California
Civil Litigation REPORTER
Volume 26 / Number 1 February 2004

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Civil Litigation Reporter (ISSN 0199-0802), Volume 26, Number 1 (February 2004). Published six times a year in February, April, June, August, October, and December by Continuing Education of the Bar—California, University of California. Mailing address: CEB Civil Litigation Reporter, Department Civ LR, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612–2001.

Periodicals Postage Paid at Oakland, California, and additional mailing offices. POSTMASTER: Send address changes to Customer Service, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612–2001.

SUBSCRIPTION: $209 annually, plus $7.95 for shipping and handling. Back issues, beginning July 1979, are $35 each. Storage binders are $12.50 plus tax each. For more information, call toll-free 1–800–232–3444, or mail your order to CEB, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612–2001.

This Reporter may be cited as 26 CEB Civ Litigation Rep ___ (Feb. 2004); the short citation is 26 CEB Civ LR ___ (Feb. 2004).

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medical expenses the decedent incurred before death. CCP §§377.30–377.35. Can the heirs be held liable for a Medi-Cal lien for medical expenses that they are not entitled to recover?

This issue arises with some regularity in medical malpractice cases, particularly in county hospitals or other settings in which a large percentage of the patients are covered by Medi-Cal. A dispute about the validity of a Medi-Cal lien can cause headaches for a plaintiff's attorney following a successful verdict and can significantly impede efforts to settle a case.

Stipulation to Vacate Judgment

Parties will likely face an uphill battle to vacate by stipulation any judgment against a health care provider. In *Muccianti v Willow Creek Care Ctr.* (2003) 108 CA4th 13, 133 CR2d 1, the plaintiffs filed a wrongful death claim against Willow Creek for the death of their mother shortly after her discharge from the facility. A jury returned a verdict for the plaintiffs in excess of $5 million. Defendant appealed, but then reached a settlement with plaintiff providing, in part, that plaintiffs would consent to vacate the judgment. Defendant moved to vacate the judgment and plaintiff moved to dismiss the appeal.

The Fifth District Court of Appeal held that a judgment against the defendant health care facility could not be vacated, despite the parties' stipulation, because the public interest outweighed that of the parties. Expunging from the public record the jury's findings of negligence and willful misconduct by the health care facility would undermine the public trust. The court also pointed to various licensing and reporting requirements that would be impacted by an order vacating the judgment. Once rendered, the judgment belonged to the public rather than the individual parties, and here the public interest is served by its continuing existence. See also CCP §128(a)(8).

Brave New ~~World~~ Rules Continued: This Year's Changes to the California Appellate Rules

Paul D. Fogel and Benjamin G. Shatz

Introduction

For the past five years, the Appellate Rules Project Task Force, chaired by California Supreme Court Associate Justice Joyce Kennard, has been rewriting California's appellate rules and issuing new rules in yearly installments. Two years ago we outlined new Rules 1–18 in *Brave New ~~World~~ Rules: Changes to the First 18 California Appellate Rules,* 24 CEB Civ Litigation Rep 57 (Mar. 2002), and last year we issued a sequel, *Brave New ~~World~~ Rules Revisited,* 25 CEB Civ Litigation Rep 51 (Apr. 2003), addressing new Rules 19–29.9, effective January 1, 2003.

The bulk of this year's changes to the appellate rules, effective January 1, 2004, either concern criminal appeals—and thus do not affect civil appellate practice—or are minor, nonsubstantive changes designed to eliminate problems in the earlier revisions. There are, however, several noteworthy rule changes as well as several statutory changes that affect civil appellate practitioners and their clients.

Answers to Petitions for Rehearing

Whether to respond to a petition for rehearing used to be an irksome issue for appellate practitioners. Because most rehearing petitions are summarily denied, practitioners in many cases viewed the time and expense required for an answer to such a petition as wasteful; moreover, some courts of appeal denied petitions for rehearing even before the answer was due. At the same time, practitioners did not want to leave gross misstatements or other incorrect claims in such petitions unanswered. Amended Cal Rules of Ct 25(b)(2) addresses this problem by making answers to rehearing petitions the court of appeal's prerogative. The rule now prohibits parties from filing an answer to a petition for rehearing unless the court of appeal requests one. The court clerk must inform the parties of the court's request promptly by written order and by telephonic notification or other "expeditious method." Any answer must then be served and filed within 8 days of the court's order unless the court orders otherwise.

The rule also states that the court of appeal normally will not grant a rehearing petition unless the court has requested an answer. This is the approach the federal courts use when a party has petitioned for panel rehearing or rehearing en banc. See Fed R App P 35(e); Fed R App P 40(a)(3); 9th Cir R 35–2.

