APPEALS, WRITS AND POST-TRIAL MOTIONS

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The past year has seen a number of developments and trends of particular interest to appellate practitioners. We begin with a brief report on the Judicial Council's task force on the future of the appellate courts. We then address the significant 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 rules governing appeals.

Task Force on the Future of the Appellate Courts

In May 1997, Chief Justice Ronald M. George announced the formation of a 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. Among the reforms the task force will consider are making appellate review discretionary rather than mandatory, establishing specialized appellate panels, reducing the size of appellate panels, curtailing or dispensing with oral argument, instituting tentative opinions, and creating en banc panels to resolve conflicts in decisions within a district or statewide. The task force will also examine budgeting and staffing issues, with an eye toward enhancing the efficiency of court administration. "Task Force Weighs Major Reforms to Appellate System," L.A. Daily Journal, Feb. 10, 1998, at 3.

According to task force member Associate Justice William F. Rylaarsdam of the Fourth District Court of Appeal, "We are putting everything on the table[.] . . . We are not going to reject ideas because they are politically infeasible or [because] it's too hard to get a constitutional amendment." *Id.* The task force is scheduled to deliver an interim report to the Judicial Council in November 1998.

Supreme Court Decisions and Pending Cases

Constitutional Right To Appeal

For the second time since 1995, the Supreme Court will grapple with the fundamental question whether the state constitution guarantees litigants the right to appeal from an adverse judgment in a civil case. In *Powers v. City of Richmond*, 10 Cal. 4th 85 (1995), a case arising under the Public Records Act, Gov. Code § 6250 et seq., the court was unable to muster a majority position on the question. Three justices concluded the constitution does not guarantee a right of appeal. *See Powers*, 10 Cal. 4th at 91 (opinion of Kennard, J., with Baxter and Werdegar, JJ., concurring). Two other justices disagreed, concluding "the lead opinion errs by failing to recognize a litigant's constitutional right of appeal, i.e., a right to review on the merits and a written opinion." *Id.* at 173 (dissenting opinion of Lucas, C.J., with Mosk, J., concurring). The two remaining justices concurred that the statute in question was constitutional but declined to endorse the plurality's sweeping conclusion that the constitution does not guarantee a right of appeal in other cases. *See id.* at 116 (conc. opinion of George, J., with Arabian, J., concurring) ("[I]t is neither necessary nor appropriate to go beyond the Public Records Act provision here at issue to announce a broad constitutional rule that may be understood to validate virtually all, or at least most, legislative measures that in the future might substitute writ review for direct appeal in contexts not presented by the case now before us.").[1]

Last year, the issue resurfaced in *Leone v. Medical*

[1] For a fuller treatment of *Powers*, see 1995 California Litigation Review, Appeals Writs and Post-trial Motions 73-75.

Board, 57 Cal. App. 4th 1240 (1997), rev. granted Dec. 23, 1997 (S065485). Two physicians who had been disciplined by the Medical Board of California challenged the Board's decisions by filing mandamus actions in superior court. The physicians appealed from the judgments denying relief in each action. The Board then 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 issue in *Leone* was 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. *Id.* at 1243-44, 1249.

The court of appeal found two provisions of the state constitution to be pertinent. Article VI, section 10, provides that superior courts have original jurisdiction over, among others, "proceedings for extraordinary relief in the nature of mandamus," which the court read to include actions such as those sub judice. Article VI, section 11, provides that, with the exception of cases in which the death penalty has been imposed, "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute." The court held these provisions together guaranteed the physicians a right to review by appeal: "[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." *Leone*, 57 Cal. App. 4th at 1250. As noted, the Supreme Court has granted review. Of the five current justices who participated in *Powers*, three concluded that the constitution does not guarantee a right to appeal; two concluded otherwise. The views of Justices Chin and Brown, who joined the court after Powers was decided, will likely determine the outcome in *Leone*. [2]

Oral Argument In Writ Proceedings

In *Lewis v. Superior Court*, No. S061240, review granted June 25, 1997, the Supreme Court will decide 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. The issue was noted but left unresolved in *Alexander v. Superior Court*, 5 Cal. 4th 1218, 1223 n.3 (1993). The *Lewis* case also raises the question whether the court of appeal's unpublished opinion (No. E019932) satisfied Article VI, section 14 of the state constitution, which requires that decisions of the "courts of appeal that determine causes shall be in writing with reasons stated."

