usual writ procedure and issue an alternative writ or order to show cause." (*Id.* at 1261.)

In the course of its discussion, the court confirmed that the state constitution *does* guarantee the parties a right to oral argument on *appeal*.[3] (*Id.* at 1253-55.) Dissenting Justices Kennard and Brown disagreed with the majority's conclusion that the pertinent constitutional provisions applied only to appeals and

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[2] The court expressed concern that overburdened appellate courts "might be disinclined to intervene to correct even the clearest and most obvious error by extraordinary writ" if they were obliged first to calendar the matter and hear oral argument. (*Id.* at 1260.) Justice Kennard disagreed and faulted the majority for its lack of faith in the conscientiousness of the appellate bench: "The . . . time required for oral argument is relatively modest, and I am confident, as the majority apparently is not, that Court of Appeal justices are too conscientious to allow this modest additional burden to dissuade them from rendering a decision that would save the trial court and the litigants the much greater expenditure of time and resources required for holding a needless trial and perhaps also a subsequent appeal." (*Id.* at 1275 [dis. opn. of Kennard, J.].)

[3] See article VI, section 2 of the California Constitution ("Concurrence of 4 judges present at the argument is necessary for a judgment" by Supreme Court) and article, VI, section 3 ("Concurrence of 2 judges present at the argument is necessary for a judgment" by Court of Appeal).

would have construed them to apply to writ proceedings as well. (*See Id.* at 1270-71 [dis. opn. of Kennard, J.]; *Id.* at 1275-76 [dis. opn. of Brown, J.].)

The court had considerably less difficulty disposing of the second issue, whether the Court of Appeal's opinion in the case at hand satisfied the requirements of article VI, section 14 of the California Constitution, which provides: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."[4] (See *Id.* at 1261-64.) The court held an appellate opinion satisfies the constitution if it recites the court's conclusions and the principal reasons underlying them. "[A]n opinion sufficiently states 'reasons' if it sets forth the 'grounds' or 'principles' upon which the justices concur in the judgment. . . . [T]his requirement is not subject to measurement by objective criteria, because what constitutes an adequate statement of reasons necessarily is a subjective determination." (*Id.* at 1262.)

The court confirmed that the appellate courts have no obligation to respond to every argument raised by the parties nor to address every authority the parties regard as controlling. Although it is "preferable" to do so, "a Court of Appeal has no *constitutional* obligation to discuss or distinguish decisions of other Courts of Appeal simply because a party deems them to be controlling or contrary to the result reached by the court. The constitutional requirement is satisfied as long as the opinion sets forth those reasons upon which the decision is based; that requirement does not compel the court to discuss all its reasons for rejecting the various arguments of counsel." (*Id.* at 1264.)

The *Lewis* decision will no doubt be well received in the halls of the appellate courts, which are currently seeking ways to increase efficiency and expedite the appellate process. Litigants can only hope that the barebones constitutional requirements for written opinions identified in *Lewis* will not become the order of the day and that the courts will not lose sight of the importance of thoroughly reasoned dispositions. As the Judicial Council's Appellate Process Task Force observed in its Interim Report, the constitutional requirement of a written decision with reasons stated not only "contributes to discipline in decision-making" but "promotes public confidence in the appellate courts and their processes." (Interim Report of the Appellate Process Task Force, p. 42.)

Legal Arguments Raised For First Time In Supreme Court

An argument that a decision of the Supreme Court should be overruled may be raised for the first time in the Supreme Court. It need not be raised in the Court of Appeal. In *People v. Birks* 19 Cal.4th 108 (1998), the Supreme Court explained: "The Court of Appeal must follow, and has no authority to overrule, the decisions of this court. [citation.] Because the issue now presented could not have been decided below, it is properly before us in the first instance." (*Id.* at 116, fn. 6; *cf. Cedars-Sinai Medical Center v. Superior Court* 18 Cal.4th 1, 21 (1998) [conc. opn. of Baxter, J.] [because one Court of Appeal panel "is free to disagree with a decision by another panel, division, or district, and may even reconsider its own prior decisions[,]" party has "no excuse" not to present Court of Appeal with argument that court should not follow decision of another panel, division, or district].)