Note that this new answer-by-invitation-only procedure applies only to rehearing petitions in the court of appeal. Rule 29.5(b), governing petitions for rehearing in the supreme court, has been revised to make clear that an answer may be filed as a matter of right within 8 days after a rehearing petition is filed.

Replies to Answers to Petitions for Review

Another frustration for practitioners was the limitation on what a party who petitions the California Supreme Court for review could argue in a reply to an answer to the petition. Under former Rule 28.1(d), a reply was limited to any additional issues for review that the answering party raised. Practitioners frequently violated this rule by

replying to points made in the answer, whether or not those points raised "additional issues." Revised Rule 28.1 repeals subdivision (d), making clear that a reply brief is no longer so limited.

New Service and Filing Requirements

Revisions to the appellate rules and other statutes in the last few years have expanded the types of cases in which appellate briefs must be served on the Attorney General and other public officers. See, *e.g.*,former Rule 15(e) (requiring service on the Attorney General and district attorney); Bus & P C §17209 (requiring service on Attorney General and district attorney in Unfair Competition Act cases). New Rule 44.5 replaces some of these provisions in a single rule and sets forth general provisions concerning these service requirements. Rule 44.5(a) requires the service of briefs or petitions on the Attorney General if the brief or petition (1) questions the constitutionality of a state statute, or (2) is filed on behalf of the state, a county, or an officer whom the Attorney General may lawfully represent. New Rule 44.5(c) now requires that the cover of any document that must be served on a nonparty public officer or agency contain language identifying the statute or rule requiring service: "Service on [insert name of state officer or agency] required by [insert citation to the appropriate statute or rule]."

Forgetting to serve required state officers and agencies is a common problem. Indeed, within days of new Rule 44.5 becoming effective, the court of appeal was invoking it. See, *e.g.*,Order of Jan. 20, 2004, in *Smith v Wyeth,* No. B163861. ("This is an unfair competition case. No proof appeal served on DA or AG. Plaintiff to serve AG & DA within 10 days & file proof of service. Further, plaintiff's briefs do not comply with Cal Rules of Ct 44.5(b) and (c). Plaintiff to file corrected briefs within 10 days.") See http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=2&doc_id=162956&div=5.

The tricky part of complying with new Rule 44.5, of course, is knowing when a statute requires service on a nonparty public entity. Recognizing that problem, the Advisory Committee Comment to the Rule helps practitioners by referring them to the new mandatory "Civil Case Information Statement" Judicial Council form APP-004 (discussed below), which enumerates the various statutes sprinkled throughout the various codes (*e.g.*, Business and Professions Code, Civil Code, Government Code, Health and Safety Code).

In a minor change in filing requirements, former Rule 44(b)(1)(ii) required the filing of an original plus 14 copies of a brief in a cause pending in the supreme court. Revised Rule 44(b)(1)(B) reduces the number of copies by one, so that filings should now include an original and only 13 copies.

Notice of Stays

New Rule 224 imposes a duty to notify the trial court and other parties who have appeared in an action if a stay is issued by "order of a federal court or a higher state court." Rule 224(b)(1). Specifically, the party who requested or caused a stay must immediately file and serve (on all parties who have appeared) a notice of the stay, attaching a copy of the stay order. The notice must state the reason a stay was ordered and must indicate whether the stay applies to all parties or only certain specified parties. Rule 224(c). Similarly, notice must be filed and served immediately when a stay is vacated or "no longer in effect." This always was sound practice; now it is required by the rules.

To help implement this new rule, the Judicial Council created a new, mandatory "Notice of Stay of Proceedings" form, CM-180, available on-line at http://www.courtinfo.ca.gov/forms/documents/cm180.pdf.

Other Important Appellate Law Changes for 2004

New Civil Appellate Judicial Council Forms

The Judicial Council has issued six new optional forms approved for use in civil appeals and has revised one existing mandatory form. New "form" APP-001 actually is a general information sheet explaining the basic procedures for appeals in unlimited civil cases. This four-page guide primarily is addressed to pro per litigants, but may be of use to practitioners unfamiliar with basic appellate procedure.

New form APP-002 is a simple (and optional) Notice of Appeal/Cross-Appeal form for unlimited civil cases. Similarly, new form APP-003 is an optional form for designating the record. It offers four choices: Appendix only (with no reporter's transcript); Appendix with reporter's transcript; Clerk's Transcript only; and Clerk's and Reporter's Transcript. Other new optional forms include: Abandonment of Appeal (APP-005); Application for Extension of Time to File Brief (App-006); and Request for Dismissal of Appeal (App-007).