Court of Appeal Decisions

Payment For Reporter's Transcript

Under rule 4(a) of the California Rules of Court, a party filing a notice to prepare a reporter's transcript for appeal ordinarily must deposit with the clerk the estimated cost of the transcript, calculated according to a formula set forth in the rule. The clerk disburses the deposit to the reporter when the reporter delivers the transcript. *See* Cal. R. of Ct. 4(a). The party may avoid the deposit requirement, however, by obtaining from the reporter and filing with the clerk "the reporter's written waiver of a deposit." Cal. R. of Ct. 4(c). Court reporters generally will provide a written waiver in exchange for payment. But paying the reporters in advance has its risks, as the appellant learned the hard way in *Bitters v. Networks Electronic Corp.*, 54 Cal. App. 4th 246 (1997). The appellant in *Bitters* paid the reporter more than $6,000 in several installments over about five months. *Id.* at 247-48. One payment was sent to the reporter at a motel in New Mexico; another was sent to her in Tennessee. *Id.* The reporter absconded with the money and never

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[2] Interestingly, another court of appeal recently addressed the identical issue decided in *Leone* and reached the opposite conclusion – without citing *Leone* or noting that the issue was pending before the Supreme Court. *See Landau v. Medical Board of California*, 60 Cal. App. 4th 940 (1998) (holding Bus. & Prof. Code § 2337 does not run afoul of article VI, section 11 of the California Constitution). The Supreme Court should grant review in *Landau* and hold the case pending the decision in *Leone*.

delivered the transcript. The Court of Appeal issued an order to show cause to both the appellant and the superior court clerk to determine who should bear the cost of preparing the transcript from the notes left behind by the missing reporter. The appellant and the clerk each argued the other should bear the cost. *Id.* at 248-49. The clerk took the position "that when appellant had undertaken to pay the reporter directly, rather than depositing the fees with the court, it had assumed the risk of the reporter's delinquency." *Id.* The Court of Appeal agreed with the clerk:

> [A]ppellant chose to deal directly with the reporter rather than deposit the fees with the superior court. In making this decision, appellant assumed the risk of loss should the reporter fail to prepare the transcript. If an appellant deposits the fees with the superior court and the reporter fails to produce the transcript, the fees are available for payment to a replacement reporter. Use of this court deposit procedure both ensures timely payment of the reporter and provides protection of appellant from a reporter's default. When an appellant elects to use the alternative waiver procedure, the safeguards of the court deposit procedure are defeated. The superior court cannot elect to refuse the waiver of deposit; an appellant has a right to make this election under the court rules.

Id. at 250. The court also noted that the superior court had no notice the reporter might default. The appellant, in contrast, had reason to be suspicious when the reporter requested that payments be delivered to out-of-state locations. "Where both appellant and the superior court appear to have been taken advantage of by the reporter, fairness dictates that the party which could have best prevented the fraud should bear the loss." *Id.* Consequently, the appellant was required to pay twice for the same transcript or forgo its appeal.

Bitters puts litigants on notice that, if they pay the reporter directly, they assume the risk the reporter will abscond. It seems odd that a procedure prescribed by the rules should entail any risk, but litigants can avoid the risk by following the risk-free deposit procedure.

Review Of Judicial Disqualification Motions

In *Roth v. Parker*, 57 Cal. App. 4th 542 (1997), the court of appeal confirmed that the petition for writ of mandate under Code of Civil Procedure section 170.3 is the exclusive means of challenging an order denying a statutory motion to disqualify a judge. The court noted that section 170.3 does not bar review on appeal from final judgment of a nonstatutory claim that a judgment is invalid by reason of judicial bias. However, the court added that counsel may and should seek to resolve such issues by statutory means and counsel's failure to do so can result in a forfeiture of any constitutional claim. The court "conclude[d] that appellant, having failed to seek writ review of the order, has forfeited any nonstatutory constitutional challenges to the judgment." *Id.* at 548. The court also noted that the issue had been waived because it was not raised in the lower court or in the appellant's opening brief but only in her reply brief. *Id.* at 548-49.

