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Brave New ~~World~~ Rules, the Final Chapter: This Year's Changes to the California Appellate Rules

Paul D. Fogel and Benjamin G. Shatz

Introduction

Six years ago, the California Judicial Council's Appellate Advisory Committee established the Appellate Rules Project Task Force, chaired by California Supreme Court Associate Justice Joyce Kennard. The task force's charge was to revise and improve California's appellate rules, which had not undergone major examination or revision since Bernard E. Witkin originally drafted them 60 years earlier. The task force approached this mammoth project by issuing new and amended rules in annual and piecemeal installments. The first installment, covering Cal Rules of Ct 118, took effect in January 2002; the second installment, covering Rules 19–29.9, took effect in January 2003; and the third installment, covering Rules 30–36.3, took effect in January 2004. We have chronicled the changes in the rules relevant to civil practitioners in three previous "Brave New ~~World~~ Rules" articles in the Civil Litigation Reporter (24 CEB Civ LR 57 (Mar. 2002), 25 CEB Civ LR 51 (Apr. 2003), and 26 CEB Civ LR 15 (Feb. 2004)). This article discusses the fourth and final installment, which took effect January 1, 2005.

Primary topics included in this installment include appellate motions, the number of copies of documents that must be filed, writ petitions, and publication/depublication. Practitioners should note that the latest revisions also affect the rules for small claims cases and family law appeals. We address only the most significant changes that are relevant to practitioners.

Basic Appellate Practice

Meeting the Jurisdictional Deadline

Former Rule 45(c) set forth one of the cardinal principles of appellate practice, *i.e.*, that the time to file a notice of appeal is jurisdictional and may not be extended. To emphasize this important point and remind counsel and litigants of it more forcefully, this rule has been moved to a more prominent position and now appears in revised Cal Rules of Ct 2(b).

Designating the Record

Multiple appeals often arise from the same trial. When this occurs, the trial court receives multiple notices designating the record on appeal and may have difficulty matching each record designation with its corresponding

notice of appeal. This confusion causes delays in record preparation. To overcome this problem, designations for reporter's transcripts, clerk's transcripts, and joint appendixes now "must state the date the notice of appeal was filed." Cal Rules of Ct 4(a)(4), 5(a)(4), and 5.1(a)(1).

Obtaining Exhibits

Parties wishing to include exhibits in their appendix sometimes encounter difficulty obtaining copies of exhibits in the possession of opposing counsel or litigants. New Rule 5.1(c) outlines a procedure for a party preparing an appendix to obtain a copy of an exhibit held by another party. Essentially, the requesting party first should ask the party who has the exhibit for a copy. The rule directs all parties to "reasonably cooperate with such requests." If the request is "unsuccessful," the requesting party may serve and file in the court of appeal a notice requiring the party who has the exhibit to deliver it to the requesting party or the court within 10 days. Cal Rules of Ct 5.1(c).

Using Priority Mail to File the Brief

One provision of former Rule 40(k) allowed briefs to be deemed timely filed if sent by "certified" mail on the due date. Certified mail may take up to a week or longer to reach the court, while priority mail has a similar cost and is typically delivered much faster. Thus, new Rule 40.1(b)(3)(a) replaces certified mail with priority mail. Also, former Rule 40(k) applied only to "briefs," defined in former Rule 40(i) as including petitions for review, petitions for rehearing, and corresponding answers; replies to petitions for review were missing from this list. New Cal Rules of Ct 40.1(b)(3) now expressly also includes replies to petitions for review.

Filing a Certificate of Interested Entities

California's Code of Judicial Ethics requires appellate justices to recuse themselves from hearing matters that might financially affect them or their immediate family. Cal Rules of Ct App Div II, Canon 3(E)(3)(d). In today's corporate environment of nested and interlocking parent and subsidiary companies, it often is difficult to know which entities may have an interest in the outcome of an appeal.

To address this concern, the U.S. Courts of Appeals require a Corporate Disclosure Statement (see Fed R App P 26.1) and the California Supreme Court requires parties to file a Certification of Interested Entities or Persons. Sup Ct, Internal Operating Practices & Procedures IV(L). No such rule exists for the California Courts of Appeal. However, in September 2004, the Fourth District, Division One, implemented a local procedure for use in civil cases in which a corporate entity is a party. Under this procedure, the court clerk requires, after the record is filed, that each party file a "Certification of Interested Entities or Parties" listing "the parent and subsidiary corporations of the corporate party and any persons, associations of persons, firms, partnerships, corporations or other entities, other than the parties themselves, known by the party to have a financial interest in the subject matter of the case or in a party to the case." 4th Dist, Div 1, Internal Operating Practices & Procedures XII (first paragraph). The Fourth District, Division One, also has a similar procedure for civil cases in which a partnership is a party. See 4th Dist, Div 1, Internal Operating Practices & Procedures XII (second paragraph).