Other issues too may be raised for the first time in the Supreme Court, at least where the issue is one "of law that does not turn on the facts of th[e] case, it is a significant issue of widespread importance, and it is in the public interest to decide the issue . . . ." (*Cedars-Sinai Medical Center v. Superior Court, supra,* 18 Cal.4th at 6.) Thus, in *Cedars-Sinai Medical Center,* the court addressed an issue that had not been raised or decided in the Court of Appeal but was raised for the first time in the petition for review: whether California recognizes a tort remedy for "first-party" intentional spoliation of evidence. (The court answered no.) The court noted that its "power of decision . . . extends to the entire case (Cal. Rules of Court, rule 29.2(a)), although as a matter of policy we ordinarily exercise that power only with respect to issues raised in the Court of Appeal (*Id.*, rule 29(b))." (*Id.*)

In justifying its decision to address the newly raised issue, the *Cedars-Sinai Medical Center* court

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[4] The Court os appeal's opinion, of course, was superseded by the Supreme court's grant of review and therefore will not appear in the official reports. It appears at 82 California Reporter 2d, at pages 106-108.

stressed the significance of the issue and the fact that, because the lower courts had recognized the tort of intentional spoliation, "delaying until some future case an announcement of our conclusion that a tort remedy should not be recognized in the circumstances present here would be extremely wasteful of the resources of both courts and parties, for they would continue to litigate such cases on the assumption that the tort exists." (*Id.*)

In a concurring opinion, Justice Baxter argued the court should not have addressed the issue. He pointed out that article VI, section 12 of the state constitution grants the Supreme Court jurisdiction to review the "decision" of the Court of Appeal for error. (*Id.* at p. 20 [conc. opn. of Baxter, J.].) Similarly, rule 29(a) of the California Rules of Court, which implements that jurisdiction, specifies the circumstances under which the court will grant "[r]eview . . . of a decision of a Court of Appeal." Because the Court of Appeal never addressed the viability of a cause of action for intentional spoliation, Justice Baxter asserted, the majority's decision to address the issue was in excess of its jurisdiction and contrary to established procedures. (*Id.* at 20-22 [conc. opn. of Baxter, J.].)

Supreme Court Power *Not* To Decide Issues Raised

Complementing the Supreme Court's authority to review certain issues not raised in the Court of Appeal (see above) is the court's authority *not* to review issues that *were* raised below, even after the issues have been fully briefed in the Supreme Court. Thus, in *Cotran v. Rollins Hudig Hall Internat., Inc.* 17 Cal.4th 93 (1998), the Supreme Court declared: "We . . . conclude that a handful of additional issues resolved by the Court of Appeal which plaintiff seeks to reargue here . . . do not warrant review by this court. Although we have not formally limited the scope of our review in this cause, that does not affect our power to consider 'any or all' of the issues addressed by the Court of Appeal. (Cal. Rules of Court, rule 29; . . . .)" (*Id.* at 109.)

Decision Of Issues Not Framed In Petition For Review

Ordinarily, the Supreme Court will not address an issue not fairly included within the issues framed by the petition for review. (See Cal. Rules of Court, rule 28(e)(2).) In *Shulman v. Group W Productions, Inc.* 18 Cal.4th 200, 233 (1998), footnote 13, the court noted that it will address such an issue where it must do so "to state and decide fairly and accurately the legal questions inherent in the case. (Cal. Rules of court, rule 29.2(a).)"

Constitutional Right to Appeal

Pending before the Supreme Court are two cases that raise the fundamental question whether the state constitution guarantees litigants the right to appeal from an adverse judgment in a civil case. (*See Leone v. Medical Board* 57 Cal.App.4th 1240, (1997) rev. granted Dec. 23, 1997 (S065485); *Landau v. Superior Court* 60 Cal.App.4th 940, (1998) rev. granted Apr. 15, 1998 (S068095).) Both cases arose under Business and Professions Code Section 2337, which states that, notwithstanding any other provision of law, review of a superior court's decision in a mandamus action challenging discipline imposed by the Medical Board of California "shall be pursuant to a petition for an extraordinary writ."

The Courts of Appeal reached opposite conclusions. The *Leone* court held: "[T]hat portion of section 2337 which provides that an appellate challenge to the superior court's judgment entered in an administrative mandamus action can only be done by extraordinary writ is an impermissible attempt to limit the constitutional jurisdiction of the Court of Appeal."[5] (*Leone v. Medical Board, supra,* 57 Cal.App.4th at 1250.) In contrast, the *Landau* court, without acknowledging *Leone*, held section 2337 did not run afoul of any state constitutional provision. (*Landau v. Superior Court, supra,* 60 Cal.App.4th at 951.)

The Supreme Court will decide whether the Legislature can, consistent with the state constitution, relegate an aggrieved physician to review solely by means of a petition for extraordinary writ, a procedure that (in contrast to review by direct appeal) does not guarantee the physician oral argument before the appellate court or a written opinion setting forth the bases for the court's ruling on the petition.