Review Of Post-Judgment Orders Awarding Expert Witness Fees

The *Roth* court also held that it lacked jurisdiction to review the lower court's discretionary award of expert witness fees as costs because the appellant had filed her notice of appeal from the judgment before the court had awarded the expert witness fees. A post-judgment order embodying a discretionary award of expert witness fees is separately appealable, *see* Code of Civ. Proc. § 904.1(b), and is not embraced within the scope of an appeal from the judgment. *Compare Grant v. List & Lathrop*, 2 Cal. App. 4th 993, 997-98 (1992) (where judgment itself awards costs and fees leaving only the amount to be determined, appeal from judgment subsumes any later order setting the amount).

Review of Good Faith Settlement Determinations

In *Rohr Indus., Inc. v. First State Ins.. Co.*, 59 Cal. App. 4th 1480 (1997), Transport Insurance Co. settled a coverage dispute with its insured, Rohr, Inc., then filed a motion for a good faith settlement determination under Code of Civil Procedure sections 877 and 877.6. First State Insurance Co., another of Rohr's insurers, opposed the motion on the ground the procedures set forth in section 877.6 applied only to settlements involving a party who was alleged to be a joint tortfeasor or co-obligor on a

contract debt, not to settlements involving one of multiple insurers of a common insured. The trial court granted Transport's motion under the statutes and under its "inherent powers." *Id.* at 1491. The order barred all other insurers of Rohr from asserting any claim against Transport for contribution, indemnity or other relief related to the underlying action against Rohr. *Id.* First State appealed from the order.

Transport contended the Court of Appeal lacked jurisdiction over the appeal because a petition for writ of mandate is the only vehicle for obtaining review of a good faith settlement determination. Transport relied on section 877.6(e), which states: "When a determination of good faith or lack of good faith of a settlement is made, any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate. The petition for writ of mandate shall be filed within 20 days after service of written notice of the determination, or within any additional time not exceeding 20 days as the trial court may allow."

The Court of Appeal held the procedure prescribed by section 877.6(e) applies when the appellant challenges the merits of a determination that a settlement was made in good faith but not when the appellant challenges the very applicability of the statutory scheme: "[A] party wishing to challenge the merits of a 'good faith' determination must do so via a petition for writ of mandate as prescribed by statute. However, when a party wishes to challenge the legality or appropriateness of extending the applicability of sections 877 and 877.6 to settlements not involving 'joint tortfeasors' or 'co-obligors on a contract debt,' as the terms are used in these statutes, they may do so by way of appeal. When an appeal raises a challenge to the applicability of sections 877 and 877.6 to multiple insurer settlements the courts have exercised their jurisdiction to review the appeal." *Rohr Indus., Inc.*, 59 Cal. App. 4th at 1485-86.

But neither of the cases the court cited supports its conclusion that a party may appeal from an order under section 877.6 if the party challenges the section's applicability. In *Topa Insurance Company v. Fireman's Fund Insurance Companies*, 39 Cal. App. 4th 1331 (1995), the insurer did not appeal from an order under section 877.6; it appealed from an order dismissing its cross-complaint. *Id.* at 1335-36. A written dismissal order is tantamount to a judgment and is appealable. *See* Civ. Proc. Code §§ 581d, 904.1(a)(1). In *Hartford Accident & Indemnity Co. v. Superior Court*, 29 Cal. App. 4th 435 (1994), the insurer did not appeal at all; it petitioned for a writ of mandate from a good faith settlement determination under section 877.6. *See id.* at 437, 439, 441.

The *Rohr* court failed to support its conclusion that a party may, depending on the type of argument it advances, appeal from a good faith settlement determination under section 877.6. The conclusion is at odds with cases that have held a petition for writ of mandate is the exclusive means of obtaining review of a good faith settlement determination.[3] *See, e.g., Housing Group v. Superior Court*, 24 Cal. App. 4th 549, 552 (1994). Further, under the court's reasoning, the propriety of an appeal from an order under section 877.6 cannot be determined until the appellant has filed its opening brief. The rule is thus a recipe for uncertainty in an area of the law - appealability - where certainty is essential.

