FEATURED ARTICLES

This Year's Changes to California's Appellate Rules—and a Peek at Potential Future Changes

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Introduction

Recently, vacancies on the United States Supreme Court and the California Supreme Court have put appellate courts in the limelight. Last year's statewide celebrations marking the centennial of the California Court of Appeal also raised the visibility of appellate courts. See http://www.courtinfo.ca.gov/courts/courtsofappeal/ for links to various celebratory speeches and written materials (http://www.courtinfo.ca.gov/courts/courtsofappeal/documents/coa100booklet.pdf; http://www.courtinfo.ca.gov/courts/courtsofappeal/documents/coa100panels.pdf).

From a technical, rules-oriented point of view, however, the heady days of significant changes to California appellate practice on a regular yearly basis have drawn to a close. For the past four years, the month of January marked the effective date of major rule changes to the California Rules of Court affecting civil appellate practice. These annual rule changes emanating from the Appellate Rules Project Task Force concluded last year when the Task Force issued its last installment. See Fogel & Shatz, *Brave New Rules, the Final Chapter: This Year's Changes to the California Appellate Rules,* 27 CEB Civ LR 7 (Feb. 2005).

The changes to the rules effective in 2006 that affect appellate practice in California's courts are minor in comparison. (Amendments to all of the California Rules of Court that take effect January 1, 2006, can be found at http://www.courtinfo.ca.gov/rules/amendments/jan2006.pdf.) Nevertheless, there are a few tidbits that practitioners need to know—and a few interesting proposed rules that did not take effect this year, but which may return in future incarnations.

Citation to the Record in Appellate Briefs

The most significant rule change this year concerns record citations in appellate briefs. Rule 14(a)(1)(C) used to require that every brief "support any reference to a matter in the record by a citation to the record." Fair enough. But the rule did not specify exactly what form such citations should take. Most practitioners realized that this meant at least a citation to a specific page in the record, and many scrupulous practitioners also included a volume reference as well, when the reporter's transcript, the appendix, or the clerk's transcript contained multiple volumes.

Despite what might seem to be commonsense practice, many briefs failed to contain specific record citations and many citations failed to provide volume references. Indeed, the prevalence of briefs without precise record citation prompted the ire of those most affected by such lax citation: court of appeal research attorneys. A group of research attorneys from the Second Appellate District brought this chronic citation problem to the attention of the Appellate Courts Committee of the Los Angeles County Bar Association, which then proposed a change to Rule 14 governing the form and contents of appellate briefs.

As a result, amended Rule 14(a)(1)(C) now requires that every appellate brief "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Accordingly, record citations such as "RT 365" or "CT 747" now should take the form of something like "Vol. 2 RT 365" or "Vol. 3 CT 747." If adding "extra words" to the citation is problematic, citations such as "2-RT-365" or "3-CT-747" should pass muster.

Additionally, looking ahead to a future in which appellate records are provided in electronic format, amended Rule 14(a)(1)(C) also provides that if the record is submitted in electronic format, citations must identify the place in the record where the matter appears "with the same specificity required for the printed record."

Dismissal After Settling on Appeal

With more alternative dispute resolution processes in place—notably the programs in the First and Second Districts—more matters have been settling on appeal. Because the courts understandably do not appreciate working up a matter only to learn later that a settlement mooted the court's expenditure of resources, a notice requirement was added to Rule 20 back in 2003. Rule 20 requires that when a civil case settles after a notice of appeal is filed, the appellant must immediately serve and file a notice of settlement in the court of appeal.

Apparently, however, many litigants assumed that filing the notice of settlement sufficed to "end" the appeal. As a result, many litigants never bothered to follow up their notice of settlement with a formal abandonment or request for dismissal of the appeal. Without such an abandonment or dismissal, the appeal remained on the court's docket without a final disposition.

Amended Rule 20 now requires appropriate follow-through after a notice of settlement. Under new Rule 20(a)(3), an appellant has 45 days after filing a notice of settlement to either file an abandonment (for appeals in which the record has not yet been filed with the court of appeal) or a request for dismissal (if the record already has been filed). Presumably, 45 days will give the appellant enough time to finalize the settlement. If an appellant fails to file an abandonment, a dismissal request, or a letter providing good cause why the appeal should not

be dismissed, new Rule 20(a)(4) empowers the court of appeal to dismiss the appeal and order each side to bear its own costs. This paradigm mimics Rule 225(b), which requires parties in the superior court to file a dismissal within 45 days after filing a notice of settlement. Like the new citation format rule discussed above, this amendment simply transforms otherwise sound, commonsense practice into a mandatory court rule.

