Comment

Criticism and Legal Analysis

NEW AND IMPROVED!

Starting today, revised Rules of Court to change California appellate practice

By Paul D. Fogel and Benjamin G. Shatz

Despite the economic slowdown, 2002 is not the year for lawyers who have business in the courts of appeal to cut costs by continuing to use a 2001 rule book. The California Rules of Court relating to appeals are undergoing a major overhaul, with the first set of new rules (Cal. R. Ct. 1-18) having taken effect on New Year's Day. This is the first major revision in California's appellate rules since the esteemed legal scholar Bernard E. Witkin drafted the rules of court in the early 1940s.

Rules 1 through 191 govern appellate and writ practice in California. The first 60 rules address appellate and writ practice in the Supreme Court and Courts of Appeal. After 60 years of service, these rules were ready for a facelift, or in some cases, retirement. A Judicial Council task force has been given the redrafting duty. Its goals are to remove ambiguous, obsolete and redundant provisions and to make the rules simpler and clearer with an eye toward streamlining appeals. The project is progressing in phases. So far rules 1 through 18 have been rewritten, reorganized and (in some cases) renumbered. After they were twice circulated for comment and reviewed by the Judicial Council and other committees, they took effect Jan. 1.

Changes to the remaining rules are in the works.

Some of the revisions to the first set are significant. For that reason, lawyers who rely only on past experience (or an old rule book) may find themselves in serious trouble. Here are some especially noteworthy changes:

• *Notice of appeal.* Because the timely filing of a notice of appeal is jurisdictional — i.e., if a notice of appeal is late, the court of appeal has no jurisdiction and there is no remedy for a tardy filing — accurate calendaring of the due date is critical. Calculating that date is especially tricky when post-judgment tolling motions (e.g., new trial or JNOV) are involved. Under former rule 3(a), the date of *entry* of an order denying a timely filed post-judgment tolling motion triggered a 30-day extension of the time to file a notice of appeal. This trigger created a trap for the unwary, because the parties had no control over — and sometimes no notice of — when the order was entered. Thus, under revised rule 3, the 30-day extension begins to run on the date the superior court clerk mails, or a party serves, the denial order or notice of its entry.

Similarly, the former rules provided for an extension of time after the denial of a JNOV motion only if the moving party also unsuccessfully had moved for a new trial. That is no longer required. Revised rule 3(c)(1) provides the extension after an order denying JNOV regardless of whether the moving party also moved for a new trial. Another uncertainty in the former rules was whether the time to file an appeal from an order denying a motion for JNOV was 30 or 60 days. The revised rule clarifies that a party has 60 days to appeal such an order.

The new rules also resolve a split of authority concerning the effect of a motion for reconsideration (C.C.P. ß 1008) on the time to file a notice of appeal from an appealable order. 1988's *Rojes v. Riverside Gen. Hosp.*, 203 Cal.App.3d 1151, said the motion extended the time to appeal, but 1998's *Conservatorship of Coombs*, 67 Cal.App.4th 1395, said it didn't. Revised rule 3(d) takes the *Rojes* route and extends the time to appeal from an appealable order by 30 days after notice of an order denying a "valid" (i.e., timely) reconsideration motion.

Revised rule 3(e)(2) also allows an extension of time for filing a protective cross-appeal when the superior court grants a JNOV motion. The former rule allowed this extension when a new trial motion or motion to vacate a judgment was granted, but omitted mention of JNOV motions.

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• *Reporter's transcript.* Under the former rules, the time to prepare the reporter's transcript commenced when the reporter received a party's designation of the hearings to be transcribed. Now, under revised rule 4, that period begins when the superior court notifies the reporter, even if the reporter is served with the designation by the parties. This rule — based on mailing rather than receipt — provides greater certainty in calculating the due date for the transcript.

Clarification is also enhanced by revised rule 4(a)(1), which requires an appellant who does not wish to designate any transcripts as part of the appellate record to file and serve a notice of intent to proceed without reporter's transcript within 10 days after filing the notice of appeal. Previously, the superior court clerk did not know if an appellant did not want a transcript or simply failed to timely designate one, which sometimes caused the appeal to fall into default.

• *Clerk's transcripts and appendixes.* In contrast to the former rule, revised rule 5(a)(4) allows parties who elect to proceed by way of a clerk's transcript to designate portions of documents that the clerk places into the transcript. In another improvement, revised rule 5.1(c) deletes the requirement that all documents in appendixes — except those that are necessary to determine the timeliness of the appeal — must bear a clerk's date stamp. This obviates the need to obtain file-stamped copies of all but specified documents from the court or opposing counsel. In addition, revised rule 5.1(a)(3)(B) adopts the Ninth Circuit's practice of requiring the superior court clerk to provide counsel with a copy of the register of actions ("docket sheet"), by which counsel can determine which documents to include in the appendix. Another Ninth Circuit practice adopted is the prohibition against including unnecessary documents or portions of documents in appendixes. Revised rule 5.1(b)(2). These two changes are aimed at ensuring that appendixes contain only documents that are necessary to decide the issues on appeal. Finally, with revised rule 5.1(d)(2), the joint appendix has a new due date: It must now be filed with the opening brief, not the respondent's brief.