Transport also argued "good faith determination is a nonappealable interlocutory order." *Rohr Indus., Inc.*, 59 Cal. App. 4th at 1486. The Court of Appeal disagreed but again cited no case to support its position. Indeed, in *Chernett v. Jacques*, 202 Cal. App. 3d 69, 71 (1988) and *Barth Wittmore Ins. v. H. R. Murphy Enterprises, Inc.*, 169 Cal. App. 3d 124, 130 (1985), the same court had declared that a good faith settlement determination is a nonappealable interlocutory decree. The *Rohr* court distinguished *Chernett* on the ground the appellant there was challenging the merits of the good faith settlement determination, not the applicability of sections 877 and 877.6. *Rohr Indus., Inc.*, 59 Cal. App. 4th at 1486. This reasoning is questionable. The appealability vel non of a trial court's order should depend on the nature of the order, not on the nature of the arguments the appellant ultimately advances to challenge the order.

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[3] Because a party challenging a good faith settlement determination has no appellate recourse other than a writ petition, "the general criteria [for determining the propriety of an extraordinary writ] do not apply to petitions concerning good faith settlement determinations." *L.C. Rudd & Son, Inc. v. Superior Court*, 52 Cal. App. 4th 742, 746 (1997).

Review Of Orders Granting A Motion To Vacate

In *Garcia v. Hejmadi*, 58 Cal. App. 4th 674 (1997), the court held an order granting a motion under Code of Civil Procedure section 473 to vacate a nonappealable order was itself nonappealable and thus reviewable on appeal from final judgment: "An order granting a motion to vacate under section 473 is itself appealable, and thus reviewable only by direct appeal, where the order it vacates was an appealable final judgment. The vacated order here was an order granting summary judgment, which is not itself appealable. Appeal lies only from an ensuing judgment of dismissal. Because no such judgment appears in the record, we assume there was none and find the order granting the motion to vacate reviewable on this appeal from a posttrial judgment." *Id.* at 680 (citations omitted).

Saving Infirm Appeals

Like every year, 1997 saw its share of cases in which a party purported to appeal from a nonappealable order, placing the court in the position of having to decide whether to save or dismiss the appeal. For appellants, the results were mixed.

In *Mercury Ins. Group v. Superior Court*, 59 Cal. App. 4th 1463 (1997), *rev. granted sub nom. Wooster v. Mercury Ins. Group*, Feb 25, 1998 (S067462), the appellant purported to appeal from "an order denying its motion 'to separate non-binding [judicial] arbitration from binding [uninsured motorist] arbitration'" *Id.* at 1466. Such an order is not appealable because it is neither a final judgment nor an interlocutory order made appealable by statute. The court began by properly rejecting the respondent's argument that an earlier denial of the appellant's petition for writ of mandate barred the purported appeal. *Id.* at 1466-67; *see Kowis v. Howard*, 3 Cal. 4th 888, 899 (1992) (order summarily denying writ petition does not constitute law of the case). The court then explained that, "rather than strain to characterize the lower court's order as appealable," the court would save the purported appeal by treating it as another petition for extraordinary writ. The court cited the following considerations:

> (1) the issue concerning consolidation of personal injury and U/M claims is of widespread interest; (2) the trial court's order is clearly erroneous as a matter of law and substantially prejudices Mercury's case; (3) the question of appealability was far from clear in advance; (4) Mercury may suffer harm or prejudice that cannot be corrected on appeal; (5) and, foremost, judicial economy would not be served by deferring resolution of the issue.

Mercury Ins. Group, 59 Cal. App. 4th at 1467.

The *Mercury* court thus embraced what appears to be the prevailing view on the subject — that the court will treat an infirm appeal as a petition for extraordinary writ when considerations of justice and judicial economy dictate such treatment. *See, e.g., Connell v. Superior Court*, 59 Cal. App. 4th 382, 393-94 (1997). The *Mercury* court did not acknowledge other authority to the effect that an appellate court will only rarely save an infirm appeal by treating it as writ petition and will not do so absent a stipulation by the parties that the appeal be so treated. *See, e.g., Ponce-Bran v. Trustees of Cal. State University*, 48 Cal. App. 4th 1656, 1662 (1996).[4]

In *Waschek v. Department of Motor Vehicles*, 59 Cal. App. 4th 640 (1997), the trial court granted summary judgment for the defendant and entered judgment. The plaintiffs then filed motions for "new trial" and reconsideration. The trial court granted the "new trial" motion. The defendant again moved for summary judgment, which the court denied. The defendant purported to appeal from the order granting the plaintiffs a "new trial." *Id.* at 643. Raising the issue of appealability on its own motion, the court of appeal explained that, "[s]ince there was no trial there could be no 'motion for a new trial.' The trial court's order vacating summary judgment for [the defendant] more closely resembled an order granting a motion to reconsider." *Id.* at 643 n.4. The court nevertheless entertained the appeal, explaining: "[I]n such circumstances appellate courts have either construed the trial court's order as an appealable order granting a "new trial" or treated the appeal as a petition for mandate. We shall do the same." *Id.* at 643-44 n.4 (citations omitted).