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[5] For a fuller treatment of *Leone*, see 1997 California Litigation Review, Appeals Writs and Post-trial Motions pages 63-64.

Court of Appeal Decisions

New Trial Motion As De Facto Motion For JNOV

In *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairsx* 67 Cal.App.4th 743 (1998), a homeowner sued his homeowners' association for invasion of privacy and breach of the association's covenants, conditions and restrictions. The trial was bifurcated between liability and damage phases. The jury found the association liable. Before the damage phase began, however, the court granted the association's motion for new trial. Moreover, the court announced that it "would keep on granting new trial motions as long as the jury returned liability verdicts for [the homeowner]." (*Id.* at 746.) The homeowner then petitioned for a writ to set aside the new trial order.

The Court of Appeal granted the petition. The court took the opportunity to review the distinctions between motions for new trial and motions for judgment notwithstanding the verdict (JNOV). The court explained that motions for nonsuit, directed verdict, and JNOV are "analytically the same and governed by the same rules." (*Id.* at 750.) The purpose of these motions "is to allow a party to prevail as a matter of law where the relevant evidence is *already in*." (*Id.*) An order granting one of these motions is strictly reviewed; the appellate court resolves conflicts in the evidence and draws all reasonable inferences favorably to the nonmoving party. (*Hansen v. Sunnyside Products, Inc.* 55 Cal.App.4th 1497, 1510 (1997).)

The purpose of a motion for new trial, on the other hand, "is to allow a *reexamination* of an issue of fact." (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs, supra,* 67 Cal.App.4th at 751.) A trial court has much wider latitude to grant a motion for new trial because doing so does not entail an immediate victory for either side but rather "the reenactment of a *process* which may eventually yield a winner." (*Id.*) The wider latitude accorded a court in ruling on a new trial motion is reflected in the relatively deferential "abuse of discretion" standard under which new trial orders are reviewed. (*Id.*)

When the trial court concludes all the evidence is in and the plaintiff cannot possibly prevail, the court should grant JNOV. On the other hand, "[w]hen a trial judge grants a motion for new trial based on insufficiency of the evidence, it is *not* because the judge has concluded that the plaintiff *must* lose, but only because the evidence in the trial that actually took place did not justify the verdict. Evidence might exist to justify the verdict, but for some reason did not get admitted; perhaps the plaintiff's attorney neglected to call a crucial witness or ask the right questions. *There is still the real possibility that the plaintiff has a meritorious case.*" (*Id.* at 581, fn. omitted.)

In the case at hand, the trial court purported to grant a new trial, but signaled its true intention "by stating on the record that plaintiff could *never* prevail given the reasonableness of the defendant's position." (*Id.* at 752-53, fn. omitted.) The Court of Appeal concluded: "It is clear from the record that the granting of the motion was a de facto [JNOV] . . . ." (*Id.* at 753.) Accordingly, the Court of Appeal reviewed the order under the strict standards governing review of orders granting JNOV — and found it wanting: "The de facto [JNOV] masquerading as a new trial order therefore must be the de facto equivalent of reversed. The case must now proceed to damages."[6] (*Id.* at 756.)

Sanctions and Frivolous Appeals

As we noted last year, judicial tolerance for frivolous appeals and less-than-competent counsel seems to be decreasing as appellate backlogs and workloads increase. The trend continues, so much so that one court took the trouble to dispense some free advice to trial attorneys who may be too close to a case to recognize its lack of merit. The advice: hire appellate counsel.

In *Estate of Gilkison* 65 Cal.App.4th 1443 (1998), the appellant, an attorney, appealed from a 1997 order approving the final distribution of the assets of a decedent's estate. The plaintiff did not challenge the distribution but contended "that the trial court abused its discretion in 1994 by denying his request for $4,078.51 in extraordinary fees." (*Id.* at 1446.)

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[6] The Court of Appeal observed the new trial order was erroneous for a second reason: it was premature. A trial court cannot entertain a motion for new trial "where the plaintiff has prevailed on the liability issue if the motion is made before the damages phase has even commenced." (*Id.* at 752, fn. 3.) The Court of Appeal, however, issued the writ based on the trial court's more fundamental error — "misusing a motion for new trial as a de facto dispositive motion." (*Id.* at 752.)

The Court of Appeal explained that "[t]he grant or denial of such fees is addressed to the sound discretion of the probate court" and noted that "[a]n attorney who prosecutes an appeal from an order addressed to the trial court's sound discretion is confronted with more than a daunting task." (*Id.* at 1448.) The attorney apparently was not up to the task: "Appellant does not even attempt to demonstrate just how the trial court abused its discretion in this case. He conclusionally states that the trial court disregarded the law and was prejudiced against him. Given the facts and circumstances as well as the precedents which govern review, this appeal was 'dead on arrival' at the appellate courthouse." (*Id.* at 1449.) The court then dispensed its advice:

> "[T]rial attorneys who prosecute their own appeals, such as appellant, may have 'tunnel vision.' Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice. We suspect that had appellant done so they would have advised him not to pursue this appeal." (*Id.* at 1449-50.)