Finally, new Rule 20(a)(4) clarifies that the notice-of-settlement procedures set forth in Rule 20(a) do not apply to situations in which the parties are seeking the court of appeal's approval of a settlement involving a stipulated reversal. In such situations, the court of appeal will learn of the settlement when the parties file a motion under CCP §128(a)(8), governing the stipulated reversal process.

Filing Applications to Extend Time

Another minor change concerns the filing of the all-important application for an extension of time. Last year, Rule 43(c) took effect, requiring that applications "must be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to all parties." This left the court clerks with envelopes ready to send to all parties, but without orders to put into those envelopes. Now new Rule 44(b)(2)(G) amends the existing requirement of filing an original and one copy of an application by imposing the added requirement that additional copies of such applications must be provided for every other party in the appeal. Presumably, these extra copies will make it easier for the court to provide notice of its ruling on an application by sending these extra copies, stamped "granted" or "denied," in the envelopes supplied under Rule 43(c).

Proposed Rules That Were Not Adopted

Two proposed rules that were circulated for discussion last year, but not adopted, raise interesting issues that are likely to recur.

Recusal Information

The first proposed rule that did not make the grade concerns certificates of interested parties. For the past two years, a proposed new rule—slated to be Rule 14.5—has been circulated and redrafted that would require parties on appeal to provide information to enable court of appeal justices to consider disqualifying themselves from hearing matters in which they may have an interest. See http://www.courtinfo.ca.gov/invitationstocomment/documents/spr05–02.pdf.

Justices, of course, already have a duty to recuse themselves in such cases—see, *e.g.*, Cal Rules of Ct App Div II, Canon 3(E)(5)(d)—but the problem has been identifying such cases in the complicated context of unnamed parent corporations and similar situations.

A rule to identify potential conflicts of interest exists in federal appellate practice, requiring the inclusion of a corporate disclosure statement from all nongovernmental corporate parties with their first filing at the appellate level. Fed R App P 26.1. Similarly, California Supreme Court practice requires parties to file a "Certification of Interested Entities or Persons" within 15 days after review is granted. Cal Sup Ct, IOPP IV(L). But no such rule exists for the California Courts of Appeal.

Even without guidance from a rule of court, several courts of appeal have implemented a conflict of interest disclosure practice. For instance, in the Fourth District, Division Three, every nongovernmental corporate party must file a Certification of Interested Entities or Persons within 15 days from the completion of briefing or concurrently when filing a writ petition. See 4th Dist, Div 3, IOPP V. Similarly, the Fourth District, Division One, requires both corporations and partnerships to file a Certification of Interested Entities or Persons when the record is filed in a civil appeal. See 4th Dist, Div 1, IOPP XII.

The most recent version of proposed Rule 14.5 would have required any corporation, partnership, firm, or any other nongovernmental association to file a certificate concurrently with filing its first paper in the court of appeal. (A similar proposal would have created new Rule 56(i) to require writ petitions to include such a certificate.) The certificate envisioned by the proposed rule would list any entity or person that a party knows has either a financial interest in the subject matter of the controversy (or in a party to the proceeding), or any other kind of interest that could be substantially affected by the outcome of the proceeding. An ownership interest of less than 10 percent of the stock of a publicly held corporation would not constitute a financial interest, and an interest "substantially affected by the outcome" of a proceeding would not arise solely because an entity or person was in the same industry or field of business as a party or because the case might establish a precedent that would affect an entire industry or field.

Judicial recusal remains an important issue. If the history of this proposal is any indication, the notion of requiring the filing of some sort of certificate of interest is likely to persist in future proposals and eventually reach fruition as a rule of court.

Memorandum Opinions

Another proposed rule that was not adopted would have converted §6 of the California Standards of Judicial Administration (Cal Rules of Ct App Div I, §6) into a rule of court. See http://www.courtinfo.ca.gov/invitationstocomment/documents/spr05–07.pdf. Section 6 urges the courts of appeal to use "memorandum or other abbreviated form of opinion" when resolving appeals that are determined by the substantial evidence rule or a controlling statute or existing precedent.