In *Forsyth v. Jones*, 57 Cal. App. 4th 776, 780

[4] For a fuller treatment of this subject, see 1996 California Litigation Review, Appeals, Writs and Post-Trial Motions 64.

(1997), the court sua sponte considered the propriety of the appellant's purported appeal from an order sustaining a demurrer without leave to amend. The court opted to save the infirm appeal by liberally construing the notice of appeal:

> An order sustaining a demurrer is interlocutory and thus not appealable. Any appeal must be taken from the subsequently entered judgment of dismissal. However, a notice of appeal must be 'liberally construed in favor of its sufficiency.' In accordance with that mandate, a notice of appeal which erroneously purports to appeal from an order sustaining a demurrer will be deemed to be sufficient if (1) a judgment of dismissal was actually entered either before or after the filing of the notice of appeal, (2) there is no doubt as to which ruling the appellant seeks to have reviewed, and (3) the respondent could not possibly have been misled to its prejudice.
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> Forsyth's notice of appeal not only refers exclusively to the order, it was filed before the judgment was even entered. Nevertheless, since the actual judgment was entered soon thereafter and there is no confusion as to the scope of the appeal, the notice of appeal is sufficient.

Id. at 780 (citations omitted).

The appellate court was not as forgiving in *Don Jose's Restaurant, Inc. v. Truck Ins. Exch.*, 53 Cal. App. 4th 115 (1997). There, the complaint alleged eleven causes of action. The defendant obtained summary adjudication on the two key causes of action. Seeking a means of obtaining appellate review of the summary adjudication ruling without first having to try the remaining nine causes of action to a final judgment, the parties stipulated to the following: the plaintiff would dismiss the remaining causes of action without prejudice; the defendant would waive all limitations defenses; if the plaintiff prevailed on appeal, the matter would proceed in the trial court on all eleven causes of action; on the other hand, if the defendant prevailed on appeal, the plaintiff would dismiss the remaining nine causes of action with prejudice. The plaintiff then filed a notice of appeal from the order granting summary adjudication. *Id.* at 117.

"Not so fast," said the court. *Id.* Under the "one final judgment rule," an appeal will not lie from an order disposing of only part of an action. The court found the parties' stipulation to be an impermissible attempt to lend a sheen of finality to an interim ruling. The court offered the following advice to parties who find themselves in a similar situation: If the summary adjudication ruling effectively guts the plaintiff's case, the defendant should 'mop up' the case with a second motion for summary adjudication of the remaining causes of action. *Id.* at 118 & n.2. On the other hand, if the summary adjudication ruling does not spell an end to the plaintiff's case, the parties should try the remaining causes of action to a final judgment before proceeding to the court of appeal.[5] *Id.* What the parties may not do is relegate the nonadjudicated causes of action to "a kind of appellate netherworld," to be "brought back to life" if the plaintiff prevails on appeal. *Id.*

In *Jackson v. Wells Fargo Bank*, 54 Cal. App. 4th 240 (1997), the court followed *Don Jose's Restaurant* on remarkably similar facts. The court explained an appellant may not, even with a "willing accomplice in the respondent[,] . . . separate [its] causes of action into two compartments for separate appellate treatment at different points in time." *Id.* at 245. The *Jackson* court refused to save the infirm appeal by treating it as a petition for writ of mandate: "Although such is technically within our powers, that procedure is reserved for 'unusual circumstances' [citation] which are not present here." *Id.*

Calendar Preference On Appeal

As appellate backlogs mount and the time to decision in the appellate courts lengthens, calendar preference in the appellate courts has assumed increasing importance. California Rule of Court 19.3 permits an application for calendar preference in the appellate court but does not specify the grounds on which preference may be sought.[6] The

[5] Alternatively, the plaintiff may obtain a final judgment without trial by dismissing the remaining causes of action with prejudice. The court noted this alternative may not be attractive to the plaintiff because it may mean the permanent loss of viable causes of action. *Id.* at 118 n.3.