The court imposed a $1,000 sanction on the appellant "for pursuing this frivolous appeal." (*Id.* at 1451.)

The defendant in *Westphal v. Wal-Mart Stores, Inc.* 68 Cal.App.4th 1071 (1998), should have heeded the *Gilkison* court's advice. Defendant appealed from a judgment for plaintiff in a personal injury action arising from a slip-and-fall accident on defendant's premises. Defendant contended the damages awarded — special damages of $8,000 and general damages of $150,000 — were excessive. (*Id.* at 1073-74.) The court's opening observations signaled the fate that was to befall the defendant: "Summarizing the evidence in the light most favorable to its position in the trial court, defendant asks us to be an 'independent voice of conscience' and find the general damages award is excessive. Defendant fails to appreciate that, as a reviewing court, we view the evidence through a different lens than does the trier of fact." (*Id.* at 1074.) The court explained that it would "consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor." (*Id.* at 1078.) So considered, the evidence "disclosed that plaintiff suffered severe pain following the accident, presently suffers from pain on a daily basis which creates functional lifestyle limitations, and will have chronic pain for the rest of her life." (*Id.* at 1080.)

The court then lowered the boom: "Given the stringent standard of appellate review for claims of excessive damages, the evidence in support of the judgment, and the absence of meaningful analysis by defendant, we conclude this appeal 'indisputably has no merit.' . . . There is no arguable basis for reversing the judgment." (*Id.* at 1081.) The court criticized defendant's statement of facts, which "omit[ted] pertinent testimony or glosse[d] over the degree of plaintiff's pain and suffering" (*Id.* at 1082), as well as its legal argument, which was "conclusory and present[ed] no meaningful, substantive analysis which might indicate that defendant's contention has some possible merit" (*Id.* at 1081). The court was also offended by the defendant's "unsubstantiated potshot" at the plaintiff's chiropractor. (*Id.* at 1082.)

The court sanctioned the defendant $11,000, payable to the plaintiff, and $2,500, payable to the clerk of the court "to compensate the court for the expense of processing, reviewing, and deciding a frivolous appeal." (*Id.* at 1082-83.)

Time To Appeal From Order Denying Motion For JNOV

An order denying a motion for JNOV is appealable under Code of Civil Procedure, Section 904.1, subdivision (a)(4). Rule 2 of the California Rules of Court gives the appellant 60 days from the date of service of notice of entry of an appealable order to file a notice of appeal, except as otherwise provided by, inter alia, rule 3. Rule 3 appears to *extend* the time to appeal from an order denying a motion for JNOV when the appellant filed both a motion for new trial and a motion for JNOV and both were denied: "When the same party has served and filed valid notices of intention to move for a new trial and to move for entry of a [JNOV], and both motions are denied . . . , the time for filing the notice of appeal from the judgment or from the denial of the motion to enter a [JNOV] is *extended* for all parties until the earlier of 30 days after entry of the order denying the motion for a new trial or its denial by operation of law, or 180 days after entry of the judgment." (Cal. Rules of Court, rule 3(d), emphasis added.)

In *Kressler v. Troup*, formerly published at 66 Cal.App.4th 796, (1998) mod. 67 Cal.App.4th 467b, the Court of Appeal construed rule 3 to *shorten* from 60 to 30 days the time to file a notice of appeal from an order denying a motion for JNOV. Thus, the court held, a notice of appeal from such an order filed 42 days after denial of the appellant's motion for new trial was untimely. (*Id.* at 805-806.) The court disagreed with a contrary holding in *Crotty v. Trader* 50 Cal.App.4th 765, 771 (1996). (*See* 66 Cal.App.4th at 808.)