The only new mandatory form is APP-004 (formerly APP-001), the civil appeal Case Information Statement now required by Rule 1(f). This revised form is not substantively different from last year's version, although it has a new section regarding service requirements that outlines, with statutory citations, the various circumstances when the Attorney General or other nonparty public officer must be served.

All of these new revised forms are available through the courts' website, and users have the capability of com-

pleting the forms on-line and then printing them out for filing. See http://www.courtinfo.ca.gov/forms/latest.htm; http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/forms.htm; http://www.courtinfo.ca.gov/courts/ courtsofappeal/6thDistrict/forms.htm.

Sample language for the certificate of compliance required under Rule 14(c)(1) (length of brief) also appears on the website: http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/forms/complnce.pdf.

Increased Civil Appellate Filing Fees

It is no secret that California is facing a record budget deficit. To help combat this growing problem, the legislature passed AB 1759, which, effective August 2, 2003, increased court filing fees across the board for a variety of pleadings, motions, and other items. Most important to civil appellate practitioners, the base fee for filing a notice of appeal or a writ petition in the court of appeal increased from $265 to $485. Govt C §68926. Similarly, the base fee for filing a petition for review to the supreme court, or a writ petition in the original jurisdiction of the supreme court, increased from $200 to $420. Govt C §§68926, 68927.

On top of the increased base fees, an additional $170 fee now must be paid when filing a notice of appeal, writ petition, or petition for review. Govt C §68926.1(b). This additional fee is deposited into the Appellate Court Trust Fund, a newly established fund "for the purpose of funding the courts of appeal and the Supreme Court." Govt C §68933. The Judicial Council has authority to apportion the fund as it sees fit to address "the needs of each court, in a manner that promotes equal access to the courts, ensures the ability of the courts to carry out their functions, and promotes implementation of statewide policies."

The bottom line is that appellate filings are now more expensive than ever before. Filing a petition for review or writ in the supreme court now costs $590. Govt C §§68926, 68926.1(b), 68927. Filing a writ petition to the court of appeal now costs $655. Govt C §§68926, 68926.1(b). And filing a notice of appeal costs $755, consisting of the $485 filing fee (Govt C §68926) (which already includes $65 to the State Law Library Special Account (Govt C §68926.3)), the $170 fee for the Appellate Court Trust Fund (Govt C §68926.1(b)), and the $100 fee for the superior court's transcript and appeal processing (Govt C §68926.1(a)).

What's Next?

Many more new rules are coming, although only a few will affect civil appellate practice. In particular, the fourth installment will address extension of time requests, writ petitions, and stay requests. The proposed new rules will also (1) prohibit the practice of "joining" another party's writ petition; (2) provide for the filing of a reply to a preliminary opposition to a writ petition; (3) address timing issues regarding the return and a reply to the return; and (4) require that the cover of a stay request include the nature of the action to be stayed, as well as the trial judge's name, department, and phone number (to make it easier for the court of appeal to contact the trial judge quickly, if necessary). Most of these rules are designed to formalize common practices rather than enact significant substantive changes.

Just as the major changes to the state appellate rules are winding down, the action is heating up on the federal side. There are several controversial changes being considered to the Federal Rules of Appellate Procedure, including a proposal to allow citation to unpublished dispositions. We will review these and other changes in next year's installment of *Brave New ~~World~~ Rules.*

SUPREME COURT WATCH

Duty Is in the Eye of the Beholder: Supreme Court to Wrestle With Thorny Landowner Liability Issues

Christina J. Imre

When is a landowner or business legally responsible for a third party's criminal act committed on or near its property? What must they do to protect patrons and invitees? These questions, favorites of torts professors and bar examiners alike, will simply not go away. Every time the state high court makes a "definitive" ruling on the scope and limits of duty, foreseeability, and causation, another fact pattern crops up, requiring the court to reconsider the parameters of the business or landowner's obligations.

The high court's seminal pronouncement in recent times was *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 25 CR2d 137, which held that landlords must take "reasonable steps" to secure common areas against third parties' foreseeable criminal acts. If the burden of preventing future harm is great, "a high degree of foreseeability [of the criminal act] may be required." Duty is determined by balancing the foreseeability of the crime against the "burdensomeness, vagueness and efficacy of the proposed security measures." 6 C4th at 678. The court has made clear that prior *similar* acts are required to satisfy the foreseeability requirement. See, *e.g., Sharon P. v*