[6] Other provisions in the rules and statutes provide for calendar preference in particular kinds of civil actions, e.g., probate proceedings, Civ. Proc. Code § 44, juvenile matters, Cal. R. of Ct. 39(e), and contested election proceedings, Civ. Proc. Code § 44.

rule provides: "A motion for preference on the calendar, supported by points and authorities, shall be filed no later than the last day for filing the appellant's reply brief."

In *Warren v. Schecter*, 57 Cal. App. 4th 1189 (1997), the Court of Appeal evaluated a motion for calendar preference under the standards governing trial setting preference set forth in Code of Civil Procedure section 36.[7] The court explained that, though section 36 does not by terms apply to appellate proceedings, "the statute's rationale for granting calendar preference to certain litigants is equally applicable to appellate proceedings." *Id.* at 1199. The court also relied on its inherent power to control its own proceedings and its power under Code of Civil Procedure section 187 to adopt any suitable method of practice in situations not specifically addressed in the rules or the Code of Civil Procedure. *Id.* The court concluded by echoing the calls for an amendment to the rules of court to make explicit that ailing or elderly litigants are entitled to calendar preference on appeal. *Id.* at 1199-1200.

Sanctions; Frivolous Appeals

With increasing appellate backlogs and workloads comes increasing judicial intolerance for frivolous appeals and frustration with incompetent or recalcitrant appellate counsel. More and more, it seems, the courts are rebuking and/or sanctioning counsel in both published and unpublished opinions. *See, e.g.*, "Lawyer Fined $28K for Filing 'Frivolous' Appeal," L.A. Daily Journal, Dec. 31, 1997, at 2; *In re Grayson*, 15 Cal. 4th 792 (1997) (fining attorney $1,000 for failing to comply with order requiring her to file opening brief in automatic death penalty appeal following seven extensions of time).

One court's frustration boiled over in *Caro v. Smith*, 59 Cal. App. 4th 725 (1997). Both sides' attorneys had signed a stipulation to submit the plaintiff's personal injury claim to binding arbitration. The defendant participated in the arbitration and acknowledged on the record she knew it would be binding. The plaintiff prevailed, then filed a motion to confirm the award. Defense counsel opposed the motion, arguing that he had not been authorized to stipulate to binding arbitration and that his client's signature was essential. *Id.* at 730. He did not submit a declaration by his client denying she had consented to the binding arbitration. The trial court confirmed the arbitration award.

Defense counsel then pursued an appeal on behalf of his client, renewing his argument that the arbitral award was invalid because he had not been authorized to stipulate on his client's behalf. The Court of Appeal found the argument frivolous:

> Oral contracts, Samuel Goldwyn is widely quoted as saying, are not worth the paper they are written on. Defendant's lawyers would give the same short shrift to a stipulation signed by one of them to submit a personal injury claim to binding arbitration. They call the stipulation worthless because their client did not personally sign it. They say plaintiff's counsel acted at his peril in taking them at their word concerning their authority to stipulate on their client's behalf. . . . .
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> Such tactics are unworthy of the humblest trade or occupation, and they should be unthinkable for a calling claiming to be a profession. The case law, . . . plainly recognizes that clients may subsequently ratify arbitration agreements to which they did not initially subscribe. There is no question there was ratification by both defendant, the nominal client, and her carrier (which actually controlled the litigation).

Id. at 728. The court imposed sanctions of $12,250 for a frivolous appeal and offered "[a] final word on litigation tactics":

> Lawyers in an adversarial system are free to inflict hard blows on their opponents as part of their responsibility to zealously guard the interests of their clients, but not low ones. No lawyer should be a person of two truths, his own and his client's. We do not see how the practice of law can long endure as a profession if attorneys will misrepresent their authority to act on their clients' behalf and then attempt to renege on their own signed stipulations. Misinterpreting case authority in an effort to avoid unfavorable outcomes adds to the dishonor.

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[7] Under section 36, litigants who are over age 70 or seriously ill are entitled to preference in trial setting under certain circumstances.

Id. at 739. *Compare In re Marriage of Hinman*, 55 Cal. App. 4th 988, 1003 (1997) (appeal not frivolous and sanctions not warranted where authority on appealed issue was conflicting).