The Supreme Court ordered the *Kressler* opinion depublished (*Kressler v. Troup* (Dec. 22, 1998, S074314) 1998 Cal. LEXIS 8542), so it is no longer authority in California. Nevertheless, until the interplay between rules 2 and 3 is clarified, either by the Supreme Court or by an amendment to the rules, prudent counsel will take steps to ensure that any notice of appeal from an order denying a motion for JNOV is filed within 30 days after denial of the appellant's motion for new trial.[7]

Effect Of Motion For Reconsideration On Time To Appeal Under Rule 3

Rule 3 also figured in the decision in *Conservatorship of Coombs* (1998) 67 Cal.App.4th 1395. Rule 3 extends the time to appeal from the judgment where a motion for new trial (rule 3(a)) or a motion to vacate the judgment (rule 3(b)) has been filed. The issue in *Coombs* was whether a motion for reconsideration of a judgment or an appealable order likewise triggered an extension of time to appeal under rule 3. The court said no. "Rules 3(a) and 3(b) are not ambiguous in their language with respect to the motions which trigger their application. Neither refers to motions for reconsideration. Following the general rules of construction, we decline to interpret those rules in a fashion inconsistent with their express language." (67 Cal.App.4th at 1398.)

The *Coombs* court noted its *disagreement* with "a number of appellate decisions [which] have concluded that '[a] motion for reconsideration under Code of Civil Procedure section 1008 is treated for purposes of rule 3 . . . in the same manner as a motion for new trial or a motion to vacate.'" (*Id.* at 1398-99, quoting *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1009.) The *Coombs* court noted that the reasoning of those cases "might justify the creation of a rule extending the time for appeal after denial of motions for reconsideration," but the court left the enactment of such a rule to the Judicial Council or the Legislature. (*Id.* at 1400.)

Time To Appeal From Judgment Entered After Matter Taken Under Submission

The clerk's mailing of a file-stamped copy of the judgment commences the 60-day period for filing a notice of appeal under rule 2(a), even though the matter had been taken under submission by the court before the judgment was entered. The time to file a notice of appeal is not affected by rule 309, which addresses the clerk's obligation to notify the parties of any ruling, order or judgment on a matter under submission. (*Hughes v. City of Pomona* 63 Cal.App.4th 772, 777 (1998).)

Appealability Of Judgment Entered Under Code Of Civil Procedure Section 998

In *Pazderka v. Caballeros Dimas Alang, Inc.* 62 Cal.App.4th 658 (1998), the court held a judgment order entered pursuant to a settlement under Code of Civil Procedure Section 998 is not appealable. The court explained that entry of a judgment under Section 998 is a ministerial act that no judge or jury ever considers. Consequently, "[a]n appeal from a section 998 judgment order would be meaningless, because there would be no record" for the Court of Appeal to review. (*Id.* at 667.) "[U]nless the [settlement] contract was void on its face," the appellate court "would have nothing upon which to base its conclusion." (*Id.*) The court added that the appropriate procedure for obtaining appellate review of a Section 998 judgment "is to request the trial court to vacate the judgment pursuant to [Code of Civil Procedure] section 473." (*Id.* at 667-68.) The trial court will then entertain evidence and make findings, which afford a basis for appellate review. The aggrieved party should appeal "from the order denying a motion to vacate [the] section 998 judgment."

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[7] The Appellate Rules Project Task Force of the Appellate Advisory Committee of the Judicial Council is currently undertaking a wholesale review and revision of the rules governing appeals. The task force will address the issue raised in *Kressler* and will likely amend the rules to clarify that an appellant has 60 days in which to appeal from an order denying a motion for JNOV.

(*Id.* at 669.)

New Record For Untimely Notice Of Appeal

In *People v. Funches* 67 Cal.App.4th 240 (1998), the appellant filed a notice of appeal 13 years, 4 months, and 10 days after imposition of the judgment from which he appealed. The Court of Appeal dismissed the appeal, but not before noting its historic significance: "The present case involves the most untimely notice of appeal in California history. It should not have been filed." (*Id.* at 244.)

Amendments to Statutes and Rules

The following statutes and rules of interest to appellate lawyers were amended in 1998. Unless otherwise indicated, the amendments took effect January 1, 1999.

Section 170.6 challenges after reversal — Code of Civil Procedure, Section 170.6 was amended to provide that a motion challenging a trial court judge may be made "following reversal on appeal of a trial court's final judgment" and that "the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so."

Clerk's transcript designation — Rule 5(a) has been amended to require that the appellant's notice to prepare the clerk's transcript "describe each document with particularity, including the title of the document and the date it was filed or, if the filing date is not readily available, the date it was signed." Minute orders and jury instructions, however, may be designated by generic description (e.g., "all minute orders," "all jury instructions given, refused, or withdrawn") and need not be designated by date. (Effective July 1, 1998.)

Attorneys' fees on appeal — Rule 26(a) has been amended to provide that, unless the reviewing court orders otherwise, (1) entitlement to recover costs on appeal does not include entitlement to attorneys' fees on appeal; and (2) entitlement to recover attorneys' fees on appeal should be decided by motion made in the trial court after the appeal under rule 870.2.