Requesting Extensions of Time

Because seeking extensions of time is a regular part of appellate practice, citing to Rule 45.5, which outlines "Standards for Time Extensions," is a standard practice. Fortunately, this rule, and its enumerated factors for determining good cause for extensions, remains substantively unrevised. However, the new version of Cal Rules of Ct 45.5 has been rewritten; thus, counsel may need to revise their template extension requests to reflect the new language and revised numbering of factors in the new rule.

Opposing Motions

Under former Rule 41(a), an opposition to a motion in the reviewing courts was due 10 days after the motion was served. This made it somewhat difficult for the reviewing court to calendar an opposition's due date because the service date did not always match the filing date and because motions served by mail arguably invoked CCP 1013, which allows an extra 5 days to respond. Revised Cal Rules of Ct 41(a)(3) simplifies matters by requiring the filing of any opposition to a motion within 15 days after the motion is filed. The motion's filing date is easily ascertained by checking the docket on the reviewing court's website.

Certificates Supporting Dismissal Motions

Under Rule 42(a), a certificate from the superior court clerk or a declaration is required in support of any motion to dismiss an appeal if the motion is filed before the appellate record has been filed. A common basis for such a dismissal motion is that the notice of appeal was untimely. To help evaluate the timeliness of an appeal, former Rule 42(a)(4)(5) required the moving party to supply information about any new trial motion, which, when timely filed, extends the notice-of-appeal due date. However, the requirement was underinclusive because it failed to account for other motions that can extend the notice-of-appeal deadline, *e.g.*, motions for judgment notwithstanding the verdict and reconsideration of an appealable order. Thus, revised Cal Rules of Ct 42(a)(4) broadens this requirement by mandating that the supporting certificate or dec-

laration state "the factual basis of any extension of the time to appeal under rule 3." Similarly, revised Rule 42(a)(6) now requires that the certificate or declaration state the filing date of "any document necessary to procure the record on appeal."

Providing Addressed, Stamped Envelopes for Court of Appeal Orders

Former Rule 43 required a moving party in the court of appeal or supreme court to provide the court clerk with postage-prepaid envelopes addressed to all parties for mailing copies of the court's order. Revised Cal Rules of Ct 43(c) retains this requirement for court of appeal motions, but deletes the requirement with respect to the supreme court. Apparently, rather than a help to the court, the postage-prepaid envelopes proved to be an unnecessary complication in the supreme court clerks' ordinary mailing procedures.

Filing the Correct Number of Copies

Rule 44(b) governs the number of copies of documents to be filed with the reviewing courts. Former Rule 44(b) had gaps, *e.g.*, it did not address petitions for rehearing in the supreme court. Revised Cal Rules of Ct 44(b)(1)(A) rectifies this omission by requiring the filing of an original and 13 copies of a petition for rehearing and an answer to a petition for rehearing in the supreme court—the same number required for petitions for review and briefs on the merits.

Revised Cal Rules of Ct 44(b)(1)(B) now requires an original and 10 copies of any reply to an opposition to a writ petition filed in the supreme court, and revised Rule 44(b)(1)(D) now requires an original and eight copies of any amicus curiae letters regarding petitions for review.

In another change, revised Rule 44(b)(2)(A) now requires a party filing a brief in a civil case in the court of appeal to serve only four—rather than five—copies of the brief on the supreme court. Also, the original reply to an opposition to a writ petition in the court of appeal must be accompanied by four copies. Cal Rules of Ct 44(b)(2)(B).

Filing Voluminous Exhibits

Voluminous supporting documents often accompany the filing of writ petitions and appellate motions. Reviewing courts have differing practices on how many copies of such supporting materials need to be filed. For example, the First, Fourth, and Sixth District Courts of Appeal require only the original exhibits to a writ petition; the Third District requires an original and one copy; and the Second District requires an original and four copies, unless the exhibits are "voluminous" (*i.e.*, exceeding eight volumes), in which case only an original and one copy are required.

New Cal Rules of Ct 44(b)(3) provides that only one set of supporting documents need be filed for petitions and motions, unless the court of appeal orders otherwise. See also Cal Rules of Ct 56(d)(3). This rule is intended to relieve parties from having to prepare multiple copies of voluminous documents and courts from processing and storing unnecessary extra copies. However, note that new Rule 44(b)(3) authorizes the courts of appeal to promulgate local rules or carve out exceptions in any given case; thus, depending on how the various districts react, this amendment may prove ineffective.

Serving Briefs Under Seal

Former Rule 44 did not address how to serve briefs filed under court-ordered seal. Under new Rule 15(c)(2), if the court of appeal has ordered a brief sealed, the party serving copies of the brief on the supreme court must place all four copies in a sealed envelope that identifies its contents as "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 15(c)(2)(A). The supreme court will keep the briefs under seal until it receives notice of an unsealing order from the court of appeal. Cal Rules of Ct 15(c)(2)(B).