A clearly impatient Ninth Circuit Court of Appeals in *N/S Corp. v. Liberty Mutual Ins. Co.*, 127 F.3d 1145 (9th Cir. 1997) imposed the most drastic sanction of all—dismissal—or numerous violations of, and apparent disregard for, briefing rules. The appellant's opening brief failed to discuss the appellate standard of review, failed to support factual assertions with citations to the record, exceeded the word limit, and cited California cases that had been depublished before the brief was filed. *Id.* at 1146. The court also rebuked the appellant for not responding to the appellee's motion to dismiss, which pointed out the violations, and for filing a reply brief that omitted the tables of contents and authorities. *Id.* In words that would probably be endorsed by its California counterparts, the Ninth Circuit explained its decision to dismiss the appeal:

> We are passing through a period in the history of this country when the pressures upon the courts are extremely high. They are so because of the volume of work as more and more people seek to have the courts resolve their disputes and vindicate their rights. But resources are limited. In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. Hence we have briefing rules. By and large, we have been tolerant of minor breaches of one rule or another. Perhaps we are too tolerant sometimes. But there are times when our patience runs out. Then we strike an appellant's briefs and dismiss the appeal. This is one of those times. This is a time when an appellant has approached our rules with such insouciance that we cannot overlook its heedlessness.

Id. (citations omitted).

Appeal Bonds

The court in *Lewin v. Anselmo*, 56 Cal. App. 4th 694 (1997), addressed the interesting question whether a person who agrees to act as a personal surety for an appellant may unilaterally qualify his obligation by including in the appeal bond provisions or conditions not contemplated by the Bond and Undertaking Law, Code of Civil Procedure sections 995.010 et seq. The personal sureties in question had filed a bond that included the following handwritten notation: "'We understand we have 15 days from date of executing this note to fully cancel + rescind, or hear objections.'" *Id.* at 697. Three days after filing the bond, the sureties filed a document purporting to withdraw their undertaking. When the beneficiary later filed a motion to enforce liability on the bond, the sureties defended on the ground they had timely rescinded the bond. The trial court agreed and denied the beneficiary's motion.

The court of appeal reversed, holding that liability under a statutory bond is controlled by the statute, rather than by the form of the bond. The bond will be read to include all statutorily required language, and language that is unauthorized or inconsistent with statutory provisions will be disregarded as surplusage. The court therefore "look[ed] to the Bond and Undertaking Law to determine when a statutory bond becomes effective and, once in effect, how it may be withdrawn." *Id.* at 699. Under that law, an appeal bond becomes effective when given, i.e., when filed with the court. *Id.* at 699-700. The surety may be released from liability "only by order of the court, following a properly noticed hearing" at which the beneficiary is entitled to be heard on the issue whether he would be injured if the surety were released. *Id.* at 700. The court emphasized that the statutory procedures were "more than mere formalities:"

> Section 917.1, the statute providing for an appeal bond, is designed to protect the judgment won in the trial court from becoming uncollectible while the judgment is subjected to appellate review. It provides the successful litigant with 'an assured source of funds to meet the amount of the money judgment, costs and postjudgment interest after postponing enjoyment of a trial court victory.' The procedural requirements applicable to all bonds set forth in the Bond and Undertaking Law serve to protect the rights of the beneficiary and to protect the integrity of the bonding procedures.

Id. (citation omitted). The court concluded that, because the bond in question became effective when filed and the sureties had never been released in accordance with statutory procedures, the

beneficiary's motion to enforce the sureties' liability on the bond should have been granted. *Id.* at 701-02.[8]

In *Whelan v. Rallo*, 52 Cal. App. 4th 989 (1997), the court held a postappeal order allowing enforcement of a judgment against an appeal bond is appealable "either as a judgment in a special proceeding or as a judgment collateral to the underlying judgment." *Id.* at 992 n.3. (citations omitted).

Stipulated Reversals

In *Neary v. Regents of University of California*, 3 Cal. 4th 273 (1992), the Supreme Court held that, where parties settle their dispute pending appeal and as part of the settlement stipulate that the trial court judgment be reversed, the court of appeal should honor the parties' stipulation "absent a showing of extraordinary circumstances that warrant an exception to this general rule." *Id.* at 284. The *Neary* decision generated a strong dissent, *see id.* at 286 (Kennard, J., dissenting), and its merits continue to be debated. For a striking example of the strong feelings *Neary* still generates, see *Morrow v. Hood Communications, Inc.*, 59 Cal. App. 4th 924 (1997). The parties there filed a motion for a stipulated reversal of the judgment and dismissal of the appeal. The majority felt compelled, under the doctrine of stare decisis, to grant the parties' motion but suggested the supreme court "reconsider and repudiate the doctrine adopted in Neary." *Id.* at 926.