Proposed new Rule 23.5 would have replaced §6 and encouraged memorandum opinions for appeals that fail to raise any substantial points of law or fact, including appeals clearly controlled by settled law, appeals where the evidence is clearly sufficient (or insufficient), or appeals of matters within judicial discretion. Such memorandum opinions would be required to identify the issue presented and include a concise statement of the facts, controlling law, and rationale.

This proposed new rule may have been tabled in light of the activities of the Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, also known as the "Werdegar Committee" after the committee's chair, Supreme Court Justice Kathryn Werdegar. See http://www.courtinfo.ca.gov/presscenter/newsreleases/NR64–04.PDF (court's announcement of committee); http://www.courtinfo.ca.gov/courts/supreme/comm/rfpocoaopcom.htm (committee roster). In November 2004, the Chief Justice appointed members of this committee to review and evaluate the standards used for publication of opinions. See http://www.courtinfo.ca.gov/courts/supreme/comm/rfpocoaopcharge.htm (committee's charge).

The formation of the Werdegar Committee was widely reported to be the result of "political horse-trading." See Roemer, *Panel to Study Unpublished Opinions,* Daily Journal, Nov. 24, 2004. When state Senator Sheila Kuehl proposed a bill that would have permitted citing unpublished opinions, the supreme court agreed to appoint a committee to explore the publication standards in return for dropping the bill. See Barnett, *Unpublished Opinions: Oh, the Shame of It!,* Daily Journal, Nov. 16, 2005, Forum Column.

Almost a year later, in October 2005, the committee released its Draft Preliminary Report and Recommendations. This 35-page report (and its 100-plus page appendix) is fascinating reading for anyone interested in California appellate practice. See www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf.

Although a proposed rule encouraging memorandum opinions does not directly deal with the publication of opinions, the topics are closely related. A movement has long been afoot to encourage the publication of more court of appeal opinions—if not to abolish unpublished opinions altogether, or to at least make all decisions citable. A new rule encouraging memorandum opinions arguably would appear to be a step toward fewer published decisions.

According to the report, fewer than 9 percent of all court of appeal opinions are published—meaning that more than 91 percent of the decisions that the courts of appeal issue are uncitable. The Werdegar Committee polled the state's court of appeal justices to learn what factors contribute to a decision not to publish. Interestingly, significant numbers of justices indicated that they sometimes will not publish a decision to avoid embarrassing the litigants, lawyers, or the trial judge. See Advisory Committee Draft Preliminary Report and Recommendations, p 15. This seemingly confirms a charge by the pro-publicationists that decisions often remain unpublished for reasons related more to do with who is involved in a case than with the merits of the decision. Accordingly, the committee has proposed amending Rule 976(c) to specifically reference factors that should *not* play a role in the decision whether to publish a given decision. See http://www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf

The Werdegar Committee did not address the *citation* of unpublished opinions—which have been available since October 2001 in on-line legal research databases such as Lexis and Westlaw. That issue was the "gorilla in the room" just beyond the committee's official charge, and Boalt Professor Emeritus Stephen R. Barnett has called the report a "last-ditch [effort] to keep unpublished opinions uncited." Barnett, *Unpublished Opinions: Oh, the Shame of It!,* Daily Journal, Nov. 16, 2005, Forum Column. Of course, momentum in certain quarters has been building for years now to allow citation to all decisions, published or not. Indeed, new Rule 32.1 of the Federal Rules of Appellate Procedure, which will allow citation to unpublished federal decisions, is expected to take effect this year.

The Werdegar Committee's report is likely to result in at least some modification to Rule 976 next year. But the larger issue of citability remains. Tune in for next year's installment to find out how California's appellate rules may change in response to the Werdegar Committee—or otherwise. One pending proposal would reorganize and renumber all the California Rules of Court, moving the appellate rules from Title 1 to Title 8. See http://www.courtinfo.ca.gov/invitationstocomment/documents/SP06–10.pdf. Thus, next year may see the replacement of "Rule 17" notices and "Rule 5.1" appendices with "Rule 8.220" notices and "Rule 8.124" appendixes!

Medical Malpractice Case Law in California: 2005 Developments

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Introduction

In 2005 the courts clarified standards and procedures in the medical malpractice arena. There were no dramatic changes because most of the published appellate opinions addressed fairly discrete issues. The case with perhaps the broadest application is the California Supreme Court's decision in *Fitch v Select Prods. Co.* (2005) 36 C4th 812, 31 CR3d 591, holding that Medi-Cal may not