Getting the Cover Color Right

Rule 44(c)(1) lists documents that may be filed in the reviewing courts and their corresponding cover colors. However, former Rule 44(c) did not specify cover colors for certain documents. Hence, revised Rule 44(c)(1) adds the following covers to the list:

- Appellant's Appendix = green (matching the Appellant's Opening Brief);
- Respondent's Appendix = yellow (again, matching the corresponding brief);
- Joint Appendix = white;
- Answer to Amicus Curiae Brief = blue;
- Reply to an Answer (or Opposition) to a Writ Petition = red.

Further, revised Rule 44(c)(2) clarifies that in cross-appeals, the cover of a combined respondent's brief/opening brief must be yellow and the cover of a combined reply brief/respondent's brief must be tan. See Cal Rules of Ct 44(c).

Petitioning for a Writ

Word Limits, Supporting Documents

Revised Rule 56(b)(6) states that the 14,000-word limitation of Rule 14(c) applies to writ petitions. And, as noted above, revised Rule 56(d)(3) provides that only one set of supporting documents need be filed unless the court requires additional copies. Moreover, Cal Rules of Ct 56(f)(1) now makes clear that if the respondent is the superior court (or a judge), the supporting documents need

not be served on that court. This makes sense because the court's file already contains that supporting documentation.

New Deadlines for Preliminary Writ Oppositions and Replies

Former Rule 56(b) allowed a real party in interest to file a preliminary opposition within 5 days "after service and filing" of the writ petition. This wording was problematic because a petition could be served and filed on different days. Revised Rule 56(g)(1) now allows the respondent or real party to file a preliminary opposition within 10 days after the petition is filed.

New Rule 56(g)(3) allows a writ petitioner 10 days to file a reply to any preliminary opposition. Former Rule 56 did not authorize such replies, although the courts of appeal often accepted them.

Former Rule 56(f) required the return to be filed "at least five days before the date set for hearing." This provided little or no time for the petitioner to reply to the return or for the court to prepare for oral argument. Revised Rule 56(h)(2) now requires filing the return or opposition within 30 days after the court issues the alternative writ, order to show cause, or notice that the court is considering a peremptory writ in the first instance. Petitioners have 15 days after a return is filed to file a reply. Cal Rules of Ct 56(h)(3).

Note, however, that the new 30-day deadline for filing a return and 15-day deadline for filing a reply are subject to a clause reading "[u]nless the court orders otherwise"—meaning that these deadlines remain subject to the court's discretion in any given case. Cal Rules of Ct 56(h)(2), (h)(3). Thus, in particularly urgent matters, the court of appeal may order more expedited briefing.

Similarly, although the new rule explicitly allows preliminary oppositions and replies, it also makes clear that the court of appeal retains its authority to rule "[w]ithout requesting opposition or waiting for a reply." Cal Rules of Ct 56(g)(4).

Requesting a Stay

Revised Rule 49.5 requires the cover to a writ petition or any other document seeking a stay or writ of supersedeas to prominently display the notice "STAY REQUESTED" and to "identify the nature and date of the proceeding or act sought to be stayed." Cal Rules of Ct 49.5(a). Further, either the cover or the beginning of the body of the petition must also state the trial court and department involved and the name and telephone number of the trial judge whose order the petitioner seeks to stay. Cal Rules of Ct 49.5(b).

Citing New Opinions and Requesting Publication or Depublication

California Rules of Ct 976, 976.1, and 977–979, governing publication and depublication of appellate opinions, have been rewritten. There are several notable substantive changes:

Revised Rule 977(d) clarifies that "[a] published California opinion may be cited or relied on as soon as it is certified for publication or ordered published." Previously, it was unclear whether a court of appeal decision could be cited or relied on before it was final as to the court of appeal or before the period for granting review had expired.

Revised Rule 978(a)(3) now requires that requests to the court of appeal to publish an opinion be made within 20 days after the opinion is filed. Former Rule 978(a) required that they be filed "promptly"; this vague directive meant that publication requests often arrived after the court of appeal had lost jurisdiction.

Revised Rule 978(b)(1) now requires the court of appeal to forward publication requests that it denies (or on which it cannot rule because it has lost jurisdiction) to the supreme court within 15 days after the decision is final in the court of appeal.

Revised Rule 979(a)(2) reiterates that a request for the supreme court to depublish "must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages." Thus, a party seeking both review and depublication must file two separate documents, and the due dates for each are different.