• *Appellate briefs.* As in the federal appellate courts, briefs produced on a computer are now subject to a 14,000-word limit (with a requirement that counsel sign a certificate stating the number of words); the former 50-page limit now applies only to typewritten briefs. But unlike the federal appellate rules, which limit a combined appellee's and cross-appellant's brief to 14,000 words and a reply brief to 7,000, revised rules 14(c)(1),(4) permit 14,000 words for each of the principal briefs (opening, respondent's and reply), and 28,000 words for a combined brief in a cross-appeal.

Another new feature, in revised rule 14(d), is that briefs may now include up to 10 pages of attachments consisting of exhibits or other record materials that are helpful for an understanding of the issues on appeal. Practitioners are also cautioned to check revised rules 14(b)(2) through (4), which set forth specifications for typeface, type style and type size.

The new rules also conform *amicus curiae* practice in the courts of appeal to that in the California Supreme Court. Now, under rule 13(b)(3), an applicant seeking permission to file an *amicus* brief must accompany the application with the proposed brief. In the past, this was considered good practice, but was not required.

• *Brief filing deadlines.* Near and dear to every appellate lawyer's heart is the ability (or more often, need) to obtain an extension of time by stipulation. Revised rule 15(b)(1) makes clear that the parties may grant each other self-executing stipulations of time up to 60 days. Although this is not a change in prior practice, some courts of appeal believed the former rule permitted them to reject the parties' stipulation.

Revised rule 15(b)(3) also clarifies that a party need not apply for an extension of time if it can file its brief within the 15-day grace period allowed under rule 17. Similarly, under rule 15(b)(2), a party seeking an extension of time must show that it has either already used up a 60-day stipulation from the opponent or that it could not obtain one. Both of these revised rules, adopted from local rules from the First District Court of Appeal, are designed to relieve the courts from the burden of considering unnecessary extension applications.

In situations where different parties are both appellants and respondents (e.g., a cross-appeal), revised rule 16(a) puts the initial burden on the parties to devise a briefing sequence. The parties must submit a joint (or separate) proposal(s) and the court decides the briefing sequence, which then triggers due dates. Moreover, rule 16(b)(1) prohibits the former practice of a party who is simultaneously both an appellant and respondent from filing separate appellant's and respondent's briefs; a combined brief is now required.

• *Exhibits.* Revised rule 18 makes several important changes regarding the transmittal of exhibits to the court of appeal. Under the former rules, a party wishing original exhibits be sent to the court of appeal had to wait until oral argument was set before requesting the transmittal of exhibits from the superior court. Now, under rule 18(a)(1), parties can request transmittal after the filing of the respondent's brief. Another change, in rule 18(b)(2), is that parties in possession of designated exhibits can now send those exhibits directly to the court of appeal. These revisions help ensure that the court of appeal will receive exhibits earlier in the appellate process, to consider when it undertakes the task of drafting a calendar memorandum.

One caveat: The new rules do not provide for special treatment of pending appeals that straddle these rule changes. In particular, there is no "grandfather clause" allowing existing appeals to continue to proceed under the old rules. Accordingly, by their terms, the new rules effective Jan. 1 apply to all appeals, future and *present.* Counsel currently handling appeals must therefore conform their practices immediately. Counsel should pay special attention to situations where the new rules alter the old rules in such a way as to make compliance with either set impossible. For example, under the former rules, parties were to designate exhibits for transmittal to the court of appeal after oral argument was scheduled; but under the new rules designation must occur 10 days after the last respondent's brief. Thus, a deadline that did not yet arise under the old rules may already have expired under the new rules. In such circumstances, the courts of appeal presumably will be lenient and allow parties to transmit exhibits in accordance with the former rule. When in doubt, call the clerk's office!

This brief summary of a few of the more significant revisions should convince even the thriftiest practitioner of the need to purchase a new rule book this year. Of course, there is always the option of keeping current by using the Internet. A complete listing of the revised rules is available at www.courtinfo.ca.gov/rules/amendments.html. And remember, this is only the first set of revisions. For a preview of coming attractions — the second installment, which covers rules 19 to 29.9 (including some significant revisions of the Supreme Court rules) — go to: www.courtinfo.ca.gov/invitationstocomment/proposals.htm. This means that new rule books will likely be a necessity in January 2003 as well. ■