Justice Kline filed a dissenting opinion that all but dared the supreme court not to revisit the *Neary* rule. His opening remarks: "There are rare instances in which a judge of an inferior court can properly refuse to acquiesce in the precedent established by a court of superior jurisdiction. This is, for me, such an instance. I acknowledge that the opinion of the California Supreme Court in Neary . . . requires that the motion before us be granted. I would deny the motion, however, because I cannot as a matter of conscience apply the rule announced in Neary."[9] *Id.* at 926-27 (Kline, P.J., dissenting) (citations omitted). Justice Kline proceeded to explain that, in his view, "the doctrine of stipulated reversal announced in Neary . . . is destructive of judicial institutions," *Id.* at 927, because it engenders "a public perception that civil judgments are commodities that may be bought and sold, which is sure to undermine the public respect for judicial institutions that is the genuine source of judicial authority. Should this occur, it is the rule of law that would be endangered, not just the reputation of the courts of this state." *Id.* at 929. The majority and dissenting opinions in *Morrow* (should they remain published) will surely fuel the ongoing debate over the wisdom of permitting stipulated reversals in California.

Rule Changes

The following rules of interest to appellate lawyers were added or amended in 1997 and took effect on January 1, 1998.

Nonparty's statement of interest

The rules have been amended to require that a nonparty disclose the nature of his or her interest when supporting or opposing the granting of a petition for review (Cal. R. of Ct. 14(b)), when seeking leave to file an amicus brief in the court of appeal (Cal. R. of Ct. 14(c)), and when requesting depublication of a court of appeal opinion or responding to such a request (Cal. R. of Ct. 979(a), 979(b)). These changes make mandatory what has always been good practice.

Oral argument

Rule 22 governing oral argument was repealed and, in its place, new rules 22 and 22.1 were enacted governing oral argument in the Supreme Court and the courts of appeal, respectively.

An outgrowth of the Supreme Court's dissatisfaction with oral arguments divided into uselessly small increments by multiple attorneys for a single side, new rule 22(d) states "no more than one counsel may be heard on each side—even if there is more than one party on each side—unless the court orders otherwise. A request to divide oral argument among

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[8] The *Lewin* court also held that the principal's alleged undue influence over the personal sureties and fraud in obtaining the bond from them afforded no defense as against the beneficiary, who had no knowledge of and did not participate in the misdeeds. *Id.* at 701-02.

[9] The majority distanced itself from the dissent's endorsement of "the power of an inferior court to refuse to acquiesce in precedent established by a court of superior jurisdiction" but otherwise expressed agreement with the dissent. *Id.* at 926.

two or more counsel shall be filed not later than 10 days after the date of the order setting the case for oral argument." Time will tell how friendly the court will be toward requests to divide oral argument.

In the Courts of Appeal, each party who appeared separately in the lower court may be heard at oral argument, but "[n]o more than one counsel may argue for each party who appeared separately in the court below, unless the court orders otherwise." Cal. R. of Ct. 22.1(d). Where separately represented parties wish to be heard, and where the court permits an amicus curiae to participate in the argument, "the court may apportion or expand the time according to the respective parties' interests." Cal. R. of Ct. 22.1(b).

Certification of questions of state law

With the enactment of rule 29.5, California joins the ranks of the many states that authorize their high courts to answer questions of state law certified from courts in other jurisdictions. Rule 29.5(a) authorizes the California Supreme Court to "answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth." Certified questions will not be accepted from federal district courts. *See* Cal. R. of Ct. 29.5(b). The rule specifies several conditions that must be satisfied before certification will be permitted in a particular case, *see* Cal. R. of Ct. 29.5(a), and prescribes detailed procedures that must be followed by the certifying court and by the California Supreme Court. The California Supreme Court retains the discretion "to accept or deny the request for an answer to the certified question of law." Cal. R. of Ct. 29.5(e).

Proofs of service

Rule 40(f) has been amended to require that the proof of service accompanying documents filed in the appellate courts "name each party represented by each attorney served."