The revisions to the publication rules do not signal the end to their evaluation. Last November, Chief Justice Ronald George appointed an Advisory Committee on Rules for Publication of Court of Appeal Opinions. The 13-member committee, chaired by Associate Justice Kathryn Werdegar, includes one justice from each of the six districts, the supreme court's Reporter of Decisions, the Chief Justice's Principal Attorney, the Chief Deputy Attorney General, and three private appellate practitioners. This committee will review the standards the reviewing courts are currently using in determining which court of appeal decisions are published, and will consider whether these standards are applied consistently. The committee will make recommendations for possible changes in a report currently due in June 2005.

Serving the AG in Unfair Competition Cases

One final statutory change to appellate practice concerns unfair competition cases involving Bus & P C §§17200 and 17500. Over the past few years a patchwork of rules and statutes were enacted to ensure that the At-

torney General (AG) (specifically, the Consumer Law Section of the AG's office) and local District Attorney (DA) offices received copies of all appellate briefs and petitions involving §§17200 and 17500 matters. Last year, however, the repeal of former Rule 15(e)(2) on this subject created the unintended and anomalous situation that, under existing law, the AG/DA service requirement applied only to "the person who commence[s] the proceeding" in the appellate court—*i.e.*, appellants or petitioners. To correct this oversight, the legislature amended Bus & P C §§17209 and 17536.5, effective January 1, 2005, to clarify that "each person filing any brief or petition"—*i.e.*, both appellants/petitioners and respondents—must serve the AG and DA.

Conclusion

Over the past six years, the Appellate Rules Project Task Force examined and evaluated more than 135 rules—one of the most extensive projects of its kind in recent Judicial Council history. The new, revised, and rewritten rules now in place improve appellate practice in California for litigants, lawyers, and the courts. Although the task force's goals have been accomplished, other task forces and committees continue to seek to improve appellate practice. Thus, practitioners must remain vigilant for future changes.

Medical Malpractice Case Law in California: 2004 Developments

William M. White and Suzanne D. McGuire

Introduction

This article discusses recent developments of interest to medical malpractice attorneys handling cases in California, including admissibility of expert opinions, causation, elder abuse, CCP 998 offers, MICRA, discovery, and other issues.

Expert Witnesses

Whether offered at trial or in a declaration, expert opinions lacking a reasonable basis, or rendered without a reasoned explanation illuminating why the underlying facts lead to the ultimate conclusion, have no evidentiary value. As reflected in *Jennings, Bushling,* and *Lockheed,* discussed below, attorneys are becoming more aggressive in challenging expert opinions. Expect to see the trend continue as medical malpractice litigators on both sides challenge conclusory expert opinions regarding the standard of care and causation.

Conclusory Causation Opinion Inadmissible Unless Accompanied by Reasoned Explanation

In *Jennings v Palomar Pomerado Health Sys., Inc.* (2003) 114 CA4th 1108, 8 CR3d 363, the Fourth District Court of Appeal held that a conclusory expert witness opinion on causation was properly stricken because it did not assist the jury in its fact-finding function.

Plaintiff Jennings filed a medical malpractice action for injuries caused by a retained ribbon retractor left in his abdominal cavity after surgery to correct a colovesical fistula. Due to a subcutaneous infection, Jennings had a prolonged recovery and required two more surgeries. 114 CA4th at 1112.

At trial, Jennings claimed that the retained retractor caused the subcutaneous infection. Defendants admitted that leaving the retractor in the peritoneal cavity was negligent, but denied that retention of the retractor was a cause of the postoperative infection. 114 CA4th at 1114. The case was tried on causation and damages.

Plaintiff's infectious disease expert testified at trial that the retained retractor was a cause of the infection, based on assumptions that (1) the retractor was contaminated when placed inside the peritoneal cavity and (2) it remained contaminated despite irrigation of the peritoneal cavity before closing. The expert testified that between the time the incision was closed and the point when the retractor became encased in the omentum, bacteria migrated from the contaminated retractor in the peritoneal cavity to the subcutaneous tissue and caused the postoperative infection. 114 CA4th at 1114. To explain his opinion, the expert said that because the retractor was retained and probably contaminated, and an infection later occurred nearby, it just sort of makes sense. 114 CA4th at 1115. The trial court granted defendants motion to strike the experts testimony.

The appellate court affirmed. Applying the established rule that expert testimony must assist the trier of fact (Evid C §801), the court held that a conclusory expert opinion regarding causation does not assist the trier of fact unless accompanied by a reasoned explanation showing how the expert connected the facts with the ultimate conclusion. 114 CA4th at 1117. Here, plaintiff's expert provided no explanation of how it was more probable than not that the bacteria multiplied, in the absence of clinical symptoms usually seen with peritonitis, and migrated all the way to the subcutaneous tissue without leaving a trail of inflammation or infection evidencing the migration. 114 CA4th at 1120.

> [A]n expert who expresses a conclusion supported only by a statement telling the jury (in essence), "Trust me, I'm an expert, and it makes sense to me" has provided no grist for the jury's